

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP-11287-2015(O&M)
Date of Decision: 04.08.2021

M/s Steelman Industries

.....Petitioner

Versus

Union of India and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY TIWARI
HON'BLE MR. JUSTICE VIKAS BAHL.**

Present: Mr. Deepak Gupta, Advocate
for the petitioner.

Mr. Anshuman Chopra, Advocate
for the respondents.

(Through Video Conferencing)

JUSTICE VIKAS BAHL, J.

CM-7508-2021

This is an application filed by the applicant/petitioner to dispose of the present writ petition in light of the judgment dated 09.03.2021 passed by the Supreme Court in '*Civil Appeal No.1827 of 2018*' titled '*M/s Canon India Pvt. Ltd. Vs. Commissioner of Customs*, cited at '*2021 (376) ELT 3 (SC)*'. It has further been prayed that the present petition, which was adjourned *sine die* to await the crystallization of the issue of law arising in the present case, by the Supreme Court of India, may kindly be fixed for hearing.

It has been stated in the application that the Supreme Court of India in M/s Canon India Pvt. Ltd. (supra) has held that the

Joint/Additional Director (in short “DRI”) is not the “**proper officer**” to issue show cause notice under Section 28(4) of Customs Act, 1962 and that in the present case also the show cause notice culminating into the order-in-original dated 15.05.2015 has been issued by the Joint Director, DRI.

In view of the averments made in the application, and also with the consent of Learned Counsel for both the parties, the main petition is taken up on board for hearing today itself.

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That the challenge in the present writ petition is to the order-in-original dated 15.05.2015 (P-10), which was passed in pursuance of the show cause notice dated 29.11.2012 (Annexure P-1) issued by the Joint Director, DRI, Ludhiana Regional Unit. Several issues have been raised in the present writ petition including the issue that the Joint Director, DRI is not the ‘**proper officer**’ and has no jurisdiction to issue the said show cause notice. It has specifically been stated that as per Rule 16 of the Customs and Central Excise Duties and Service Tax Drawback Rules 1995, only the ‘**proper officer**’ of the custom department can raise the demand. The relevant portion of para 17.C and 17.D of the writ petition, where the said issues have been raised are reproduced hereinbelow: -

*“C. That as per Rule 16 Customs and Central Excise Duties and Service Tax Drawback Rules 1995, the claimant shall on demand by a **proper officer** of Customs repay the amount erroneously or in excess paid to him. Rule 16 is reproduced as under: -*

Rule 16. Repayment of erroneous or excess payment of drawback and interest.- Where an amount of drawback and interest, if any, has been erroneously or

*the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a **proper officer** of Customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962 (52 of 1962).*

*In the above stated Rule, it has been provided that **proper officer** may raise demand and claimant shall be liable to pay. No period for issuing the show cause notice and recovery has been prescribed. Under Section 28 of the Customs Act, a maximum period of 5 years has been prescribed for recovery of duty not levied or short levied or erroneously refunded.”*

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*“D. That Show Cause Notice in question was issued by Joint Director, Directorate of Revenue Intelligence, Ludhiana. As per Rule 16 of the Drawback Rules, demand can be raised by a **proper officer** of Customs. **Proper officer** of Customs has been defined under Section 2(34) of the Customs Act. Section (34) of the Act is reproduced as under:-*

SECTION 2. Definitions.- *In this Act, unless the context otherwise requires.*

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

*The Show Cause Notice could be issued by **proper officer** and respondent is not a **proper officer**. There is no notification by which the Joint Director-DRI has been notified as **proper officer**. The Hon'ble Supreme Court in case of Commissioner of Customs Versus Sayad Ali, 2011 (265) ELT 17 (SC) has clearly held that **proper officer** means an officer who has been specifically entrusted functions either by Board or by Commissioner of Customs. In the absence of specific entrustment, the officer or Customs had no power to issue Show Cause Notice. In the present case, there is demand of drawback and it had been raised under Rule 16 of the Drawback Rules. In the absence of any notification, notifying the Joint Director-DRI as **proper officer**, the Joint Director-DRI had no authority to issue Show Cause Notice. Therefore, the Joint Director-DRI had issued Show Cause Notice in question beyond his jurisdiction."*

It has further been stated that as per settled law, once the show cause notice has been issued by an incompetent authority, then the entire proceeding subsequent to the same, is also illegal in law. Reliance for the same has been placed upon the judgment of the Supreme Court in M/s Canon India Pvt. Ltd. (supra). The relevant portion of the judgment is reproduced herein below: -

"1. This batch of statutory appeals (being Civil Appeal Nos.1827/2018, 1875/2018, 1832/2018 and 3213/2018) under Section 130E of the Customs Act, 1962 arises from a common final order of the Central Excise and Service Tax Appellate ('CESTAT') dated 19th December 2017 ('impugned order')."

