



## Supreme Court holds that DRI officers not empowered to issue SCN when custom officer allows exemption from customs duties at the time of clearance

18 March 2021

### In brief

Recently, the Supreme Court held<sup>1</sup> that officers of the Directorate of Revenue Intelligence (DRI) are not empowered to issue show cause notices (SCN) when the custom officer (of the Appraisal group) allows exemption from custom duties at the time of clearance. The Court also observed that only an officer that undertakes assessment can re-assess the issue and the term 'the proper officer' under section 28(4) of the Customs Act, 1962 (Customs Act) has to be understood as the same officer (designation) that had assessed the goods at the time of clearance. The Court also held that the entrustment of the functions of customs officers to the DRI *vide* notification issued under section 2(34) of the Customs Act is not proper.

### In detail

#### Facts

- The appellants had claimed exemption on the import of cameras. Based on the appellant's request for 'first check', the Deputy Commissioner, Appraisal Group, Delhi Air Cargo (customs officer) checked the goods and cleared them as exempt.
- Subsequently, the Additional Director General, DRI (DRI officer) issued an SCN under section 28(4) of the Customs Act, seeking to deny the exemption.
- An order was issued alleging that the customs officer had been induced to clear the cameras by wilful misstatement and suppression of facts about the features of the cameras, leading to confiscation of goods, demand of interest and imposition of penalty.
- The Customs Excise and Service Tax Appellate Tribunal (CESTAT) upheld this order and the taxpayer appealed to the Supreme Court against the CESTAT's order.

#### Issue before the Supreme Court

Did the DRI officer have the authority under law to initiate a proceeding under section 28(4) of the Customs Act, when customs officer of the Appraisal Group had cleared the goods for import?

#### Supreme Court's decision

The Supreme Court held that the initiation of proceedings by DRI officers is without any jurisdiction, as the DRI officer is not 'the proper officer' to exercise power under section 28(4) of the Customs Act. The Court also held that the entrustment of the functions of customs officers to the DRI, *vide* notification issued under section 2(34) of the Customs Act is not proper. The Court also held that there was no wilful misstatement or suppression of facts by the appellants to attract the extended period of limitation under section 28(4) of the Customs Act. The following explains the rationale and observations of the Supreme Court.

<sup>1</sup> Civil Appeal No.1827 OF 2018

### DRI cannot be construed to be ‘the proper officer’ and issuance of SCN is invalid

- The intention behind the term, ‘the proper officer’, used in section 28(4) of the Customs Act, is to grant the power to recover customs duties not on ‘any proper officer’ but only on ‘the proper officer’, who had assessed the goods at the time of clearance. Unlike words ‘A’ and ‘An’, the word ‘the’ refers to a particular person or thing.
- When the language of a statute directs the way in which a particular thing should be done, it must be construed in that manner alone.
- The nature of power assigned to the proper officer under section 28(4) of the Customs Act is in the form of a review of the earlier decision of assessment. Such power should be construed to have been conferred only on the same officer who assessed the imported goods, or his successor or any other officer who has been assigned the function of assessment.
- Where the statute confers the same power to perform an act to different officers, officers belonging to different departments cannot exercise their powers in the same matter.

### Notification entrusting the function to DRI as ‘proper officer’ is invalid

- The Additional Director General of the DRI has been appointed as an officer of customs under Notification No. 17/ 2002 dated 7 March 2002.
- Notification No. 40/ 2012 dated 2 May 2012, which extends the functions of a proper officer under section 28 of the Customs Act to DRI officers has been issued under section 2(34) of the Customs Act. This section is part of the definition clause of the Customs Act and does not confer any powers on any authority to entrust any functions to officers.
- If the intention was to entrust DRI officers with the functions of the custom officers, the Government should have exercised this power under section 6 of the Customs Act, which is the only section that provides for the entrustment of the functions of customs officer on other officers of the Central or State Governments.
- The Court referred to the decision of the Supreme Court in the case of Sayed Ali and Another<sup>2</sup> that DRI officers were not empowered to assess/ re-assess duty.

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## The takeaways

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This is a very important judgement in the context of jurisdiction and simultaneous empowerment of DRI officers for the purpose of reassessment and has far-reaching ramifications. As per this judgement, (i) only the original officer who assessed and cleared the goods can re-assess the goods and not DRI officers, and (ii) entrustment of the reassessment function to DRI officers is invalid. This would be another strong ground for taxpayers to contest past proceedings initiated by DRI officers.

Note that some notifications were issued after the Supreme Court’s decision in the Sayed Ali<sup>2</sup> case (also referred to in this decision), and customs law was amended retrospectively, to validate the acts of DRI officers. The Supreme Court has stayed a decision of the Delhi High Court in the case of Mangali Impex Limited,<sup>3</sup> which held that DRI officers do not have the power to issue SCN, which is pending. The Central Board of Indirect Taxes and Customs had also issued instructions<sup>4</sup> in light of this stay order.

As this issue has been highly litigated in the past, with retrospective amendments to prevent revenue loss, the Government’s approach to redress the impact of this decision and the outcome of the Mangali Impex<sup>3</sup> case pending before the Supreme Court need close watching.

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## Let’s talk

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For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor.

<sup>2</sup> Commissioner of Customs v. Sayed Ali and Another (2011) 3 SCC 537

<sup>3</sup> Mangali Impex Limited v. Union of India [2016 (5) TMI 225 (Delhi High Court)]

<sup>4</sup> F.No.276/ 104/ 2016-CX.8A (Pt.) dated 3 September 2019

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