

Amol

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 14964 OF 2024

Pawan Kumar

...Petitioner

Versus

Union of India represented by Secretary
to the Govt. of India, Ministry of
Finance, Dept. of Revenue & Ors

...Respondents

Mr Sushant Murthy, *for the Petitioner.*

Mr Siddharth Chandrashekhar, *with Sangeeta Yadav, for
Respondent No. 2.*

Ms Sangeeta Yadav, *for the Respondent No. 3.*

CORAM M.S. Sonak &
 Jitendra Jain, JJ.
DATED: 18 November 2024

PC:-

1. Heard learned Counsel for the parties.
2. This Petition challenges the impugned Order-In-Original dated 5 December 2023. This Petition was kept pending because of the pendency of Review Petition No. 400 of 2021 before the Hon'ble Supreme Court in the case of ***Canon India Private Limited*** (Civil Appeal No. 1827 of 2018) wherein the Hon'ble Supreme Court had held that DRI officers cannot be considered as "proper officer" for issuing the show cause notice.

3. The Supreme Court vide its order dated 7 November 2024 has disposed of the review petition by observing that decision passed in the *Canon India Private Limited* (Supra) did not consider the notification and provisions of law since same was not brought to their notice. The Supreme Court in review petition held that DRI officer is a “proper officer” for issuing show cause notice. The Supreme Court also upheld the Validation Act by which amendment, the DRI officers were empowered to issue show cause notice. Now that the review petition filed by the revenue has been allowed, the petition is taken up for disposal.

4. The reasons recorded in paragraph 168 of the Hon’ble Supreme Court’s order dated 7 November 2024, is reproduced below for the convenience of reference:-

“168. In view of the aforesaid discussion, we conclude that:

(i) DRI officers came to be appointed as the officers of customs vide Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue, Ministry of Finance, Government of India. This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002 issued by the Department of Revenue, Ministry of Finance, Government of India, to account for administrative changes.

(ii) The petition seeking review of the decision in *Canon India* (*supra*) is allowed for the following reasons:

a. Circular No. 4/99-Cus dated 15.02.1999 issued by the Central Board of Excise & Customs, New Delhi which empowered the officers of DRI to issue show cause notices under Section 28 of the Act, 1962 as well as Notification No.

44/2011 dated 06.07.2011 which assigned the functions of the proper officer for the purposes of Sections 17 and 28 of the Act, 1962 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in ***Canon India (supra)***. In other words, the judgment in ***Canon India (supra)*** was rendered without looking into the circular and the notification referred to above thereby seriously affecting the correctness of the same.

b. The decision in ***Canon India (supra)*** failed to consider the statutory scheme of Sections 2(34) and 5 of the Act, 1962 respectively. As a result, the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of Section 28 in accordance with Section 6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty under Section 28 of the Act, 1962.

c. The reliance placed in ***Canon India (supra)*** on the decision in ***Sayed Ali (supra)*** is misplaced for two reasons – *first*, ***Sayed Ali (supra)*** dealt with the case of officers of customs (Preventive), who, on the date of the decision in ***Sayed Ali (supra)*** were not empowered to issue show cause notices under Section 28 of the Act, 1962 unlike the officers of DRI; and *secondly*, the decision in ***Sayed Ali (supra)*** took into consideration Section 17 of the Act, 1962 as it stood prior to its amendment by the Finance Act, 2011. However, the assessment orders, in respect of which the show cause notices under challenge in ***Canon India (supra)*** were issued, were passed under Section 17 of the Act, 1962 as amended by the Finance Act, 2011.

(iii) This Court in ***Canon India*** (*supra*) based its judgment on two grounds: (1) the show cause notices issued by the DRI officers were invalid for want of jurisdiction; and (2) the show cause notices were issued after the expiry of the prescribed limitation period. In the present judgment, we have only considered and reviewed the decision in ***Canon India*** (*supra*) to the extent that it pertains to the first ground, that is, the jurisdiction of the DRI officers to issue show cause notices under Section 28. We clarify that the observations made by this Court in ***Canon India*** (*supra*) on the aspect of limitation have neither been considered nor reviewed by way of this decision. Thus, this decision will not disturb the findings of this Court in ***Canon India*** (*supra*) insofar as the issue of limitation is concerned.

