

Apex Court in review, holds that DRI officers are “Proper Officers” for Customs Law

***Commissioner of Customs v. Canon India Private Ltd.*¹**

The Supreme Court ('SC'/'the Court') allowed the Review Petition filed by the Revenue (Customs) Department, thereby revisiting its earlier decision in ***Canon India Private Ltd. v. Union of India***². The Apex Court declared the law that officers of the Directorate of Revenue Intelligence (DRI) are "proper officers" under Section 28 of the Customs Act, 1962 ('the Act') and were empowered to issue Show Cause Notices('SCNs').

The Court held that its previous judgment had erroneously concluded that DRI officers lacked jurisdiction, as it had overlooked relevant statutory provisions, and so overturned it. The Court also upheld the validity of the 2022 amendment provisions contained in Section 97 of the Finance Act 2022.

Background

- The SC in the case of ***Commissioner of Customs v. Sayed Ali and Another***³ ruled that the Commissioner of Customs (Preventive) is not a "proper officer" under Section 2(34) of the Act and, therefore, lacks authority to issue SCN under Section 28. The SC stressed that only officers

explicitly assigned the role of assessment in a specific jurisdiction have the powers to issue these notices, aiming to prevent administrative confusion by clearly defining the authority for such actions.

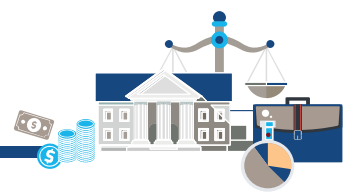
- In response, the Central Government issued Notification No. 44/2011-Cus-NT, dated July 6, 2011 designating various officers, including those from DRI, as "proper officers" prospectively, and introduced Section 28(11) of the Act *vide* the Customs (Amendment and Validation) Act, 2011 ('Validation Act 2011') to retroactively validate actions by previously appointed customs officers.
- This retroactive provision encountered legal challenges, notably in ***Mangali Impex Ltd. v. Union of India***⁴, where the Delhi High Court ruled that Section 28(11) did not authorize DRI officers to issue SCNs before April 8, 2011, citing concerns over administrative disorder. Specifically, the High Court held that operation of Section 28(11) is limited for the period April 8, 2011 to September 16, 2011. Appeal against the said ruling was pending before SC.

¹ Review Petition No. 400 of 2021

² 2021 (3) TMI 384 - Supreme Court

³ 2011 SCC 537

⁴ 2016 SCC Online Del 2597



- On the other hand, the Bombay High Court upheld Section 28(11) in ***Sunil Gupta v. Union of India and Others***⁵, resulting in conflicting legal provisions.
- The SC, in ***Canon India (Supra) 2021*** affirmed its stance in *Sayed Ali*, asserting that only officers specifically authorized to assess could issue these notices, and these must be “proper officers”, thereby concluding DRI officers lack explicit authorization to assess and issue SCNs. Curiously Section 28(11) and Section 17 were not brought to the attention of the Supreme Court.
- Aggrieved by the same, the Revenue Department sought a review by filing the present Review Petition.

Submissions by the Revenue Department

- SC’s decision in ***Canon India*** requires review due to apparent errors and, oversight of pending appeal in ***Mangali Impex (Supra)***, which High Court judgement was stayed.
- The ***Canon India*** judgment mistakenly assumed that officers from the DRI are not “Customs officers” unless specifically empowered under Section 6 of the Act. While Sections 3, 4 and 5 of the Act classify DRI officers as Customs officers, rendering empowerment under Section 6 is unnecessary and unwarranted.
- The decision in ***Sayed Ali (Supra)*** was specifically about Customs (Preventive) officers, who were not granted proper officer status. It did not consider DRI officers who, under Circular No. 4/99-Cus. dated February 15, 1999 and Notification No. 44/2011-Cus (N.T.) dated July 6, 2011, were empowered to issue SCNs, by the Central Board of Excise & Customs (‘the board’) in terms of Section 2(34).
- The decision in ***Mangali Impex*** was based on an incorrect interpretation of Section 28(11) being

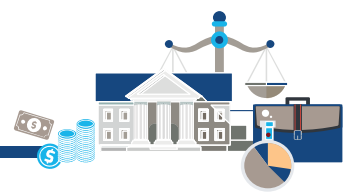
overbroad and disregarded the Department’s measures to prevent jurisdictional overlap, which have been in place since 1999 through various notifications and circulars. Thus, the decision in ***Mangali Impex*** should be set aside and the judgement of the Bombay High Court in ***Sunil Gupta*** upheld as it supports the correct interpretation of Section 28(11).

