CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Customs Appeal No. 290/2009

(Arising out of Order-in-Original No. 06 /2009 Commissioner dated 27.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

With

(i) **Customs Appeal No. 291/2009** (Arising out of Order-in-Original No. 07 of 2009 Commissioner dated 27.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(ii) **Customs Appeal No. 292/2009** (Arising out of Order-in-Original No. 08 of 2009 Commissioner dated 28.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(iii) **Customs Appeal No. 293/2009** (Arising out of Order-in-Original No. 09 of 2009 Commissioner dated 28.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(iv) **Customs Appeal No. 294/2009** (Arising out of Order-in-Original No. 10 of 2009 Commissioner dated 28.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(v) **Customs Appeal No. 295/2009** (Arising out of Order-in-Original No. 11 of 2009 Commissioner dated 29.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(vi) **Customs Appeal No. 296/2009** (Arising out of Order-in-Original No. 12 of 2009 Commissioner dated 29.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(vii) **Customs Appeal No. 297/2009** (Arising out of Order-in-Original No. 13 of 2009 Commissioner dated 29.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

(viii) **Customs Appeal No. 298/2009** (Arising out of Order-in-Original No. 14 of 2009 Commissioner dated 29.5.2009 passed by the Commissioner of Customs and Central Excise, Coimbatore)

Manasa Impex Services **Appellant**
New No. 223, Old No. 299 & 300
Kamaraja Road, Uppilipalayam Road
Coimbatore – 641 015.

Vs.

Commissioner of Customs (Preventive) **Respondent**
No. 1, Williams Road
Cantonment, Trichy – 620 001.

APPEARANCE :

Shri S. Murugappan, Advocate for the Appellant
Smt. Anandalakshmi Ganeshram, Auth. Representative for the Respondent

CORAM :

Hon'ble Shri P. Dinesha, Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Date of Hearing : 18.03.2025
Date of Decision: 21.08.2025

FINAL ORDER NOS. 40832-40840/2025

Per M. Ajit Kumar,

These appeals arise out of Order in Original No. 6 to 14/2009 dated 27.5.2009, 28.5.2009 and 29.5.2009 passed by the Ld. Commissioner of Customs and Central Excise, Coimbatore. The appeals pertain to the same appellant, and the facts are more or less similar except with some minor variations which have no bearing on the ultimate decision in these appeals. The legal issues involved are also identical. Accordingly, Appeal No. C/290/2009 is taken as the lead case as was argued at the Bar by the rival parties, and all the above appeals are taken up for consideration in this common order.

2. The brief facts of the case are that Directorate of Revenue Intelligence (**DRI**) investigated the alleged fraudulent export activities by M/s. SSK Knit Apparels, Tirupur. It appeared that the firms were fictitious, export values were inflated, and undue drawback benefits were claimed without realizing export proceeds. A show cause notice (**SCN**), dated 06.10.2006 was issued by DRI to the Custom House Agent/ Customs Broker (**CHA/ CB**), appellant herein, for allegedly filing shipping bills without verifying declarations and other such acts facilitating the wrongful drawback claims of Rs. 1,05,81,796/-. The OIO

confirmed recovery of the drawback amount along with interest from the exporter. A penalty of Rs.5,00,000/- was also imposed on the appellant herein i.e. M/s. Manasa Impex Services under sec. 114(iii) of the Act. Hence the present appeal.

3. Shri S. Murugappan, Ld. Counsel appeared for the appellant and Smt. Anandalakshmi Ganeshram, Ld. Authorized Representative appeared for the respondent.

3.1 Shri S. Murugappan, Ld. Counsel for the appellant, submitted that the SCNs were issued by DRI. The DRI Officers are not competent officers to issue these notices in terms of Section 75 of the Customs Act, 1962 (herein after also referred to as '**Act**'), read with Rule 16 and Rule 16A of the Central Excise and Service Tax Drawback Rules, 1995 (herein after also referred to as **'Rules'**). These appeals were kept pending in the light of the Hon'ble Madras High Court's Interim Directions. Recently on 21.02.2025, the Division Bench of the Madras High Court dismissed the appeals filed by the department in respect of earlier decision on the ground of monetary limit and litigation policy of the Union Government. Now, therefore, the appeals can be decided by the Hon'ble Tribunal. The recent judgment of the Supreme Court in the Review Petition filed by the Union Government in the case of **M/s. Canon India Pvt. Ltd**. [2024 INSC 854], deals with the powers of the DRI Officer with regard to Section 17 and Section 28 of the Act. The issue of notice by DRI in terms of Section 75 of the Act read with Rules 16 and 16A of the Rules, which have been rescinded in 2017, was not a question decided by the Hon'ble Supreme Court in the above case. As far as the Rules referred to above and Section 75 of the Act are concerned, during the relevant periods, DRI Officers lacked jurisdiction and thus, the show cause notices issued by them are not valid.

