

Supreme Court holds that DRI officers are ‘proper officers’ for issuing show cause notices



Historical Background

- Supreme Court in *Sayed Ali* held that Commissioner of Customs (Preventive) (CCP) is not a ‘proper officer’ under Section 2(34) of the Customs Act, 1962 (Customs Act) and hence, did not have the jurisdiction to issue a Show Cause Notice (SCN) under Section 28. Against this, the tax authorities filed a review petition which was dismissed on the ground of delay in filing the review.
- **Subsequent developments pursuant to the *Sayed Ali* (*supra*) ruling:**
 - **Amendment to Sections 17 and 28 *vide* Finance Act, 2011 (FA 2011) w.e.f. 8 April 2011:**
 - While the Section 17 amendment altered the method of assessment of Bills of Entry and Shipping Bills, Section 28 was revamped.
 - Explanation 2 to Section 28 was introduced *inter alia* stipulating that any non-levy or short-levy or erroneous refund before the date of Presidential assent to Finance Bill, 2011 (8 April 2011) shall be governed by Section 28 as it stood prior to the amendment.
 - Later, the Central Board of Indirect taxes and Customs (CBIC)² issued Notification No. 44/2011-Cus. (NT) dated 6 July 2011 **prospectively** assigning functions of the ‘proper officers’ to CCP, Directorate of Revenue Intelligence (DRI), Directorate General of Anti-Evasion (“DGAE”) and officers of Central Excise (CE officers).
 - **For past periods**, Section 28(11) was introduced *vide* Customs (Amendment and Validation) Act, 2011 (Validation Act) to provide that all persons appointed as officers of Customs under Section 4(1) (prior to 6 July 2011) were deemed to have and always had the power of assessment under Section 17 and were deemed to be and always have been ‘proper officers’ under Section 28.
- **Challenge to the constitutional validity of Section 28(11) - introduced *vide* the Validation Act:**
 - **Bombay High Court:** In *Sunil Gupta*³, the Bombay High Court held that DRI is deemed to have been possessing the authority, as per Section 28 (unamended or amended or substituted).
 - **Delhi High Court:** Subsequently, in *Mangali Impex Ltd.*⁴, the Delhi High Court held that Section 28(11) would not empower DRI or DGAE to either adjudicate the SCNs already issued by them for the period prior to 8 April 2011 or to issue fresh SCNs for the said period. Against this, the tax authorities preferred an appeal before the Supreme Court wherein the operation of the aforesaid ruling was stayed *vide* order dated 1 August 2016.
- On 9 March 2021, the Supreme Court in *Canon India*⁵ *inter alia* held as follows:
 - Unless it is shown that DRI officers are customs officers and are entrusted with the functions of a proper officer under Section 6, they would not be competent to issue SCNs. Since no such entrustment was made, DRI officers could not be assigned as ‘proper officers’.
 - On conjoint reading of Sections 2(34) and 28, only a customs officer, who has been assigned the specific functions of assessment / reassessment, either by CBIC or the Commissioner of Customs, was competent to issue a SCN under Section 28. Against this, the tax authorities preferred a Review Petition before the Supreme Court.
- Pending decision on the Review Petition, various amendments were made by the Finance Act, 2022 (FA 2022) to Sections 2, 3 and 5 of the Customs Act. Further, Section 110AA of the Customs Act was also introduced to *inter alia* provide that a SCN under Section 28 can only be issued by that ‘proper officer’ who has been conferred with the jurisdiction, by an assignment of functions under Section 5, to conduct assessment under Section 17 in respect of such duty. Further, Section 97 of the Finance Act, 2022 *inter alia* provides for validation of certain actions. The constitutional validity of these amendments was challenged before Supreme Court⁶.

- Thus, the following matters were pending before the Supreme Court:
 - Appeal filed by the tax authorities against *Mangali Impex Ltd. (supra)*;
 - Review Petition filed by the tax authorities against *Canon India (supra)*;
 - Constitutional validity of the amendments made by the Finance Act, 2022.