- Section 97 of the Finance Act, 2022 has been challenged as it retroactively validates past actions under the Act, upholding their legality. However, to prove arbitrariness, proof of actual misuse must be provided. Mere presumptions or potential misuse doesn’t justify declaring a law unconstitutional. At any rate this provision can be seen as surplusage

Submissions by the Respondent

- Power of review is extremely circumscribed and limited and cannot be a means to re-argue a case. The decisions in the case of ***Canon India*** and ***Mangali Impex*** are correct in their conclusion and does not require interference.
- Sections 17, 46, 47 and 28 of the Act respectively are interlinked and involve a sequential flow of events to be processed by a single officer, and therefore, empowering DRI officers (different officers) to issue SCNs, is illegal.
- As Section 28 relates to short levy and reassessment, only the officer who initially assessed the goods should issue recovery notices. Also, the ruling in ***Canon India*** was correct that DRI officers could not be assigned duties under Section 6 of the Act without proper notification.
- Section 97 of the Finance Act, 2022 is unconstitutional as it violates the principles of prior decisions and creates confusion by granting jurisdictions to multiple officers. Further, past actions or jurisdictional facts determined by courts cannot be validated retroactively. Additionally,

⁵ 2014 SCC Online Bom 1742



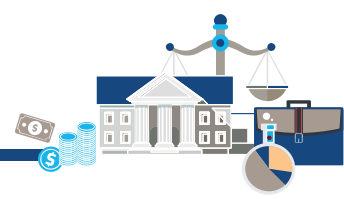
absence of valid notifications prior to April 1, 2022 leads to legal confusion, rendering prior actions of Customs officers without jurisdiction.

Analysis

- Article 137 of the Indian Constitution, empowers the SC to review its judgments or orders, governed by Parliament's laws and the Court's Review Rules, 2013. Reviews are allowed only on defined grounds, such as errors apparent on the record, newly discovered evidence or any other sufficient reason as defined in the Code of Civil Procedure, 1908. Courts interpret "any other sufficient reason" to mean reasons similar to those specified, permitting review if a significant legal provision or jurisdictional error was overlooked, as was held in **Girdhari Lal Gupta v. D. H. Mehta**⁶ and **Northern India Caterers Ltd. v. Lt. Governor of Delhi**⁷. The Court thus, accepted and allowed the Review Petition on this premise.
- Sections 17 and 28 of the Act outline distinct duties assessment processes. Section 17, amended in 2011, allows importers and exporters to self-assess duties, with Customs officers conducting verifications as needed upon entry. In contrast, Section 28 provides a quasi-judicial process for post-clearance review of assessments, enabling Customs officers to issue SCNs in cases of short-levy or erroneous refunds, often following DRI investigations. Further, Section 110AA, introduced in Finance Act 2022, clarifies that only an officer of Customs assigned as "proper officer" may issue SCNs, but it does not imply past procedures were incorrect or, create a mandatory link between Sections 17 and 28.
- The article "the" in "the proper officer" under Section 28 was misinterpreted to mean that the same officer handling assessments under Section 17 must also conduct reviews under Section 28. However, Section 28 refers to an officer specifically designated for post-clearance reviews, not necessarily the one who handled the initial assessments under Section 17. Court observed that statutory language should be contextually interpreted to avoid rigid grammatical readings that could cause inconsistencies; here, "the" denotes specific functions assigned to a proper officer, not a link between Sections 17 and 28.
- The case of **Sayed Ali** revolved around the issuance of a SCN by the Assistant Collector of Customs (Preventive) Mumbai for violations under Section 111(d) of the Act. Further, linkage between Section 17 and 28 in this case were *obiter dicta* and not binding. Additionally, this ruling was deemed not to be applicable to period after April 8, 2011, as Section 17 of the Act had been significantly amended by the Finance Act, 2011, and the case facts were for a date anterior to that
- In **Canon India**, the SC mistakenly ruled that DRI officers were not "Proper Officers" under the Act, based on an incorrect interpretation of Notification No. 40/2012-Customs (N.T.) dated May 2, 2012. This notification, issued under Section 2(34), it was held now, correctly designated DRI officers as "Proper Officers."
- The amendment to Section 2(34) *vide* the Finance Act, 2022 further clarifies that "proper officers" are those assigned functions by the Board or senior Customs officials. It was held now that the Court wrongly limited "proper officer" to those directly involved in clearing goods, overlooking the broader appointment powers granted to the board under Section 4 of the Act allowing appointment of Customs officers, including DRI officers, as "Officers of Customs" via notifications. These appointed officers, defined as "proper officers" under Section 2(34), are empowered to carry out functions under the Act, including issuing SCNs and adjudicating cases. It was also held that Section 6 pertains to another aspect of the matter- authorising other Government Officials

⁶ 1971 (3) SCC 189

⁷ 1980 (2) SCC 167



- Section 97 is neither arbitrary nor discriminatory and it validates the prior actions of DRI officers, as assigned through Notification No. 44/2011 Cus- (N.T.) dated July 6, 2011.

