



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.09.2021

CORAM:

THE HONOURABLE MR JUSTICE R.SURESH KUMAR

W.P. (MD) Nos.4032 to 4034 of 2018

and W.M.P (MD) Nos.4174, 4175, 4176, 4177 and 4178 of 2018

In W.P (MD) No.4032 of 2018:

Deepak Gopaldas Bajaj

.. Petitioner

Vs.

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

2.The Additional Director General
Directorate of Revenue Intelligence,
No.25, Gopalakrishnalyer Road,
T.Nagar, Chennai - 600 017.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari and call for the records pertaining to the impugned order-in-original No.43/2014 dated 28.08.2014 issued by the first respondent and quash the same.

In W.P (MD) No.4033 of 2018:

M/s.Taher Impex Pvt. Ltd.,
Rep. by its Directorate
Shri Zuzer Rajkotawala

.. Petitioner

Vs.

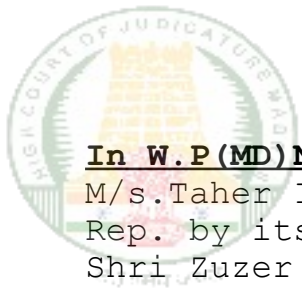
1.The Commissioner of Customs,
Custom House,
Tuticorin - 628 004.

2.The Additional Director General
Directorate of Revenue Intelligence,
No.25, Gopalakrishnalyer Road,
T.Nagar, Chennai - 600 017.

3. The Assistant Commissioner of Customs (ARC),
O/o. The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari and call for the records pertaining to the impugned order-in-original No.43/2014 dated 28.08.2014 issued by the first respondent and quash the same.



In W.P(MD)No.4034 of 2018:

M/s.Taher Impex Pvt. Ltd.,
Rep. by its Directorate
Shri Zuzer Rajkotawala

.. Petitioner

Vs.

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

2.The Additional Director General
Directorate of Revenue Intelligence,
No.25, Gopalakrishnalyer Road,
T.Nagar, Chennai - 600 017.

3. The Assistant Commissioner of Customs (ARC),
O/o. The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari and call for the records pertaining to the impugned detention notice dated 13.11.2017 in C.No.VIII/48/562/2013 - Arrears issued by the 3rd Respondent and quash the same.

In all the 3 Writ Petitions:

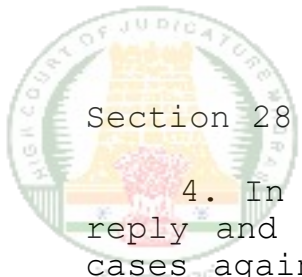
For Petitioner	:	Mr.G.Derrick
For Respondents	:	Mr.R.Aravindan

C O M M O N O R D E R

Since the issue raised in these Writ Petitions are one and the same, with the consent of the learned counsel appearing for both sides, these Writ Petitions are heard together and are being disposed of by this common order.

2. The petitioner in W.P(MD)Nos.4033 and 4034 of 2018 namely Taher Impex Pvt. Limited, in short we call as 'Taher Impex' imported certain polyester items and in respect of the same, he used the Duty Free Replenishment Certificate (hereinafter call it in short as 'DFRC') for paying the import duty.

3.In this context, according to the respondent Customs, the petitioner in W.P(MD)No.4032 of 2018 i.e Deepak Gopaldas Bajaj acted as broker and both have wrongly used the DFRC at the time of import of different goods as the original DFRC was given for cotton goods to the original exporter and therefore, in this regard the respondent Customs issued a Show Cause Notice on 17.03.2009 under



Section 28(1) of the Customs Act, 1962 (In short 'the Act').

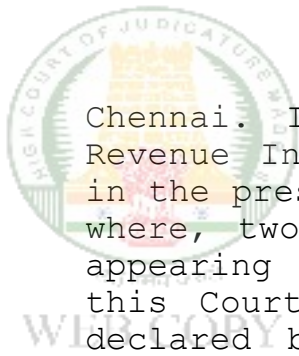
4. In response to the same, the petitioners had submitted their reply and after adjudication, a common adjudication order in these cases against the petitioners were passed by the respondent Customs on 28.08.2014. Challenging the same and the consequential order of detention notice in one case, these Writ Petitions were filed for the respective prayers.

5. Though these Writ Petitions were filed in the year 2018, at that time various grounds were raised on behalf of the petitioners, when these Writ Petitions are taken up for final hearing, Mr.G.Derrick, learned counsel appearing for the petitioners, among various grounds, has projected the prime ground i.e want of jurisdiction.