Consequently, the decision of this Tribunal in terms of the Final Order No.40048-40065/2018 dated 09.01.2018 [**Manasa Impex Services, Cargomar (CHA), Trans Asian Shipping Services (P) Ltd., Prasanna Kumar Vs CC and CCE Coimbatore** – 2018 (1) TMI 441 – CESTAT CHENNAI], for the same appellant, will hold good and on that ground, these appeals need to be allowed. The Ld. Counsel stated that even otherwise, there is no evidence, whatsoever, in these proceedings to show that the customs broker was aware of the mis-declaration or there is any collusion with the exporters in exporting substandard goods. He stated that;

A) The finding that the appellant had not obtained the written authorisation or verified their credentials from the exporters before filing the SB's relate to the Custom House Agents Licencing Regulation (**CHALR**) and is not a violation of the Act.

B) The export documents when handed over to the appellant was signed by the proprietor of the export firm. There was no occasion to doubt the same.

C) The SB's show the name of the appellant as the CHA which was duly signed by the exporter, which is sufficient to show that there was proper authorisation from the exporter. Even otherwise action in such a case would lie under the CHALR.

D) As regards the allegation that it is the responsibility of the CHA to verify the genuineness and correctness of various documents given in accordance as per CHALR, he stated that the CHA cannot assume the responsibility for verifying the authorisation. That is the work of the Customs officers.

E) The Bill of Lading (**BL**) is prepared after the export goods are handed over to the liner. The OIO cannot allege that the appellant has

been instrumental in liaising with the freight forwarders in getting the port of discharge changed. Nor has such a charge been made by the exporter in his statement.

F) The above findings in the OIO will not render the goods liable for confiscation under section 113(i) and the appellant liable for a penalty under section 114(iii) of the Act. In the present case the OIO fails to adduce evidence as to how the value in respect of the goods exported was mis-declared or any other material was mis-declared. Further nothing has been shown that they had abetted the exporter, as no active participation including collusion with the exporter has been demonstrated in the OIO.

Accordingly, under law as well as on merits, the appellants are eligible for appropriate relief and hence the impugned orders may be set aside.

3.2 Smt. Anandalakshmi Ganeshram, Ld. Authorized Representative appeared for the respondent. She stated that the jurisdiction issue relied upon by the Ld. Advocate concerns the recoverability of irregular availment of drawback from exporters by invocation of Rule 16 and where the SCNs have been issued by D.R.I. However, the issue in the present appeals are whether penalties can be imposed under Section 114/117 of the Act on CHAs and other persons who have facilitated the fraud. Hence the appeals must fail on the ground of challenging the issue of SCN by DRI. Further she submitted that mens rea is not a required ingredient for imposition of penalty under section 114 of the Act and hence penalty has been correctly imposed. She relied on the following judgments to support the stand of revenue:

i) **SRG INTERNATIONAL** reported in 2008-TIOL-2019-CESTAT-DEL

ii) **SRI MEENAKSHI APPARELS PVT LTD** reported in 2010-TIOL-938-HC-KAR-CUS

iii) **SUNIL GUPTA** reported in 2014-TIOL-1949-HC-MUM-CUS

iv) **Gujarat Travancore Agency Vs. Commissioner of Income Tax** [1989 (42) ELT 350 (SC)]

She prayed that the appeals may be dismissed.

4. We have heard the rival parties and have carefully gone through the appeals. The issues involved are:

A) Whether DRI Officers have jurisdiction to issue SCN under Section 75 of the Act read with the relevant Rule.

B) If so whether a penalty can be imposed on the CHA in terms of Section 114 of the Act.

