

EY Tax Alert

SC validates issuance of SCN by DRI as a Proper Officer by favorably disposing review petition filed by the department

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Executive summary

This Tax Alert summarizes a recent Supreme Court (SC) ruling¹ disposing the review petition filed by the Customs department on the issue whether Directorate of Revenue Intelligence (DRI) is the proper officer to exercise the power under section 28(4) of the Customs Act, 1962. Earlier, the apex court dealt with the issue of validity of the proceedings initiated by the Additional Director General (ADG), DRI for recovery of duty under Section 28(4) of the Customs Act, 1962, and held that ADG, DRI is not "the proper officer" to exercise the power under the said section². Subsequently, a review petition was filed by Department against the impugned order.

The key observations of the SC are:

- ▶ The impugned decision was based on the Apex Court ruling in case of Sayed Ali³. SC in Sayed Ali (supra) held that for the "proper officer" to exercise the functions under Section 28, such officer must necessarily possess assessment power under Section 17.
- ▶ Section 17 was however, subsequently amended w.e.f. 08.04.2011 and the impugned order did not consider the said amendment. Further, perusal of sections 17 and 28 indicate that there is no mandatory condition linking the two provisions and hence the interpretation in Sayed Ali is erroneous.
- ▶ DRI officers were notified⁴ by Central Government as "proper officer" for the purposes of Sections 17 and 28.
- ▶ Enactment of Section 28(11) is constitutionally valid and decision of Mangali Impex⁵ is set aside. Further, retrospective amendments made through Section 97 of the Finance Act 2022, validating the actions of DRI officer, are valid.

Accordingly, SC allowed the review petition filed by Revenue and restored all the show cause notices issued by DRI.

¹ TS-515-SC-2024-CUST

² TS-75-SC-2021-CUST. Refer our tax alert dated 15 March 2021

³ (2011) SCC 537

⁴ Notification No. 44/2011-Cus-N.T. dated 06.07.2011

⁵ (2016) SCC Online Del 2597

Background

- ▶ The taxpayer had imported Digital Still Image Video Cameras (DSIC) and availed exemption of basic customs duty during the period March 2012 to March 2014.
- ▶ The taxpayer submitted the Bill of Entry along with the necessary documents and after due verification, the customs authority cleared the goods as exempt from duty in accordance with the relevant notification.
- ▶ Subsequently, a show cause notice (SCN) was issued under Section 28(4) of the Customs Act, 1962 (the Act) alleging that the goods imported were not eligible for exemption and there has been willful misstatement and suppression of facts by the appellants in relation to the technical specifications of the product.
- ▶ Section 28 authorizes "the proper officer" to issue a SCN where any duty has not been levied or not paid or has been short-levied or short-paid.
- ▶ While the decision to clear the goods under the exemption notification was taken by the Deputy Commissioner, Appraisal Group, Delhi Air Cargo, the SCN was issued by the Additional Director General, Directorate of Revenue Intelligence (ADG, DRI).
- ▶ The litigation travelled upto Supreme Court (SC), and the SC allowed the appeal filed by taxpayer on the ground that DRI was not proper officer under the provisions of the Act to issue notice under Section 28⁶.
- ▶ Aggrieved by the above ruling, Revenue filed a review petition before SC against the impugned order. Concurrently, the Central Government vide Section 97 of the Finance Act, 2022 brought in retrospective amendments to the Act validating all past actions initiated by DRI officers.
- ▶ Separately, Delhi High Court in case of Mangali Impex⁷ had held that assignment of powers to DRI under Section 28 would create confusion and declared Section 28(11) unconstitutional for being violative of Article 14 owing to its inherent arbitrariness. However, Bombay High Court in the case of Sunil Gupta⁸ had upheld the constitutionality of Section 28(11).
- ▶ Thus, as part of this present review, SC has dealt with the following topics:

- ▶ Review petition filed against the impugned order
- ▶ Constitutional validity of Section 28(11) of the Act, which was held invalid by judgment in Mangali Impex (*supra*) and upheld by the Court in case of Sunil Gupta.
- ▶ Validity of Section 97 of Finance Act, 2022.