6. The reason being for raising the ground of want of jurisdiction is that, under Section 28 of the Customs Act, it has been specifically mentioned that only a proper officer shall initiate proceedings to issue Show Cause Notice and to complete the proceedings by way of adjudication. The proper officer should have been nominated or appointed for the specific purpose by the Central Government. However, the Directorate of Revenue Intelligence Officials are not the proper officers as they have not been specifically appointed, as such within the meaning of Section 6 of the Customs Act.

7. In this context, it is the further contention of the learned counsel for the petitioner that, the issue as to whether the officials of the Directorate of Revenue Intelligence can be treated as a proper officer for the purpose of Section 28(1) of the Customs Act to initiate the proceedings and conclude the same, there has been a direct decision whereby the law has been declared by the Hon'ble Supreme Court in a recent judgment dated 09.03.2021 made in **Canon India Private Limited Vs. Commissioner of Customs.**

8. Heavily relying upon the law declared by the Hon'ble Supreme Court in Canon India case, the learned counsel for the petitioner would contend that, since the Directorate of Revenue Intelligence officials are not automatically treated as proper officers within the meaning of Section 28 of the Customs Act, it was held that, in the said decision, by the Hon'ble Supreme Court, the proceedings initiated by the Directorate of Revenue Intelligence officials cannot be construed as valid proceedings initiated by proper officers within the meaning of Section 28 of the Act, accordingly, the whole proceedings got vitiated. By virtue of the said law, having been declared by the Hon'ble Supreme Court in Canon India case, it is the contention of the learned counsel for the petitioner that, in the present cases also, Show Cause Notice was issued on 17.03.2009 initiating the proceedings only by the **Assistant Director General of Directorate of Revenue Intelligence,**

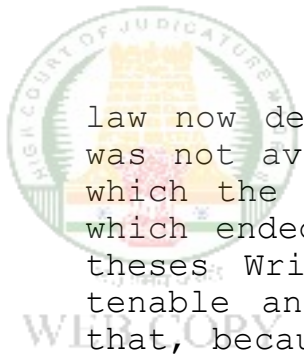


Chennai. In view of such initiation made by the Directorate of Revenue Intelligence officials, whether the proceedings culminated in the present order dated 28.08.2014, would sustain is a question, where, two recent judgments were relied on by the learned counsel appearing for the petitioner, which have been subsequently made by this Court as well as the Karnata High Court, following the law declared by the Hon'ble Supreme Court in Canon India case. On 16.03.2021, a learned Judge of this Court while disposing the writ petitions in W.P(MD)Nos.10186 and 10187 of 2014 in the matter of Quantum Coal Energy (P) Ltd Vs The Commissioner, Office of the Commissioner of Customs, Tuticorin has taken into account the law declared by the Hon'ble Supreme Court in Canon India case and ultimately allowed those Writ Petitions.

9. Subsequently in a very recent judgment the similar issue had come up for consideration before the Karnata High Court, where, the Court by order dated 14.07.2021 in W.P.No.10773 of 2018(T-CUS) and W.P.No.4628 of 2018 (T-CUS) in **Shri Mohan C.Suvarna Vs. The Principal Commissioner of Customs, Air Commissionerate, Bangalore** has extensively discussed the issue in question, where the applicability of the law declared by the Hon'ble Supreme Court in Canon India case reported in 2021 SCC online SC 200 has been considered and the Court ultimately has held that, if the Show Cause Notice is issued and the proceedings has been initiated under Section 28 of the Customs Act by the Directorate of Revenue Intelligence officials, since the said officials cannot be treated as proper officers, the entire proceedings got vitiated. Accordingly the proceedings in that case was set aside.

10. Relied upon these decisions of this Court as well as the Karnataka High Court, of course after the law declared by the Hon'ble Supreme Court in Canon India case, the learned counsel for the petitioner would submit that, in the present case also the very same facts are available, where, admittedly the Directorate of Revenue Intelligence officials have initiated proceedings under Section 28 of the Customs Act by issuing the Show Cause Notice referred to above dated 17.03.2009. Therefore the said Show Cause Notice which is culminated in the order impugned dated 28.08.2014 cannot stand in the legal scrutiny in view of the law declared by the Hon'ble Supreme Court in Canon India case, therefore, the entire proceedings has been vitiated, he contended.