5. We find that the Order of this Tribunal in the case of **Manasa Impex Services** (supra), cited by the appellant has relied upon the Order of this Tribunal in the case of **M/S. Monte International Vs Commissioner Of Customs, Amritsar** [2016 (340) ELT 345 (Tri.-Del)]. The majority judgment in the said case was delivered, after a difference of opinion led to the matter being referred to a third Member. Relevant portion of the majority order is reproduced below for a better understanding of the issue:

> "13. We first deal with the issue of jurisdiction strongly raised by the learned advocate Shri Anand appearing for the appellant. It is seen that SCN dated 31.3.05, proposing recovery of duty draw back in terms of Rule 16 of the Customs and Central Excise duty Drawback Rules, 1995 stands issued by ADG, DRI Delhi Zonal unit. As per the provisions of Rule 16 of the Customs and Central Excise Duty Drawback Rules, 1995, recovery of any alleged erroneous or excess payment of duty draw back can be demanded by a PROPER OFFICER of Customs. The proper officer stand defined under Explanation 2 (34) of the Customs Act, 1962, which reads as under:-
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> > "'Proper Officer', in relation to any function to be performed under the said, means the officer of Customs, who is assigned those functions by the Board or the Commissioner of Customs."
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> 13. The issue whether Commissioner of Customs (Prev) was the proper officer for the purpose of issue of Show cause notice in terms of Section 28 of the Customs Act, 1962 was considered by the Hon'ble Supreme Court in the case of **Commissioner of Customs Vs. Syed Ali** [2011 (265) ELT 17 (SC). It was held by the Hon'ble Supreme Court that in terms of provisions of Section 2(34) only such

officers of Customs who have been assigned specific functions would be proper officer in terms of provisions of section 2(34) of the Act. As such, **by collective reading of section 2(34) of the Customs Act and Section 28 of the Customs Act, the Hon'ble Supreme Court held that only such Customs Officer who has been assigned the specific function of assessment and reassessment of duty in the jurisdictional area, where the import concern has been effected, either by the Board or by the Commissioner of Customs, can be held to be competent to issue notice under section 28 of the Act.** As such, the Commissioner of Customs (Prev), who was having territorial jurisdiction but not the jurisdiction to issue show cause notice under section 28 was held as not proper officer in terms of said section. The contention of the learned advocate is that review petition against the said decision of the Hon'ble Supreme Court , filed by the Revenue was dismissed as reported in [2011 (274) ELT A 109.

In a subsequent matter in the case of **Chandna Impex Pvt. Ltd. vs. CC New Delhi** [2011 (269) ELT 433 (SC)], the issue as to whether the officer of DRI can be considered to be proper officer to demand duty under Section 28 of the Customs Act came up before Hon'ble Supreme Court and the matter was remanded to Hon'ble High Court to decide such substantial question of law in the light of decision in the case of Syed Ali.

Hon'ble Punjab and Haryana High Court in the case of **Era International vs. Union of India** [2011 (274) ELT 6 (P&H)] and Hon'ble Andhra Pradesh High Court in the case of **Sree Enterprises vs. CC** [2011 (274) ELT 12 (AP)] while dealing with an identical issue held that in the light of decision of the Apex Court in the case of Syed Ali , **the DRI officer cannot be held to be a proper officer for seizure of the goods or for issuing the show cause notices.**

In the light of the above decision, the appellants contention is that show cause notice issued by DRI cannot be held to have been issued by the proper officer in which case, the appeals are required to be allowed on said short ground itself.

14. It is seen that after the Hon'ble Supreme Court decision in the case of **Syed Ali and others**, Government of India issued Notification No. 41/11-Cus (NT) dated 6.7.11 wherein the officers of DRI and Commissioner of Customs and other lower officers were declared to be the proper officer in terms of Section 2(34) of the Customs Act for the purpose of Section 17 and Section 28 of the Customs Act. The amendment was made by inserting clause 11 to Section 28 wherein any action taken by the officer of Customs before 6.7.2011 shall be deemed to have and always had the powers of assessment under Section 17 and shall be deemed to have been and always had been the proper officer for the purpose of this section. In a nut shell, the law was amended with retrospective effect so as to confer jurisdiction to the DRI officers and Customs (Prev) officers for the purpose of show cause notice under section 28 of the Customs Act.

15. However in the present case, we find that show cause notice stand issued in terms of provisions of Rule 16 of Customs and Central Excise duty and Service Tax draw back 1995. The said Rule, for the sake of convenience is reproduced below:

> "RULE 16. Repayment of erroneous or excess payment of drawback and interest.- Where an amount of drawback

> and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs repay the amount so paid erroneously or in excess, as the case may be, **and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of section 142 of the Customs Act, 1962** (52 of 1962)."