Revenue's Contentions

- ▶ The impugned ruling requires review as there are errors apparent on the face of the record.
- ▶ The ruling proceeded on assumption that DRI officers are not officers of Customs and therefore need to be entrusted with such powers under Section 6 of the Act, and only upon such entrustment, the functions of a proper officer can be assigned to them.
- ▶ Section 6 would come into play for officers of the Central or State Government or Local Authority, who are not officers of customs under Section 3 and appointed in accordance with Section 4 of the Act, whereas DRI officers are customs officers under Section 3 of the Act.
- ▶ Central Government, vide Notifications⁹, has appointed Director, DRI and all officers of DRI as officer of customs.
- ▶ The finding in the impugned order that DRI officers belong to a different department and therefore cannot become proper officers under Section 28, is erroneous.
- ▶ The decision of SC in case of Commissioner of Customs v. Sayed Ali¹⁰ ('Sayed Ali') was with reference to Customs (Preventive) and would have no application to DRI and DGAE officers.
- ▶ An observation was made in Sayed Ali (*supra*) that an officer of customs who is empowered to undertake assessment or reassessment under Section 17 is alone qualified to become a proper officer under Section 28 or else it would result in empowering multiple officers dealing with same issue leading to utter chaos and confusion. This observation is incorrect as much as Board has issued notifications and circulars to ensure there is no overlap of jurisdiction.
- ▶ The decision in Mangali Impex (*supra*) is liable to be set aside and the decision in Sunil Gupta (*supra*) ought to be affirmed as Explanation 2 and Section 28(11) had different objectives sought to be achieved.
- ▶ Amendments carried out through Section 87, 88 and 97 of the Finance Act, 2022, are a mere

⁶ TS-75-SC-2021-CUST. Refer our tax alert dated 15 March 2021

⁷ (2016) SCC Online Del 2597

⁸ (2014) SCC Online Bom 1742

⁹ S. No. 1 of GSR 214 and S.No 5 of 215

¹⁰ (2011) SCC 537

surplusage done *ex abundanti cautela* and are clarificatory in nature.

Taxpayer's Contentions

- ▶ The scope of review is extremely limited and even if a different view is possible, the same cannot result in a review.
- ▶ Section 17, 46, 47 and 28 of the Act are interlinked and interdependent on each other. These provisions involve a sequential flow of events to be processed by a single officer; therefore, empowering DRI officers who are not connected to this scheme, is illegal.
- ▶ Amendment to Section 17 in allowing self-assessment is inconsequential since the power to assess and reassess the clearances still resides with the officer of Customs.
- ▶ The impugned order is correct in holding that DRI officers should be entrusted with the functions under Section 6 of the Act.

Since the Central Government has not done so, they cannot be assigned the functions of proper officer.

- ▶ All proper officers are officers of customs, but all officers of customs are not proper officers. Mere conferment of power or assignment of functions of assessment/reassessment under Sections 17 and 28 of the Act respectively is not enough.

Only that proper officer who had carried out the assessment will be the proper officer.

- ▶ The decision rendered by the High Court in Mangali Impex (supra) is correct and need not be disturbed as it perpetrates the very chaos that Sayed Ali (supra) judgement sought to prevent.
- ▶ Section 97 of the Finance Act, 2022 is liable to be struck down as manifestly arbitrary and thus violative of Article 14.

Supreme Court Ruling

Review Petition

- ▶ When a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record, sufficient to bring the case within the purview of Order XLVII Rule 1 of the Code of Civil Procedure, 1908.¹¹

In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed.

- ▶ SC ruling was passed considering the law laid down in Sayed Ali (supra) which proceeds on the assumption that for the "proper officer" to exercise the functions under Section 28, such officer must necessarily possess assessment and reassessment powers under Section 17.

However, it is pertinent to note that when Sayed Ali was decided, Section 17 read differently, and the true purport of Section 4 of the Act was not considered.

- ▶ Changes made in Section 17 highlight that the competence of the proper officer is limited only to verify self-assessment and subsequent re-assessment, and the same cannot be equated with full assessment.

This change in law was not brought to the attention of the Court.

- ▶ The proceedings under Section 28 are after the completion of the process set out in Section 17. The procedure envisaged under Section 28 is a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers.

A plain reading of Sections 17 and 28 does not bring out any such inter-dependence between the two provisions, and thus observations pertaining to interlinkage of Section 17 and 28 is incorrect.

- ▶ The use of the article "the" in the expression "the proper officer" should be read in the context of that proper officer who has been conferred with the powers of discharging the functions under Section 28 by conferment under Section 5.

However, in the absence of statutory linkage between Section 17 and Section 28, there was no legal footing to conclude that the proper officer under Section 28 should be the same officer under Section 17.

- ▶ DRI officers were notified as "the proper officer" for the purposes of Sections 17 and 28 of the Act, respectively, vide Notification¹² issued by the Central Government. Hence, DRI officers who were designated as "the proper officer" were competent to issue SCN.
- ▶ Original order held that DRI officer was not an officer of customs and hence they cannot be treated as proper officers.

Officer of customs appointed under Section 4(1) of the Act, can be designated as the "proper officer" as defined in Section 2(34) of the Act.

¹¹ Yashwant Sinha v. CBI (2020) 2 SCC 338

¹² Notification No. 44/2011-Cus-N.T. dated 06.07.2011

Madras HC in the case of N.C. Alexander¹³ has held that DRI officers are officers of Customs.

- ▶ SC in its original order held that since the Notification¹⁴ was not issued under Section 6, it was invalid.