Observations and ruling by the Supreme Court

- **Appointment of DRI officers and functions assigned to them:**
 - DRI officers were appointed as the officers of customs *vide* Notification No. 19/1990-Cus. (NT) dated 26 April 1990 (subsequently superseded by Notification No. 17/2002-Cus. (NT) dated 7 March 2002). The notification derives its power from Section 5 of the Customs Act.
 - Notification No. 44/2011 dated 6 July 2011 *inter alia* assigned functions of the proper officer to DRI officers for the purpose of Sections 17 and 28 of the Customs Act. Similarly, Circular No. 4/1999-Cus. dated 15 February 1999 empowered the DRI to issue SCNs under Section 28
- **Canon India (supra) failed to consider various statutory provisions:**
 - The following provisions were not examined in *Canon India (supra)*:
 - The statutory scheme of Sections 2(34) and 5 of the Customs Act.
 - Notification No. 44/2011 dated 6 July 2011 that assigned functions of the proper officer to DRI officers for the purpose of Sections 17 and 28 of the Customs Act.
 - Circular No. 4/99-Cus. dated 15 February 1999 that empowered DRI to issue SCNs under Section 28 of the Customs Act.
 - The judgement rendered in ignorance of the applicable law amounts to an error analogous to one apparent on the face of record and hence, the same must be reviewed.
- **Interplay between Section 17 and 28 and the correctness of the ratio laid down in *Sayed Ali (supra)*:**
 - Reliance on *Sayed Ali (supra)* in *Canon India (supra)* is misplaced on account of the following:
 - *Sayed Ali (supra)* dealt with the case of CCP, who, on the date of that decision were not empowered to issue SCNs under Section 28, unlike DRI officers who are empowered to issue SCNs as highlighted above; and
 - *Sayed Ali (supra)* examined Section 17 of the Customs Act as it stood prior to its amendment by FA 2011 whereas the assessment orders in respect of which the SCNs under challenge in *Canon India (supra)* were issued, were passed under Section 17 of the Customs Act, as amended by FA 2011 i.e., after 8 April 2011.
 - Section 17 as introduced by FA 2011 empowered the proper officer to perform functions of verification of self-assessment and subsequent re-assessment, if necessary. However, such re-assessment is not a mandatory function which is on the same footing as 'assessment' under the erstwhile Section 17. The scope of the functions of the proper officer under the new Section 17 is limited.
 - The proceedings under Section 28 are subsequent to the completion of the process set out in Section 17. Thus, Section 28 is in the nature of a quasi-judicial proceeding with the issuance of SCN by the proper officer followed by adjudication thereof. In case of DRI, the proceedings under Section 28 start only after an investigation is undertaken by DRI. Hence, the nature of review under Section 28 is significantly different from the nature of assessment and reassessment under Section 17.
 - The scheme of Sections 17 and 28 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of the Supreme Court in *Sayed Ali (supra)* and *Canon India (supra)* is patently erroneous.
 - The definite article 'the' in Section 28 refers to a 'proper officer' who has been conferred with the powers to discharge functions under Section 28 (by virtue of a notification issued under Section 5). Thus, the use of article 'the' in Section 28 has no apparent relation with the proper officer referred to in Section 17.
 - The view that the 'proper officer' for the purpose of Section 28 and other provisions of the Customs Act could only mean the person who cleared the goods (or his or her successor) and not any other officer from any department requires reconsideration in view of the amendments made *vide* the FA 2011 and also in terms of Section 4 of the Customs Act and the notification issued thereunder.
 - Contrary to the observations in *Canon India (supra)*, DRI officers were notified as 'the proper officer' for the purpose of Sections 17 and 28 (as specified above) and hence, such officers were competent to issue SCNs under Section 28.
- **Interplay between Section 2(34) and 6 of the Customs Act:**
 - Section 6 of the Customs Act applies only to the officers from departments other than officers of customs under Section 4. The assignment of functions of proper officers as mentioned in Section 2(34) and entrustment of functions of customs officers as mentioned in Section 6 operate on different planes.
 - While there may be some overlap, there can be no scenario wherein it can be held that the 'functions' under Sections 6 and 2(34) are congruent.
- **Constitutional validity of Section 28(11) - Amendments made by the Validation Act:**
 - None of the changes made to Section 28 *vide* the Validation Act have any impact on the competence of the proper officer for the purpose of fulfilment of functions under Section 28. The only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of SCNs.
 - The application of Section 28(11) only pertains to the empowerment of proper officers to issue SCNs cannot be said to be limited only to the amended Section 28 but also to the provision as it stood prior to 8 April 2011.