As is seen from the above Rule, the alleged erroneously or excess granted draw back has to be demanded by a Proper Officer of the Customs and recipient of the same has to repay the same; **Though we note that said Rule 16 does not, in clear terms, refers to issuance of show cause notice but the same refers to the demand being made by a Proper Officer of Customs.** How this demand has to be made without the issue of show cause notice and without giving an opportunity to the persons concerned to putforth his defence as against the alleged excess erroneously granted refund, stands answered by the Board's Circular No. 24/2011 Cus dated 31.5.11, Para 2 of which reads as under:

> "2. Reference have been received from the field formations for specifying the "proper officer" for issuance of show cause notice and adjudication of cases of export under the drawback and Export Promotion Schemes."

Further para 5 of the said Circular reads as under:

> "5. Further, it has been decied that the proper officer for the issuance of show cause notice and adjudication of cases under the provisions of Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules, 1995 shall, henceforth be as under:. . ."

16. **As is seen from the above said para of Circular, show cause notices are required to be issued in terms of provisions of Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 within the monetary limit laid down in the said circular, before any recovery can be initiated.** As such, we are of the view that though there is lacuna in the said Rule 16 inasmuch as the same does not specifically provide for issuance of show cause notice and only refers to the demand made by the proper officer, but we hold that said demand has to be made by the Proper Officer by way of issuance of show cause notice, as per the understanding of the Board also in the relevant portion of the Circular No. 24/11-Cus, as reproduced above.

17. **As such, the only question required to be decided is as to whether the present show cause notice of the DRI officer for recovery of erroneously granted draw back in terms of Rule 16 can be held to be valid show cause notice in the light of law declared by the Hon'ble Supreme Court in the case of Syed Ali and subsequently followed in the number of decisions referred** (supra). It is seen that after declaration of law by the Hon'ble Supreme Court in the case of Syed Ali, the law was amended with retrospective effect conferring jurisdiction on DRI officers as also on Commissioner of Customs, (Prev) for the purpose of issuance of Show cause notice in terms of Section 28 of the Customs Act with retrospective effect. **However, no such amendment was made in respect of show cause notices issued**

> under Rule 16 of Drawback Rules 1995. Infact it is seen that even when the law was amended subsequently, on 6.7.11 and section 28 was amended retrospectively with effect from 16.9.11, the Boards circular No. 24/2011 was issued on 31.5.11, wherein the issuance of show cause notice in terms of Rule 16 of Drawback Rules was considered and the proper officers were specified only in relation to the monetary limits. In the said circular, DRI officers were never considered to be proper officers for demanding draw back under Rule 16. There was no retrospective amendment carried out in the said Rule 16 so as to confer jurisdiction on the DRI officer for issuance of show cause notices. Bombay High Court in the case of **Tejus Proprietary concern of Tejus Rohitkumar Kapadia vs. Union of India** reported as [2012 (275) ELT 175 (Bom)] has taken a very serious note of the fact that Tribunal has not given due regard to the law laid down by the Apex Court and deference to Supreme Court's judgment is constitutional principle and the Tribunal's Members were bound by rigorous / strict adherence to judicial discipline. CESTAT cannot refuse to apply such Supreme Court decision on grounds that it came after issuance of show cause notice or after passing the impugned orders or on the ground that issue of jurisdiction was not raised before adjudicating authority. We also took note of the Tribunal's decision in the case of **Nylex Traders vs. Commissioner of Customs (Prev) Mumbai** [2011 (274) ELT 71 (Tri-Mum)] wherein it was observed that the jurisdictional objection can be raised at a later stage also as it goes to the root of the case. Accordingly, by following the Supreme Court decision in the case of Sayed Ali, Tribunal struck down the show cause notice issued by Commissioner (Preventive).
> As such, by applying the ratio of law, declared by the Hon'ble Supreme Court in the case of Syed Ali and subsequently followed by various other High Court, it has to be held that DRI officer was not the proper officer for issuance of show cause notice for the purpose of demand of allegedly erroneously granted excess draw back. In fact, we find that after the above point was raised by the learned advocate, the matter was adjourned so as to give an opportunity to the learned DR to find out as to whether there was any retrospective amendment in terms of Rule 16 of the Drawback Rules, on the line of retrospective amendment in Rule 28. On the next date of hearing, learned DR very fairly agreed that there is no such amendment to Rule 16. As such, we are of the view that show cause notice having been issued by ADG, DRI Delhi, is without jurisdiction and consequently present impugned order become void ab initio and cannot be upheld. The same is liable to be set aside on the ground of jurisdiction itself. We order accordingly." (emphasis added)

