



Tax alert: DRI officers are “proper officers” for issuance of Show Cause Notice under Section 28 of Customs Act, 1962

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The Supreme Court (SC) has allowed the Revenue Department’s review petition challenging its 2021 ruling in the Canon India Private Ltd. case, which previously held that the Directorate of Revenue Intelligence (DRI) officers lacked authority under the Customs Act, 1962, to issue Show Cause Notices (SCN), thereby questioning the validity of various SCNs issued by DRI to different entities. The Supreme Court has now clarified that DRI officers have the power to issue SCNs under Section 28 of the Customs Act.

In a nutshell



Earlier, in 2021, the SC in Canon India Pvt. Ltd. v. Commissioner of Customs held that DRI officers, being outside the initial assessment process u/s 17 of Act, are not “proper officers” and therefore, do not have power to issue the SCN u/s 28 of the Act.



Post the 2021 judgement, the government made amendments to the Customs Act to explicitly define and authorize officers for issuing notices and reassessing duties. However, these amendments were challenged in separate petitions*. In addition, the government filed review petition.



The said judgment was another landmark in the legal debate over various categories of officers' jurisdiction, especially regarding issue of SCNs for demanding Customs duties. This SC order has covered the earlier decisions in Sayed Ali, Mangali Impex and Sunil Gupta.



The SC's review order now confirms DRI officers as “proper officers” for issuing SCNs under Section 28 of the Act, also validating similar powers for agencies like the Customs Preventive Commissionerate and the Directorate General of Central Excise Intelligence.



The SC noted that the original judgment overlooked key circulars and notifications, including:

- Circular No. 4/99 empowering DRI officers to issue SCNs under Section 28, and
- Notification No. 44/2011 designating them as “proper officers” for Sections 17 and 28.

**The Finance Act, 2022 amended relevant sections and introduced new sections 110AA and validation provision as a consequence of the Canon judgement, even as a Review Petition was filed. These amendments were in challenge before the SC in Daikin Air Conditioning India Pvt. Ltd. Vs Union of India.*



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Directorate of Revenue Intelligence (DRI) officers have the power to issue Show Cause Notice under section 28 of the Customs Act, 1962

- In a significant case of Commissioner of Customs v. M/S Canon India Pvt. Ltd. (Review Petition No. 400 of 2021 in Civil Appeal No. 1827 OF 2018), the Supreme Court ruled that the officers of the DRI have the powers to issue show cause notices (SCN) and recover duties under section 28 of the Customs Act, 1962 ('Customs Act or 'the Act').
- It was held that DRI officers are "proper officers" to issue show cause notices under Section 28 of the Customs Act.

Detailed breakdown of the judgement is provided herein below:

1. Background of the Case

- The review petition No. 400 of 2021 was filed by the Revenue Department (represented by the Commissioner of Customs, New Delhi) seeking a review of the Supreme Court's judgment in Canon India Pvt. Ltd. v. Commissioner of Customs dated March 9, 2021.
- This case involved several civil appeals with identical legal issues regarding the authority of officers from the Directorate of Revenue Intelligence (DRI) to issue show cause notices under Section 28 of the Customs Act, 1962.
- The original judgment by a two-judge bench in Canon India concluded that:
 - Only "the proper officer" empowered to undertake the exercise of assessment or re-assessment under Section 17 in a jurisdictional area can perform the functions of "the proper officer" under Section 28 of the Act, 1962 as the exercise involved in Section 28 is the re-assessment of duty.
 - DRI officers were not "the proper officers", who undertook the exercise of assessment under Section 17. Hence, they lacked the jurisdiction to issue show cause notices under Section 28.
 - The reasoning given by the Court was that any other reading of the expression "proper officers" would lead to a multiplicity of proper officers competent to perform functions under Section 28, which would result in the perpetuation of chaos and confusion.
- This judgment upheld an earlier precedent from **Commissioner of Customs v. Sayed Ali**, which held that only Customs officers explicitly assigned the duty of assessment under Section 17 by the Board, or a Commissioner of Customs could act as proper officers.
- In remedy to defects highlighted in the Sayed Ali judgment, the Customs Department issued Notification No. 44/2011-Cus-NT and enacted Section 28(11) by the Customs (Amendment and Validation) Act, 2011 (Validation Act). This amendment retrospectively validated the powers of certain officers, including those from the DRI, as proper officers, regardless of whether they were specifically assigned such roles in the past.
- The constitutional validity of this amendment was subsequently upheld, overturning the Delhi High Court's decision in **Mangali Impex Ltd. v. Union of India** and affirming the Bombay High Court's ruling in **Sunil Gupta v. Union of India**, which confirmed that Section 28(11) is constitutionally valid, and its application is not limited to a specific period.
- The review was sought to attain clarity on the role of DRI officers as "proper officers" under the Customs Act, arguing that the **Canon India** decision misinterpreted legislative intent. This interpretation led to inconsistencies in Customs duty enforcement, impacting administrative consistency, revenue collection, and enforcement authority across India, as it questioned the very validity of large number of SCNs, with duty involvement in excess of Rs. 20,000 crore not on merits but on this technical ground.

