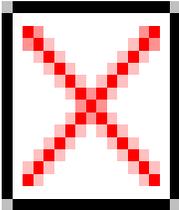


**A brief critique - Canon India case - blame at the doorstep of Revenue**

**MARCH 15, 2021**

**By R K Singh**



**ADVERSARIAL**

system of justice delivery adopted in India does not expect the judges to get into the dust of the ring, they are merely expected to decide the issue on the basis of the contentions and averments of the 'adversarial' advocates vying with each other to assist the court. One of the undesirable consequences of this system is the possibility of miscarriage of justice if even one side fails to adequately assist the court. The Canon India judgement [ [2021-TIOL-123-SC-CUS-LB](#) ] is one such example. Based on Revenue's averments mentioned in the said judgement, it can be safely concluded that Revenue's assistance to the Court in this case was conspicuously inadequate.

2. In the Canon judgement (holding that Directorate of revenue Intelligence (DRI) officers have no power to issue show cause notice demanding customs duty under section 28(4) of the Customs Act 1962, the Court rightly referred to the judgement of Sayed Ali but was not made aware of its true import and also of a series of amendments carried out by the government in the wake thereof to remove the legal infirmities pointed out therein.

3. In Sayed Ali, Supreme Court observed as under:

***"14. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act"***

***In our view therefore, it is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act."*** (bold face and underline added).

The only purpose of the above quotation is to show that even prior to the various amendments made in the wake of Sayed Ali, there could be more than one "**the proper officer**" as is evident from the words 'the officers' (plural) used by the Court in the above quote. Indeed, merely because the article "**the**" has been added before the proper officer does not mean that there cannot be more than one 'the proper officer' for a given function. By the way, insistence that only the very same officer who assessed the bill of entry can issue show cause notice under section 28 will result in a piquant situation where the department will become a helpless spectator where the short levy was on account of the "**collusion**" by the assessing officer who would then refuse to issue the show cause notice. The point being made is that even if the interpretation of the Court regarding the implication of article 'the' is accepted, it does not follow that there can be only one 'the proper officer' for the purpose of section 28 **ibid** and this position/possibility was in effect approvingly acknowledged by Supreme Court in Sayed Ali. Revenue could not adequately assist the court in appreciating this fact in Canon's case.

3. Indeed, the infirmity pointed out by Supreme Court in the case of Sayed Ali was rectified in the following manner:

(i) Notf. No. [44/2011-Cus \(NT\)](#)

was issued under s. 2(34) **ibid** inter alia specifically declaring DRI officers as the proper officer for s. 17 and s. 28 **ibid**. Further vide Notf [40/2012-Cus \(NT\)](#) the Board assigned the officers of the rank of Asstt Commissioners and above the functions of the proper officer under s. 28.

(ii) subsection 28(11) was inserted in section 28 with a non obstante clause to the effect that

**all persons appointed as officers of Customs under s. 4(1) **ibid** before 6.7.2011 shall be deemed to have and always had the power of assessment under s. 17 and shall be deemed to have been and always had been the proper officers for the purpose of this section"** (i.e. s.28 **ibid**).

If only Revenue could assist the Court to peruse notf no. [44/2011\(NT\)](#) and s. 28(11), the outcome in Canon's case would have been different.

4. The gravest failure of Revenue, however, was in failing to assist the Court to realise that vide notf no. [17/2002-Cus\(NT\)](#) as amended, DRI officers are duly appointed Customs officers under section 4 (which authorises CBEC to do so) and that theirs (i.e. DRI officers') is not a case where a non-Customs officer has to be or has been entrusted some (any) function of any officer of Customs under the Customs Act (which can be done under s.6 only by Central Government and cannot be done by Board). This proved fatal as the court concluded that DRI officers were unauthorizedly assigned the Customs functions under section 6 by Board. Had the Court been apprised of section 4 and of the fact that DRI officers are Customs officers as they are so appointed by Board under section 4 and that they are not non-Customs officers who have been entrusted with some (any) functions of the officers of Customs under s. 6, the Court would not have observed what it did in paras 20 and 21 of the Canon judgement mistaking DRI officers as non-Customs officers.

5. Although Supreme Court is not bound by High Court's orders, it would have been prudent for Revenue to draw the Court's attention to (i) Bombay HC order in the case of Sunil Gupta -[2014-TIOL-1949-HC-MUM-CUS](#) where the HC rejected the challenge to the validity of s. 28(11) and (ii) Delhi High Court's order - [2016-TIOL-877-HC-DEL-CUS](#) in the case of Mangali Impex which 'in effect' held that s.28(11) validated the show cause notices issued by DRI w.e.f 8.4.2011 when it held that s.28(11) does not validate DRI show cause notices issued before 8.4.2011; and that the Delhi HC order has been stayed by Supreme Court (Refer- [2016-TIOL-173-SC-Cus](#)).

6. In para 14 of the Canon judgement, the Court observed that

**"we find it completely impermissible to allow an officer who has not passed the original order of assessment to reopen the assessment on the ground that duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by section 28(4) to recover duties which have escaped assessment is in the nature of administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment"**

. Revenue obviously failed to point out that (i) DRI officers have been assigned the function of assessment under s. 17 vide notf. 44/2011-NT; (ii) With the amendment to section 17, the importer **self-assesses**

the goods and there is no assessment order issued by anyone in most of the cases; (iii) in the faceless assessment, location of an officer has lost its significance and even the concept of 'office' has undergone a change; an officer sitting in Mumbai office of Customs may be performing the functions relating to imports at Chennai; (iv) After passing the assessment order (in a few cases where assessment orders need to be passed), the assessing officer (as adjudicating authority) will become **functus officio** disabling himself from reviewing his own order.

Had these points been pointed out, the Court in all likelihood would have avoided making the above quoted observations which are apparently not in sync with the amended s.17 and also with the technological advances adopted by Customs (eg. faceless assessment).

6. In conclusion it can be summed up that (i) Revenue miserably failed to assist the Court in canon's case, and (ii) given Revenue's conspicuously inadequate assistance to the Court, any other outcome would indeed have been surprising.

**[The author is former Member CESTAT and Sr Partner, TLC Legal Advocates. The views expressed are strictly personal.]**

*(DISCLAIMER : The views expressed are strictly of the author and Taxindiaonline.com doesn't necessarily subscribe to the same. Taxindiaonline.com Pvt. Ltd. is not responsible or liable for any loss or damage caused to anyone due to any interpretation, error, omission in the articles being hosted on the site)*