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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 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**”.*

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*“10. 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’.*

*11. Parliament has employed the article “the” not accidentally but with the intention to designate the **proper officer** who had assessed the goods at the time of 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.

*12. 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.*

13. 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.

*14. 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)].*

15. 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 9 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.

*16. 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.*

17. Shri Sanjay Jain, learned Additional Solicitor General, relied on a Notification No.17/2002 - Customs (NT) dated 7.3.2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7.3.2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has

been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, learned Additional Solicitor General relied on a Notification No.40/2012 dated 2.5.2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows:-

*“[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.40/2012-Customs (N.T.)
New Delhi, dated the 2 nd May, 2012*

S.O. (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 officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table: -

<i>Sl. No.</i>	<i>Designation of the officers</i>	<i>Functions under Section of the Customs Act, 1962</i>
<i>(1)</i>	<i>(2)</i>	<i>(E)</i>
<i>1.</i>	<i>Commissioner of Customs</i>	<i>(i) Section 33</i>
<i>2.</i>	<i>Additional Commissioner or Joint Commissioner of Customs</i>	<i>(i) Sub-section (5) of Section 46; and (ii) section 149</i>
<i>3.</i>	<i>Deputy Commissioner or Assistant Commissioner of Customs and Central Excise</i>	<i>(i) (ii) (iii) (iv) (v) (vi) Section 28;</i>

19. *It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No.3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-Section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows:-*

“2. Definitions – *In this Act, unless the context otherwise requires, - (34) ‘proper officer’, in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the [Principal Commissioner of Customs or Commissioner of Customs].”*

20. *Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-*

“6. Entrustment of functions of Board and customs officers on certain other officers – *The Central*

Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this 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.*

22. *In the above context, it would be useful to refer to the decision of this Court in the case of **Commissioner of Customs vs. Sayed Ali and Another**⁵ wherein the **proper officer** in respect of the jurisdictional area was considered. The consideration made is as hereunder:-*

“16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The learned counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).

17. Before advertng to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that:-

“28. Notice for payment of duties, interest, etc. –

*(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the **proper officer** may,-*

(a) in the case of any import made by any individual for his personal use or by Government or by any

educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

*18. It is plain from the provision that the **'proper officer'** being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date,*

may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the ‘proper officer’.

19. Section 2(34) of the Act defines a ‘proper officer’, thus:

‘2. Definitions.-

(34) ‘proper officer’, in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;’

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

20. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under section 28 of the

Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions.”

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.

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31. In the result, these appeals are allowed. The common order dated 19.12.2017 passed by the CESTAT, New Delhi in Customs Appeal Nos. 50098, 50099, 50100 and 50280/2017 is set aside. Consequently, the impugned demand notices issued against all the three appellants herein are also set aside.”

Further reliance has also been placed upon the judgment of the Division Bench of Karnataka High Court in Writ Petition No.10773 of 2018 dated 14.07.2021 titled **‘Shri Mohan C. Suvarna Vs. Principal Commissioner of Customs’** to contend that once the show cause notice was bad in law then even the order passed in pursuance of the same was required to be set aside. The relevant portion of the judgment dated 14.07.2021 is reproduced herein below:-

“Writ petition No.10773/2018 and Writ Petition No.4628/2018 are taken up together and disposed off by a common order in light of the prayer sought for in both the petitions being identical as the Order-in-original SI. No.BLR-CUSTOM-AIR-003/16-17 dated 27.02.2017 at Annexure-G passed by the first respondent

has been called in question.”

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“5. The Directorate of Revenue Intelligence (‘D.R.I.’ for brevity), Bengaluru had issued a show cause notice dated 07.01.2008 to show-cause as to why the Order-in-Original dated 05.10.2004 accepting the declared value of aromatic chemicals (FIBU Items) should not be made inapplicable or treated as invalid and as to why the duty for an amount Rs.1,57,86,220/- should not be demanded and recovered.”