2. Decision of the Court

- The review petition of Canon India was allowed for the following reasons:
 - Circular No.4/99 dated 15.02.1999 issued by the Central Board of Excise and Customs, which empowered officers of DRI to issue show-cause notices under section 28 of the Act:
 - Notification no.44/2011 dated 06.07.2011 which assigned the functions of "proper officers" for the purposes of Sections 17 and 28 of the Act to the officers of the DRI were not brought to the notice of this Court during the proceedings in Canon India.

- The judgment in Canon India was rendered without looking into the circular and notification, therefore seriously affecting the correctness of the same. The decision in Canon India failed to look into the statutory scheme.
- The Supreme Court has held that **DRI officers would be considered as ‘proper officers’ for issuance of SCN under Section 28 of Customs Act**. The Apex Court has made following observations while passing the order:
 - Notification No. 44/2011 dated 06.07.2011 specifically assigned the functions of the proper officers under Sections 17 and 28 to DRI officers. Such assignment of functions of assessment is sufficient for the DRI officers to fall in the category of “any other officer who has been assigned the function of assessment” as mentioned in original Canon judgement.
 - Jurisdiction of DRI to issue show cause notices under Section 28 once an assessment has been done under Section 17 is not a defect at all in light of Notification No. 44/2011 dated 06.07.2011 and new Section 17 as amended by the Finance Act, 2011.
 - The amendments to Section 2(34) and Section 4 of the Customs Act, 1962, enabled the Board to appoint Customs officers, including DRI officers, for duties under Section 28. Also, officers from the DRI were validly designated as "proper officers" under Section 2(34) through notifications issued by the Board, including those from 1981, 1990, and 2002.
 - The functions of assessment and re-assessment under Section 17 and recovery of duty under Section 28 are distinct. The original judgement erroneously stated that Section 28(4) involves the function of re-assessment. The function of recovery of short-levy, non-levy, part-paid, non-paid and erroneous refund under Section 28 is not the same as the assessment or reassessment of the bill(s) of entry. It necessarily has to be a process subsequent to the completion of functions under Section 17.
 - The function of determining duty to be recovered requires application of judicial mind and therefore, cannot be an administrative review of an Act. This is especially so after the introduction of self-assessment in Section 17 vide the Finance Act, 2011.
 - The *Sayed Ali* ruling required officers issuing notices under Section 28 of the Customs Act to also hold assessment authority under Section 17, based on the law at that time. The current Bench disagreed, clarifying that Sections 17 and 28 are not interdependent and that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the cases of *Sayed Ali* (supra) and *Canon India* (supra) is patently erroneous.
 - A definite article “the” employed in Section 28 of Act has been used before “proper officer” with a view to limit the exercise of powers under Section 28 by a specific proper officer and not any proper officer. But, in the absence of any statutory linkage between Sections 17 and 28 of the Act, 1962 respectively, there was no legal footing for this Court in *Canon India* (supra) to hold that “the proper officer” in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962.
 - The validating provision of the Finance Act, 2022 has been held to be mere surplusage with respect to validation of the SCNs issued by DRI officers under Section 28. It cannot be challenged on the grounds that it does not cure the defect pointed out in *Canon India* when no defect can be made therein as a result of the review petition.

3. Impact

As a result of this detailed and comprehensive order, various legal questions regarding the powers of DRI officers raised in various previous decisions and also in validating amendment of the Customs, have been comprehensively answered by the SC. This order will result in various cases pending at different judicial/quasi-judicial fora to be taken up for arguments and order.

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