11. Heard the learned Standing Counsel appearing for the respondent Customs who would submit that, in so far as the law laid down by the Hon'ble Supreme Court in Canon India case is concerned, the Customs Department filed a review before the Hon'ble Supreme Court and the same is still pending, therefore, no conclusive decision can be arrived at on the principles laid down in the Canon India case as of now. The learned Standing Counsel would also submit that, in the year 2018, when these Writ Petitions were filed, the



law now declared by the Hon'ble Supreme Court in Canon India case was not available and therefore, there was prevailing law based on which the proceedings was initiated and adjudication was completed which ended in order-in-original and the petitioner also had filed theses Writ Petitions on other grounds of course which are not tenable and therefore, the petitioners cannot turn around to say that, because of the Canon India case they can take a plea that the proceedings initiated against the petitioners got vitiated.

12. The learned Standing Counsel for the respondents would further submit that, in fact the principles laid down by the Supreme Court in Canon India case was brought to the notice of this court in yet another batch of writ petitions which were disposed of by a learned Judge on 15.04.2021 in W.P.Nos.3144 of 2016 etc batch in the case of **Sri Sathya Jewellery Vs. the Principal Commissioner of Customs, Chennai**. In the said order, the learned Judge of this Court having taken note of Canon India case has held that, in that case the matter has gone to the Hon'ble Supreme Court only after exhausting appeal remedy available to the petitioner therein and here, since the petitioners approached this Court straight away by invoking the extraordinary jurisdiction under Article 226 of the Constitution of India, they can very well approach the appellate authority.

13. Placing heavy reliance on the judgment made by the learned Judge in Sri Sathya Jewellery case, the learned Standing Counsel would canvass to point out that, in the present case also these petitioners have challenged the order-in-original without exhausting the appeal remedy. Hence, they can very well approach the appellate authority by following the Sathya Jewellery case. Therefore, no exception can be taken to the said view taken by the learned Judge as the petitioners are similarly situated hence they can also be relegated to go before the appellate authorities if they have any presentable grounds against the order-in-original.

14. Making all these points, the learned Standing counsel for the respondents would further submit that, in fact in two Civil Miscellaneous Appeals, a Division Bench of this Court, in a recent judgment, has taken a view in favour of the Department. However, he fairly added further that, in those decisions the law declared by the Hon'ble Supreme Court in Canon India case was not referred and the same has not been taken note.

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:



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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:

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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 misstatement 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 Revisional

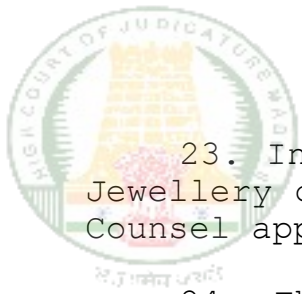


20. After having analyzed the fact whether the Directorate of Revenue Intelligence officials are proper officers under the provisions of the Customs Act especially in the context of Section 28, the Hon'ble Supreme Court has held that, the proceedings in the said case initiated by the Additional Director 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.

22. 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.



23. 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.

24. 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.

25. 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 reported 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 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-CUSTOM-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.

26. 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.

27. 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.

28. 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 can approach the High Court only after exhausting the appeal remedy. However, there are exceptions to the general rule, where, under three circumstances writ petitions are entertained. In

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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 can be questioned in a writ petition.

29. Here in the case in hand, since the said plea of want of jurisdiction was not raised as there was no such ground was available 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 judgment atleast two decisions from this Court as well as the Karnataka High Court on the same point 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.

30. Therefore in this context, even though the learned Standing Counsel appearing for the respondent has raised the vehement contention that the ground 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 order-in-original, even at the time of filing writ petition in 2018, that contention 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.

31. More over the view expressed by the learned Judge in Sathya Jewellery 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 appeal 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 apply the principles laid down by the Supreme Court in Canon India 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.

32. 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 impugned order-in-original dated 28.08.2014, the proceedings would not stand in the legal scrutiny and



therefore, it is liable to be interfered with.

33. 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.

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

Sd/-

Assistant Registrar(Records)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

CM

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,
No.25, Gopalakrishnalyer Road,
T.Nagar, Chennai - 600 017.

3. The Assistant Commissioner of Customs(ARC),
O/o. The Commissioner of Customs,
Custom House, New Harbour Estate,
Tuticorin - 628 004.

W.P.(MD) Nos.4032 to 4034 of 2018
and W.M.P(MD)Nos.4174, 4175, 4176,
4177 and 4178 of 2018
08.09.2021

KS (CO)

TR/SKN(29.09.2021) 16P 4C