Section 6 of the Act makes a general provision empowering the Central Government to entrust the functions of Board or customs officer to any of the officers of the Central or the State Government or a local authority.

A plain reading of Section 6 of the Act makes it clear that it applies only to officers from departments other than the officers of the customs under Section 4 of the Act. This view has also been upheld by Madras HC in the N.C. Alexander (*supra*).

Thus, the SC allowed the review petition filed by the Revenue.

Constitutionality Validity of Section 28(11)

- ▶ Section 28(11) was introduced to remedy the defects highlighted by this Court in the case of Sayed Ali (*supra*) and the same retrospectively empowered all officers of customs appointed under Section 4(1) before 06.07.2011 to conduct assessments under Section 17 of the Act and to be proper officers for the purpose of Section 28.
- ▶ None of the changes made by the amendments to Section 28 have any impact on the competence of the proper officer for the purposes of fulfilment of functions under Section 28.
- ▶ The only major change that warrants clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices.
- ▶ Therefore, the application of Section 28(11), which pertains only to the empowerment of proper officers to issue show cause notices under Section 28, cannot be said to be limited only to new Section 28 but also to the provision as it stood prior to 08.04.2011.
- ▶ Mangali Impex (*supra*) declared Section 28(11) as unconstitutional on the ground that a plurality of proper officers empowered under Section 28 would result in more than one show cause notice and a consequent misuse of the provision. It is a settled principle¹⁵ that possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it.

Basis above, the SC upheld the constitutional validity of Section 28(11) of the Act, thereby,

setting aside the ruling of Mangali Impex (*supra*) and upholding the ruling of Sunil Gupta (*supra*).

Validity of Section 97 of Finance Act, 2022

- ▶ It is a settled position of law that the legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law.

With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted.

- ▶ The SC in Indian Aluminium Company Co.¹⁶ has laid down the test for determining whether a validating law is enacted within permissible limits. They are as follows:

- (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional Requirements.
- (b) whether Legislature has competence to validate the law.
- (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

- ▶ The validating provision under Section 97 of the Finance Act, 2022 is a mere surplusage with respect to validation of the show cause notices issued by DRI officers under Section 28. It cannot be challenged on the ground that it does not cure the defect pointed out in the impugned order when no defect can be made out therein as a result of this review petition.
- ▶ Introduction of Section 110AA was a valid exercise of legislative power to amend the provisions of the Act. A change in law, which the legislature was competent to enact, having prospective application, cannot be a ground for the writ petitioners to question the sanctity and wisdom of the legislature in following a different mechanism to assess/re-assess bills of entry(s) and recover duty under Sections 17 and 28 respectively.
- ▶ Further, Section 110AA does not create a class of assessees to whom the law would apply differentially at the same point in time.
- ▶ Also, the mere fact that amended Section 5(4) would have retrospective effect (i.e. notices issued earlier would be governed by new provisions) will not be ground to challenge the validity of Section 97.

¹³ W.P. Nos. 33099 of 2015

¹⁴ Notification No. 40/2012-Customs (N.T.) dated 02.05.2012

¹⁵ Shreya Singhal v. Union of India (2015) 5 SCC 1

¹⁶ (1996) 7 SCC 637

Hence, SC upheld the constitutional validity of Section 97 of the Finance Act, 2022.

Conclusion

- ▶ DRI officers are entrusted with the functions of a proper officer for the purposes of Section 28 of the Act.
However, the aspect of limitation dealt by the impugned order has not been reviewed.
- ▶ Constitutional validity of Section 28(11) has been upheld. The decision of Delhi High Court in case of Mangali Impex (Supra) has been set aside and view taken by Bombay High Court in case of Sunil Gupta (supra) has been upheld.
- ▶ Section 97 of the Finance Act, 2022, which, inter-alia, retrospectively validated all show cause notices issued under Section 28 of the Act cannot be said to be unconstitutional.
- ▶ Consequential directions have been provided for disposal of petitions/ appeals that are pending at different forums, pursuant to this ruling.

Comments

By overruling its 2021 judgement in a review plea by the Custom department, Supreme Court seems to have finally settled the long-drawn litigation on the status of the officers of DRI, Commissionerate of Customs (Preventive), DGCEI, and Central Excise Commissionerate, as proper officer and its authority to issue SCNs for demanding the duty.

The ruling is likely to adversely impact all importers where notices had been issued and proceedings initiated by DRI for recovery of customs duty. Such litigations would have to be pursued on merits and limitation.

The judgment also delineates the steps for verifying the validity of retrospective statutory amendments to address legislative errors.

Recently, Jharkhand High Court in the case of Aka Logistics Private Limited [2024 (10) TMI 314 dated 3 October 2024] held Additional Director General (ADG) is a proper officer under Goods and Services Tax legislation.

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