- Since there is no overlap in the field of operation of 28(11) and Explanation 2, the interpretation of the non-obstante clause in Section 28(11) and the consequent harmonious construction of the two provisions in *Mangali Impex (supra)* is otiose.
- *Mangali Impex (supra)* failed to take into account the policy being followed by the Customs Department since 1999 which provides for exclusion of jurisdiction of all other proper officers once a SCN by a particular proper officer is issued. Such a policy provides sufficient safeguard against the apprehension of multiple SCNs to the same assessee under Section 28.
- Section 28(11) of the Customs Act cures the defect pointed out in *Sayed Ali (supra)* and hence, the judgement in *Mangali Impex (supra)* deserves to be and is consequently set aside. The Bombay High Court ruling in *Sunil Gupta (supra)* lays down the correct position of law.
- Accordingly, Section 28(11) is constitutionally valid and its application is not limited to the period between 8 April 2011 and 16 September 2011.
- **Constitutional validity of the amendments made by Finance Act, 2022:**
 - The validating provision under Section 97 of the FA 2022 is a mere surplusage with respect to validation of SCNs issued by DRI officers under Section 28. It cannot be challenged on the ground that it does not cure the defect pointed out in *Canon India (supra)* when no defect can be made out therein as a result of this review petition.
 - The introduction of Section 110AA was a valid exercise of legislative power to amend the provisions of the Customs Act and it was done with the objective of following the principle of comity to give effect to the suggestions of the Supreme Court in *Sayed Ali (supra)* and *Canon India (supra)*.
 - A purposive interpretation of Section 97 of the FA 2022 indicates that clause (i) is the object of its enactment and clause (iii) is an extension thereof to further clarify that any deficiencies in law under Sections 2, 3 and 5 of the Customs Act as they stood prior to the FA 2022 would not be an obstacle to validation of an act under clause (i).
 - Hence, the retrospective amendment of Sections 2, 3 and 5 of the Customs Act is not standalone but is restricted to achievement of the ultimate object of validation under Section 97(i) of the FA 2022.
 - In view of the above, the challenge to the constitutional validity of the FA 2022, including Section 97 thereof was set aside.
- **Way Forward:** Having held that the DRI officers, CCP, Directorate General of Central Excise Intelligence and Central Excise Commissionerates and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue SCNs, the existing disputes (preferred on the ground of maintainability of SCNs or jurisdiction of the proper officer) shall be dealt with in the following manner:

Stage of Proceedings	Way Forward
Challenge to SCNs pending before: 1. High Court by way of a Writ Petition (WP); or 2. Supreme Court by way of Appeal against the order passed by High Court disposing the WP	WP or Appeal (as the case may be) to be disposed of as per the ratio laid down in this ruling and the SCNs shall be restored for adjudication by the proper officer.
Challenge to Order-in-Original pending before: 1. High Court by way of a WP; or 2. Supreme Court by way of Appeal against the order passed by High Court disposing the WP	WP or Appeal (as the case may be) to be disposed of as per the ratio laid down in this ruling and the Court shall grant 8 weeks' time to the respective assessee to file an appeal before CESTAT.
Order issued by CESTAT are challenged before the High Court or the Supreme Court	WP or Appeal (as the case may be) to be disposed of as per the ratio laid down in this ruling and the matter be restored before CESTAT for hearing on merits.
Appeals against Order-in-Original are pending before CESTAT	CESTAT to decide the matter as per the ratio laid down in this ruling.

- It may however be noted that the ratio highlighted above would not apply in cases where the SCNs have been issued beyond the limitation period.

BDO Comments

This judgment concludes an issue which was quite technical in nature with a major impact on the proceedings instituted by the investigative agencies. Now having definitively established the jurisdictional competence of DRI officers to issue SCNs under Section 28, subsequent adjudication of these matters will necessitate a rigorous examination of the merits of each case, guided by the procedural framework delineated in this landmark ruling.