(iv) The Delhi High Court in ***Mangali Impex*** (*supra*) observed that Section 28(11) could not be said to have cured the defect pointed out in ***Sayed Ali*** (*supra*) as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective effect. In view of this, the High Court declined to give retrospective operation to Section 28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to Section 28 of the Act, 1962. We are of the considered view that the decision in ***Mangali Impex*** (*supra*) failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued. It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the High Court could not have applied the doctrine of harmonious construction to

harmonise Section 28(11) with Explanation 2 because Section 28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two. Therefore, we set aside the decision in ***Mangali Impex*** (*supra*) and approve the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** (*supra*).

(v) Section 97 of the Finance Act, 2022 which, *inter-alia*, retrospectively validated all show cause notices issued under Section 28 of the Act, 1962 cannot be said to be unconstitutional. It cannot be said that Section 97 fails to cure the defect pointed out in ***Canon India*** (*supra*) nor is it manifestly arbitrary, disproportionate and overbroad, for the reasons recorded in the foregoing parts of this judgment. We clarify that the findings in respect of the vires of the Finance Act, 2022 is confined only to the questions raised in the petition seeking review of the judgment in ***Canon India*** (*supra*). The challenge to the Finance Act, 2022 on grounds other than those dealt with herein, if any, are kept open.

(vi) Subject to the observations made in this judgment, the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Therefore, any challenge made to the maintainability of such show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, shall now be dealt with in the following manner:

- a. Where the show cause notices issued under Section 28 of the Act, 1962 have been challenged before the High Courts directly by way of a writ petition, the respective High Court shall dispose of such writ petitions in accordance with the observations made in this judgment and restore such notices for adjudication by the proper officer under Section 28.
- b. Where the writ petitions have been disposed of by the respective High Court and appeals have been preferred against such orders which are pending before this Court, they shall be disposed of in accordance with this decision and the show cause notices impugned therein shall be restored for adjudication by the proper officer under Section 28.
- c. Where the orders-in-original passed by the adjudicating authority under Section 28 have been challenged before the High Courts on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, the respective High Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT).
- d. Where the writ petitions have been disposed of by the High Court and appeals have been preferred against them which are pending before this Court, they shall be disposed of in accordance with this decision and this Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeals before the CESTAT.

e. Where the orders of CESTAT have been challenged before this Court or the respective High Court on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, this Court or the respective High Court shall dispose of such appeals or writ petitions in accordance with the ruling in this judgment and restore such notices to the CESTAT for hearing the matter on merits.

f. Where appeals against the orders-in-original involving issues pertaining to the jurisdiction of the proper officer to issue show cause notices under Section 28 are pending before the CESTAT, they shall now be decided in accordance with the observations made in this decision.”

5. In this Petition, Clause (vi)(c) of paragraph 168 would be relevant. Accordingly, we dispose of this Petition by passing the following order consistent with Paragraph 168(vi)(c) of the Hon’ble Supreme Court order.

6. The Petitioner is granted eight weeks time to file appeal challenging the Order-in-Original dated 5 December 2023 from the date of uploading of the present order.

7. If such appeal is indeed filed within eight weeks, then the appellate authority, should dispose of such appeal on their own merits and in accordance with law without adverting to the issue of limitation.

8. All contentions of the parties on merits, except to the extent such contentions stand concluded by the Hon’ble Supreme Court’s decision in Review Petition No. 400 of 2021, are kept open for consideration by the appellate authority.

9. This Petition is disposed of in above terms without any order of cost.

10. All concerned to act on an authenticated copy of this order.

(Jitendra Jain, J)

(M.S. Sonak, J)