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*“9. The learned Senior Counsel appearing on behalf of the petitioners has brought to the notice of the court that during the pendency of the said writ petition, the Apex Court in the case of **M/s. Canon India Private Limited vs. Commissioner of Customs** reported in **2021 SCC Online SC 200** (in Civil Appeal No.1827/2018 and connected matters) has laid down the law as regards to the aspect of who is **‘the proper officer’** for the purpose of Section 28 of ‘The Customs Act, 1962’ and wherein the proceedings initiated by the Additional Director General of DRI who had issued the show-cause notice was declared invalid as he was not a **‘proper officer’** as defined under the Act and that the said judgment would enure to the benefit of the petitioners also insofar as orders-in-original that were passed which were the subject matter of litigation has commenced with show-cause notice dated 07.01.2008 which was issued by the Additional Director General of Directorate of Revenue Intelligence,*

Bengaluru ("DRI" for short) who has been held as not being 'the proper officer'. It is contended that in light of the said judgment in M/s. Canon India Private Limited (supra), the impugned Order-in-Original dated 27.02.2017 which was culmination of the proceedings starting with the show-cause notice issued by an incompetent authority is liable to be 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."

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"26. Accordingly, the writ petitions are allowed. The Order-in-original SI.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."

Reliance has also been placed upon the judgment dated 19.04.2021 of this Court in CWP No.19871 of 2020 titled '**M/s Godrej & Boyee Manufacturing Co. Ltd. Vs. Union of India & others**', the relevant portion of which is reproduced herein below:-

"CM-5413-CWP-2021

1. This is an application for preponing the date of

hearing.

2. For the reasons recorded, the application is allowed.

The main case is taken up for hearing today itself.

Main case

1. This petition has been filed for quashing the impugned order-in-original No.04/CUS/ASR/PRV/2020 dated 17.08.2020 (Annexure P1), passed by the commissioner of customs (preventive), Amritsar respondent No.2.

*2. On the last date, the following order was passed in **CM5413-CWP-2021 :-***

*“This is an application for early hearing of the main case in view of the decision of the Supreme Court passed in Civil appeal No.1827 of 2018 titled as **M/s Canon India Private Limited Vs. Commissioner of Customs.***

Notice of the application.

On advance notice, Mr. Sunish Bindlish, Advocate has entered appearance and accepts notice on behalf of the non-applicants/respondents and prays for an adjournment to verify facts.

Adjourned to 19.4.2021.”

3. Today, Mr. Sunish Bindlish, Advocate has accepted that he is not in a position to distinguish the facts of this case from the judgment mentioned above, though he has stated that the Board has made a request for adjournment.

4. In our considered opinion, once it can not be denied that the

judgment of the Supreme Court is applicable to the facts of the present case, no useful purpose would be served by adjourning the matter.

5. In the circumstances, the petition stands disposed of in terms of the decision of the Supreme Court passed in M/s Canon India Private Limited (supra).

6. Petition stands disposed of.

7. Since the main case has been decided, the pending Civil Misc. Application(s), if any, also stands disposed of.”

Learned counsel for the respondent has stated that though the Department has filed review application before the Supreme Court in the aforementioned case titled as ***M/s Canon India Private Limited (supra)***, yet he fairly conceded that no stay has been granted and has also stated that the Coordinate Bench had decided the same issue.

That the above-said judgments passed by Supreme Court and various other Courts clearly show that one of the issues which has been raised in the present writ petition to the effect that the Joint Director, DRI is not **‘the proper officer’** to issue show cause notice has been held in favour of the petitioner. It has further been held that the entire proceedings stand vitiated and are required to be set aside.

We, thus, deem it appropriate to allow the writ petition and to set aside the entire proceedings from the issuance of the Show Cause Notice dated 29.11.2012 (Annexure P-1) to the passing of the order dated 15.05.2015. Since, the counsel for the petitioner in his application vide CM-7508-2021 sought disposal of the writ petition only on the basis of the above-said issue of law and has agitated only the said issue of law, thus, the

authorities are granted liberty to initiate any fresh proceedings in accordance with law.

If any such proceedings are taken up by the respondent-authorities, in accordance with law, it would be open to the petitioner to raise all the pleas as available to them including the pleas which have been raised in the present writ petition.

All miscellaneous applications, if pending, stand disposed of in above terms.

(AJAY TIWARI)
JUDGE

(VIKAS BAHL)
JUDGE

04.08.2021
Jitesh (JTS)

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No