Decision

- The SC without affecting its findings on limitation period for issuing SCNs in **Canon India**, allowed the review petition on the following grounds:
 - DRI officers were appointed as Customs officers through Notifications No. 19/90-Cus and No.17/2002, empowering them to issue SCNs under Section 28 of the Act.
 - Circular No. 4/99-Cus and Notification No. 44/2011, which empower DRI officers to issue SCNs, were not considered in the original **Canon India** decision, which affected its correctness.
 - Judgment in **Canon India** wrongly concluded that DRI officers lacked jurisdiction, as it overlooked relevant statutory provisions and the Finance Act amendments of 2011. The decision proceeded on an erroneous footing.
 - Reliance on **Sayed Ali** was misplaced, as that case concerned officers not empowered under Section 28 of the Act as “proper officers” at the time.
- Past pending cases challenging the jurisdiction, should be dealt with in line with this ruling.
- The Court overturned Delhi High Court’s ruling in **Mangali Impex** and upheld the Bombay High Court’s ruling in **Sunil Gupta**.
- The Court also upheld the constitutional validity of Section 97 of the Finance Act, 2022, which retrospectively validated SCNs issued under Section 28 of the Act.

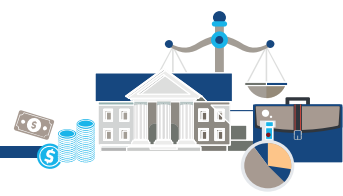
Dhruva Comments

The Apex Court (through a three-judge bench) has now settled, a long-standing issue about jurisdiction and authority of the DRI. The Court has also directed the manner in which the issue of jurisdiction - as was raised in different fora - shall be dealt with, thereby bringing to a close the dispute on this topic involving several thousand crores of Rupees.

Acknowledging errors in its previous judgement, the Supreme Court clarified that the DRI officers are “proper officers” under the Customs Act, 1962 and authorized to issue Show Cause Notices.

The ruling effectively validates past SCNs and proceedings initiated by DRI officers, which are under challenge based on the prior interpretation of the law.

The Court has surveyed all of the relevant provisions of the Customs Act and notifications, circulars, to succinctly held that Section 17 of the Act previously dealt with assessment (by the proper officer), which provision was later amended in (2011) to allow proper officer to undertake reassessment after a self- assessment whereas under Section 28 a quasi-judicial function is carried out of adjudication of duty short or not levied.



ADDRESSES

Mumbai

1101, One World Centre,
11th Floor, Tower 2B,
841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

402, 4th Floor, Venus Atlantis,
100 Feet Road, Prahladnagar,
Ahmedabad 380 015
Tel: +91 79 6134 3434

Bengaluru

Lavelle Road, 67/1B,
4th Cross, Bengaluru,
Karnataka – 560001
Tel: +91 90510 48715

Delhi / NCR

305-307, Emaar Capital Tower-1,
MG Road, Sector 26, Gurgaon
Haryana - 122 002
Tel: +91 124 668 7000

New Delhi

1007-1008, 10th Floor, Kailash Building,
KG Marg, Connaught Place,
New Delhi – 110001
Tel: 011 4514 3438

Pune

305, Pride Gateway,
Near D-Mart, Baner,
Pune - 411 045
Tel: +91 20 6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal – 700016
Tel: +91 33 66371000

Abu Dhabi

Dhruva Consultants
1905 Addax Tower, City of Lights,
Al Reem Island,
Abu Dhabi, UAE
Tel: +971 26780054

Dubai

Dhruva Consultants
Emaar Square Building 4, 2nd Floor,
Office 207, Downtown,
Dubai, UAE
Tel: +971 4 240 8477

Singapore

NeoDhruva Consultants
#16-04, 20 Collyer Quay,
Singapore 049319
Tel: +65 9144 6415

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

Kulraj Ashpnani

kulraj.ashpnani@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the “India Tax Firm of the Year” at the ITR Asia Tax Awards in 2017, 2018, 2019, 2020 and 2021.

Dhruva Advisors has also been recognised as the “**India Disputes and Litigation Firm of the Year**” at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the “**Best Newcomer Firm of the Year**” at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the “**Best Newcomer Firm of the Year**” at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review's in its World Tax Guide.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review's Indirect Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing** practice ranking table in ITR's World Transfer Pricing guide.

Disclaimer:

The information contained herein is in summary form and is therefore intended for general guidance only. This publication is not intended to address the circumstances of any particular individual or entity. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. This publication is not a substitute for detailed research and professional opinions. Before acting on any matters contained herein, reference should be made to subject matter experts, and professional judgment needs to be exercised. Dhruva Advisors LLP cannot accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of any material contained in this publication