6. Much water has flown, since the judgment of the Hon'ble Supreme court in **Commissioner of Customs Vs. Syed Ali** [2011 (265) ELT 17 (SC). A three Judge Bench of the Hon'ble Supreme Court in REVIEW PETITION NO. 400 OF 2021, in the case of **COMMISSIONER OF CUSTOMS Vs M/S CANON INDIA PVT. LTD.** [2024 INSC 854] (Also referred to as **Canon India -II**), reviewed its earlier order which held that the officers of DRI are not 'proper officers'

within the meaning of Section 28(4) of the Customs Act. The Hon'ble Court held that Circular No.4/99 dated 15.02.1999 issued by the Central Board of Excise and Customs (**CBEC**), which empowered officers of DRI to issue show-cause notices under S.28 of the Act as well as Notification no. 44/2011 dated 06.07.2011 which assigned the functions of "proper officers" for the purposes of Sections 17 and 28 to the officers of the DRI were not brought to the notice of the Apex Court during the proceedings in Civil Appeal No. 1827 of 2018, dated 09.03.202, titled **M/s Canon India Private Ltd. Vs Commissioner of Customs** (Also referred to as **Canon India - I**). The Judgment also set aside the decision of the Hon'ble High Court of Delhi rendered in the case of **Mangali Impex Ltd. Vs Union of India reported** [(2016) SCC Online Del 2597] and upheld the view taken by the Hon'ble High Court of Bombay in the case of **Sunil Gupta Vs Union of India and Others** [(2014) SCC Online Bom 1742]. It also upheld the constitutional validity of Section 97 of the Finance Act, 2022.

7. Board's Circular in **F. No. 437/9/98-Cus.IV, Circular No. 4/99-Cus, dated 15.02.1999**, referred to in the above mentioned judgment in **Canon India - II** is reproduced below:

> **Subject: Issuance of Show Cause Notice by the Officers of Directorate of Revenue Intelligence - regarding**
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> A doubt has been recently raised as to whether the Officers of Directorate of Revenue Intelligence could issue show cause notices in cases investigated by them - a practice started last year apparently in tune with the practice of the Directorate General of Anti Evasion. The matter has been examined in the Board.
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> 2. It has been observed that in terms of **Customs Notification No. 19/90-Cus (NT.), dated 26.4.90,** as amended from time to time, **the Officers of Directorate of Revenue Intelligence of different categories have been notified and appointed as Commissioners of Customs, Deputy Commissioners of Customs or Assistant Commissioners of Customs for the are specified. These officers, therefore, can legally be entrust with discharge of functions normally performed by Commissioners Deputy Commissioners or Assistant Commissioners of Customs in their jurisdiction, as the case may be.** Board can no

> doubt subject these powers/functions to certain restrictions/limitations as may be imposed, as provided under section 5(1) of the Customs Act.
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> 3. Directorate of Revenue Intelligence Officer are, therefore, to undertake investigations of cases detected by them, and to issue the Show Cause Notices on completion of investigations. In line with the instructions issued (vide F.No. 208/23/97-CX-8, dated 20.1.98) in respect of Officers of Directorate General Anti Evasion, Board has decided that in impact of cases investigated by the Directorate General of Revenue intelligence, the officers of said Directorate will be competent to and may issue show cause notices in cases investigated by them -though these will continue to be adjudicated by the concerned jurisdictional Commissioners, Additional Commissioners, Deputy Commissioners or Assistant Commissioners of Customs, as the case may be. (emphasis added)

8. Section 97 of the **Finance Act, 2022** which, inter-alia, retrospectively validated certain actions taken under the Act, is reproduced below.

> **Validation of certain actions taken under Customs Act**
>
> **97**. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal, or other authority, or in the provisions of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Customs Act),–
>
> (i) anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;
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> (ii) any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6;
>
> (iii) for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this Act, had been in force at all material times.
>
> *Explanation*. – For the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the Customs Act, as amended by this Act.

