

# TWO SWORDS CANNOT FIT INTO THE SAME SHEATH

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Recently, basis the decision formed by the 3-Judge Bench of the Hon'ble Supreme Court dated 09.03.2021 in Civil Appeal No. 1827 of 2018 in the case of M/s Canon India Private Limited vs Commissioner of Customs, CBIC has issued instruction<sup>1</sup> with respect to Show Cause Notices (SCNs) issued by the Addl. Director-General, DRI (ADG).

The specified instruction directs that presently and until further directions, all SCNs issued by DRI may be kept pending since the implications of the specified judgement are under examination by the board. Additionally, it directs that all fresh SCNs u/s 28, in respect of cases presently being investigated by DRI are required to be issued by jurisdictional Commissionerates from where imports have taken place.

## What is the judgement:

The Hon'ble Apex Court has ruled that the Additional Director General (ADG) of Directorate of Revenue Intelligence (DRI) is not the proper officer to issue Show Cause Notice (SCN). The Apex Court has concluded that the entire proceeding in the present case initiated by ADG (DRI) by issuing SCN, as invalid and without any authority of law. The Apex Court has accordingly set aside the subject SCN.

## What all are the basis forming the Judgement?

- **Section 28(4) of the Customs Act 1962:**

Referring to the provisions of Section 28(4), the Court observed that the obvious intention of the legislature was to confer the power to recover such duties not on any proper officer but only on 'the proper officer'.

- **DRI officer not even a proper officer under Section 28:**

The Supreme Court held that Additional Director General of the DRI who was appointed as an officer of Customs under the Notification dated 7 March 2002, was not entrusted with the functions under Section 28 as a proper officer under the Customs Act.

- **Usage of "the" instead of "any":**

If the intention was to give the authority to any proper officer, the Parliament would have used the word "any" instead of the word "the", which is the definite article as it refers to a particular person or thing.

- **No inherent power to review in any authority:**

The Court noted that no fiscal statute was shown where the power to re-open assessment or recover duties which have escaped assessment was conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

- **Unruly operation of statute:**

Two officers, who belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his power 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. If such a situation is allowed, it would result into an anarchical operation of statute.

- **Faulty reliance on Notification No. 40/2012-Cus. (N.T.)**

Court noted that the notification was issued under Section 2(34) of the Customs Act which merely defines a 'proper officer' and does not confer any powers on any authority to entrust any functions to officers. Further, it suggested that if it was intended that officers of the DRI 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 Customs Act, 1962.

- **Reliance on judgement in case of Sayed Ali:**

The Court relied on **CC v. Sayed Ali [2011 (265) E.L.T. 17 (S.C.)]**, wherein it was held that a SCN issued by an officer who is not a "proper officer" in terms of Section 2(34) of the Act is illegal and without authority of law. A customs officer assigned with the specific functions of assessment and re-assessment of duty is competent to issue a notice under Section 28 of the Act.

**After-effect of the judgement:**

An immediate impact of the above judgement could be a sudden surge in numbers of writ petitions by the taxpayers to quash the SCNs issued by DRI in similar circumstances.

Keeping in view the judgement formed by the Apex Supreme Court in the instance case, the proceedings under GST Law may also be looked upon where DGGSTI would raise any inquiries / Notices since the provisions of GST Law are similarly worded.

Having said above, by bringing the above instruction, CBIC has clearly expressed its intent of announcing series of amendments in customs Law to correct the very substance on which above decision has been formed. Till then, let us witness the fate of DRI investigation.