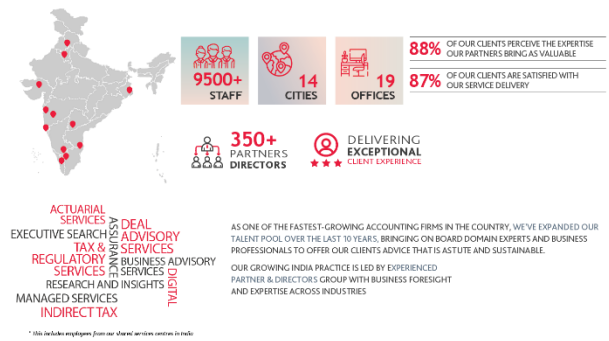
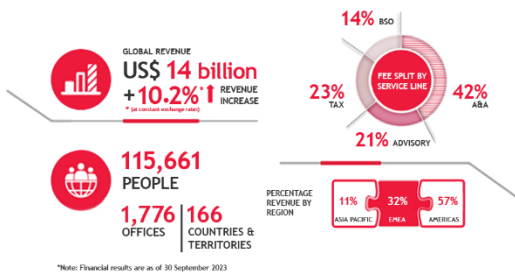
[Commissioner of Customs Vs. M/s. Canon India Pvt. Ltd. [TS-515-SC-2024-CUST]]

ABOUT BDO GLOBAL

BDO is a leading professional services organisation and are global leaders of the mid-tier, with a presence in 160+ countries and over 115,600 people working out of more than 1,750 offices. We endeavor to deliver an exceptional client experience through a tailored solutions approach, while partnering with our employees and clients globally.

ABOUT BDO IN INDIA

BDO in India offers Assurance, Tax, Advisory, Business Services & Outsourcing and Digital Services for both domestic and international clients across industries. The team at BDO in India consists of over 9,500 professionals led by more than 350+ partners and directors operating out of 19 offices, across 14 key cities.



OUR SERVICES

ASSURANCE

- Accounting Advisory Services
- Financial Statement Audit and Attestation Services

ADVISORY

- Actuarial and Related Services for Insurance
- Forensics
- Government Advisory
- IT Risk Advisory & Assurance
- Management Consulting
- Risk Advisory Services
- Sustainability & ESG
- Business Restructuring
- Corporate Finance and Investment Banking
- Deal Value Creation
- Financial Due Diligence
- M&A Tax and Regulatory
- Strategy & Commercial Due Diligence
- Valuations

BUSINESS SERVICES & OUTSOURCING

- Global Outsourcing
- Finance and Accounting Outsourcing
- Human Resource Outsourcing
- Payroll Management and Compliance Services
- Secretarial Services and Compliance Management
- Shared Services Centre



BDO DIGITAL

- Digital Services
- Technology Products and Solutions

TAX

- Corporate Tax Services
- Financial Services Tax
- Global Employer Services
- International Tax Services
- Private Client Services
- Tax Outsourcing
- Transfer Pricing
- Customs & International Trade
- Goods & Services Tax (GST)
- Indirect Tax Assessment & Litigation Assistance
- Incentives & ESG
- Tax Technology

CONTACT US

For any content related queries, you may please write to the service line experts at taxadvisory@bdo.in

For any other queries or feedback, kindly write to us at marketing@bdo.in

Ahmedabad | Bengaluru | Bhopal | Chandigarh | Chennai | Coimbatore | Delhi | Goa | Hyderabad | Kochi | Kolkata | Mumbai | Pune | Vadodara

This publication has been carefully prepared, but it has been written in general terms and should be seen as containing broad statements only. This publication should not be used or relied upon to cover specific situations and you should not act, or refrain from acting, upon the information contained in this publication without obtaining specific professional advice. Please contact BDO India LLP to discuss these matters in the context of your particular circumstances. BDO India LLP, its partners, employees and agents do not accept or assume any responsibility or duty of care in respect of any use of or reliance on this publication and will deny any liability for any loss arising from any action taken or not taken or decision made by anyone in reliance on this publication or any part of it. Any use of this publication or reliance on it for any purpose or in any context is therefore at your own risk, without any right of recourse against BDO India LLP or any of its partners, employees or agents.

BDO India LLP, a limited liability partnership, is a member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms.

BDO is the brand name for the BDO network and for each of the BDO Member Firms.
 Copyright © 2024 BDO India LLP. All rights reserved. Published in India.

Visit us at www.bdo.in