The amending Act validates among others, anything done or any duty performed or any action taken or purported to have been taken or done among other chapter to **Chapters X – 'Drawback'** and **Chapter XVII**

which includes Section 142 – 'Recovery of sums due to Government' also. Sub-section (1) of section 142 of the Act, provides for the recovery of drawback as per Rule 16 of 'Customs and Central Excise duty and Service Tax Drawback - 1995'. It further validates any notification issued under the Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6 – 'Entrustment of functions of Board and customs officers on certain other officers'. DRI officers came to be appointed as the officers of customs vide Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue.

9. Further the 'Conclusions' stated in the Apex Courts Judgment in **CANON INDIA - II**, is reproduced below, as it provides a summary of the judgment in the Courts own words.

> F. CONCLUSION
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> 168. In view of the aforesaid discussion, we conclude that:
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> (i) DRI officers came to be appointed as the officers of customs vide Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue, Ministry of Finance, Government of India. This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002 issued by the Department of Revenue, Ministry of Finance, Government of India, to account for administrative changes.
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> (ii) The petition seeking review of the decision in Canon India (supra) is allowed for the following reasons:
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> a. Circular No. 4/99-Cus dated 15.02.1999 issued by the Central Board of Excise & Customs, New Delhi which empowered the officers of DRI to issue show cause notices under Section 28 of the Act, 1962 as well as Notification No. 44/2011 dated 06.07.2011 which assigned the functions of the proper officer for Review Petition No. 400 of 2021 Page 155 of 161 the purposes of Sections 17 and 28 of the Act, 1962 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in Canon India (supra). In other words, the judgment in Canon India (supra) was rendered without looking into the circular and the notification referred to above thereby seriously affecting the correctness of the same.

b. The decision in Canon India (supra) failed to consider the statutory scheme of Sections 2(34) and 5 of the Act, 1962 respectively. As a result, the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of Section 28 in accordance with Section 6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty under Section 28 of the Act, 1962.

c. The reliance placed in Canon India (supra) on the decision in Sayed Ali (supra) is misplaced for two reasons – first, Sayed Ali (supra) dealt with the case of officers of customs (Preventive), who, on the date of the decision in Sayed Ali (supra) were not empowered to issue show cause notices under Section 28 of the Act, 1962 unlike the officers of DRI; and secondly, the decision in Sayed Ali (supra) took into consideration Section 17 of the Act, as it stood prior to its amendment by the Finance Act, 2011. However, the assessment orders, in respect of which the show cause notices under challenge in Canon India (supra) were issued, were passed under Section 17 of the Act, 1962 as amended by the Finance Act, 2011.

(iii) This Court in Canon India (supra) based its judgment on two grounds:
(1) the show cause notices issued by the DRI officers were invalid for want of jurisdiction; and (2) the show cause notices were issued after the expiry of the prescribed limitation period. In the present judgment, we have only considered and reviewed the decision in Canon India (supra) to the extent that it pertains to the first ground, that is, the jurisdiction of the DRI officers to issue show cause notices under Section 28. We clarify that the observations made by this Court in Canon India (supra) on the aspect of limitation have neither been considered nor reviewed by way of this decision. Thus, this decision will not disturb the findings of this Court in Canon India (supra) insofar as the issue of limitation is concerned.

(iv) The Delhi High Court in Mangali Impex (supra) observed that Section 28(11) could not be said to have cured the defect pointed out in Sayed Ali (supra) as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective Review Petition No. 400 of 2021 Page 157 of 161 effect. In view of this, the High Court declined to give retrospective operation to Section 28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to Section 28 of the Act, 1962. We are of the considered view that the decision in Mangali Impex (supra) failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued. It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the High Court could not have applied the doctrine of harmonious construction to harmonise Section 28(11) with Explanation 2 because Section 28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two. Therefore, we set aside the decision in Mangali Impex (supra) and approve the view taken by the High Court of Bombay in the case of Sunil Gupta (supra).

