

Ratio of Cannon India decision valid even after proposed retrospective amendment in the Customs Act – CESTAT

11 March 2022



Summary

The Customs, Excise and Service Tax Appellate Tribunal (CESTAT) Kolkata has held that under the customs law, a Show Cause Notice (SCN) can be issued only by a proper officer who has done the assessment in the first place. The CESTAT observed that under the Customs Law, customs officer and officers of Directorate of Revenue Intelligence (DRI) have been treated as distinct and separate. The CESTAT further ruled that in view of the proposed amendments as per the Finance Bill 2022, the customs officers and officers of DRI will be at par, however it does not propose to amend the power to issue SCN by the proper officer. Therefore, the SCN issued in this case by the DRI officers cannot sustain because DRI officers have not been entrusted the functions under the Customs law and such SCN was not issued by 'the proper officer'.

Facts of the case

- The appellant¹ had imported LDPE re-processed granules through three different customs ports which were assessed and cleared for home consumption.
- The DRI conducted search operations and held that the appellant had undervalued imported goods. Later, a SCN was issued proposing recovery of differential duty² along with interest and penalties.
- The appellant submitted that the DRI officers are not 'proper officers'³ to issue a SCN and this needs to be set aside as the order lacks jurisdiction.
- The department contended that any customs officer appointed prior to 6 July 2011 is a proper officer⁴.

CESTAT Kolkata observations and ruling⁵:

- **DRI officers are an intelligence and security organisation:** The officers of DRI are not the customs officers⁶. The customs law does not mention DRI and its powers anywhere. These officers were treated as distinct and separate by legislature. As per RTI Act⁷, the DRI

officers are treated as an intelligence and security organisation that have been granted immunity. Such immunity was not given to the customs officers.

- **Power of the proper officer to issue SCN:** In the case of Canon India⁸ the Apex Court had held that the officers of DRI can exercise functions of the customs officers only in case they are entrusted with such functions by the government. Also, the SCN can be issued only by the proper officers who had done assessment in the first place and not any other officer. In case if there is more than one proper officer, the SCN/demand can be raised by the proper officer who has assessed the bills of entry in the first place⁹. In this case, the bills of entries have not been assessed by officers of DRI. Hence, the SCN issued, and functions performed by DRI is without authority and thus cannot be sustained.
- **Meaning of the article 'the':** When the legislature uses the word 'the', it refers to a particular thing or person. If the parliament intended that any proper officer could exercise the power, then the word 'any' could have used. Thus,

¹ Beriwalla Impex Pvt. Ltd.

² Under section 28 of Customs Act

³ Section 2(34)

⁴ Both under section 17 and under section 28 of the Customs Act, 1961

⁵ Customs Appeal No.75015 of 2015, Final Order No.75125/2022 dated 23 February 2022

⁶ Section 3

⁷ Right to Information Act, 2005

⁸ Civil Appeal No.1827 of 2018, Judgment dated 9 March 2021

⁹ or his successor in office

the Parliament has used 'the' with an intention to designate the proper officer who had assessed the goods at the time of clearance.

- **Provisions of the Finance Bill 2022:** If the Finance Bill becomes an Act, the DRI officers will be at par with customs officers. However, there is no proposal to amend the authority to issue SCN and accordingly, SCN can be issued only by proper officer who has done assessment in the first place.
- **SCN issued by DRI cannot be sustained:** The SCN¹⁰ was not issued by the proper officer and DRI officers have not been entrusted the functions under the Customs Law. Thus, the order emanating from SCN issued by the DRI cannot be sustained.

Our comments

In a landmark judgment by the Supreme Court in case of Canon India, it had been held that the DRI officers have no power to issue SCNs under the Customs Law. Further, only the proper officer could issue such a notice as the Parliament has employed the article 'the' before the words proper officer not accidentally but with the intention to designate the proper officer who had assessed the goods at the time of clearance.

However, the Finance Bill, 2022 has proposed to widen the scope of the term 'proper officer' under customs law to include DRI and other officials appointed by the Central Board of Indirect Taxes and Customs (CBIC) with retrospective effect.

Interestingly, the CESTAT Kolkata has emphasised that there is no proposal to amend the provisions relating to power for issuance of SCN under the customs law. Therefore, it seems that the SC's verdict in the case of Canon India shall remain valid even after widening of the scope of the term proper officer and thus the DRI officers may not be authorised to issue SCNs under the customs law.

¹⁰ section 28(11) of the Customs Act

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