(v) Section 97 of the Finance Act, 2022 which, inter-alia, retrospectively validated all show cause notices issued under Section 28 of the Act, 1962 cannot be said to be unconstitutional. It cannot be said that Section 97 fails to cure the defect pointed out in Canon India (supra) Review Petition No. 400 of 2021 Page 158 of 161 nor is it manifestly arbitrary, disproportionate and overbroad, for the reasons recorded in the foregoing parts of this judgment. We clarify that the findings in respect of the vires of the Finance Act, 2022 is confined only to the questions raised in the petition seeking review of the judgment in Canon India (supra). The challenge to the Finance Act, 2022 on grounds other than those dealt with herein, if any, are kept open.

(vi) Subject to the observations made in this judgment, the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Therefore, any challenge made to the maintainability of such show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, shall now be dealt with in the following manner:

a. Where the show cause notices issued under Section 28 of the Act, 1962 have been challenged before the High Courts directly by way of a writ petition, the respective High Court shall dispose of such Review Petition No. 400 of 2021 Page 159 of 161 writ petitions in accordance with the observations made in this judgment and restore such notices for adjudication by the proper officer under Section 28.

b. Where the writ petitions have been disposed of by the respective High Court and appeals have been preferred against such orders which are pending before this Court, they shall be disposed of in accordance with this decision and the show cause notices impugned therein shall be restored for adjudication by the proper officer under Section 28.

c. Where the orders-in-original passed by the adjudicating authority under Section 28 have been challenged before the High Courts on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, the respective High Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT).

d. Where the writ petitions have been disposed of by the High Court and appeals have been preferred against them which are pending before this Court, they shall be disposed of in accordance with this decision and this Court shall grant eight weeks' time to the Review Petition No. 400 of 2021 Page 160 of 161 respective assessee to prefer appropriate appeals before the CESTAT.

e. Where the orders of CESTAT have been challenged before this Court or the respective High Court on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, this Court or the respective High Court shall dispose of such appeals or writ petitions in accordance with the ruling in this judgment

> and restore such notices to the CESTAT for hearing the matter on merits.
>
> f. Where appeals against the orders-in-original involving issues pertaining to the jurisdiction of the proper officer to issue show cause notices under Section 28 are pending before the CESTAT, they shall now be decided in accordance with the observations made in this decision.
>
> 169. In view of the aforesaid, we allow the Review Petition No. 400/2021 titled Commissioner of Customs v. M/s Canon India Pvt. Ltd. and the connected Review Petition Nos. 401/2021, 402/2021 and 403/2021 insofar as the issue of jurisdiction of the proper officer to issue show cause notice under Section 28 is concerned. As discussed, the findings of this Court in Canon India (supra) in respect of the show cause notices having been issued beyond the limitation period remain undisturbed.
>
> 170. We set aside the decision of the High Court of Delhi rendered in the case of Mangali Impex (supra) and uphold the view taken by the High Court of Bombay in the case of Sunil Gupta (supra). We also uphold the constitutional validity of Section 97 of the Finance Act, 2022.

10. In the above Review Judgment the Hon'ble Court in **Canon India – II**, while holding that DRI officers, among others, are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder, also held that the reliance placed in **Canon India – I**, on the decision in **Sayed Ali** (supra) is misplaced for two reasons – first, 'Sayed Ali' dealt with the case of officers of customs (Preventive), who, on the date of the decision in 'Sayed Ali' were not empowered to issue show cause notices under Section 28 of the Act, 1962 **unlike the officers of DRI** and secondly, the decision in 'Sayed Ali' took into consideration Section 17 of the Act, as it stood prior to its amendment by the Finance Act, 2011. However, the assessment orders, in respect of which the show cause notices under challenge in **Canon India - I** were issued, were passed under Section 17 of the Act, 1962 as amended by the Finance Act, 2011.

11. The Hon'ble High Court of Bombay had in **Sunil Gupta Versus Union of India And Others** [2014 (12) TMI 151 - BOMBAY HIGH

COURT / 2015 (315) E.L.T. 167 (Bom.)], which has the approval of the Hon'ble Supreme Court, examined a case where a show cause notice by DRI officials pursuant to an investigation against the Petitioner who had allegedly been associated with the firms which were styled as dummy firms. During the course of investigation, it was revealed that certain goods were imported in the names of these firms. They have been mis-declared in terms of description, quantity and value. The Hon'ble Court examined the power of DRI to issue the SCN and held:

> "19) What we find is that recovery of duties not levied or short levied or erroneously refunded has been brought within the purview of this Act. The section enables the authorities to proceed and deal with cases of non levy, short levy or erroneous refund of duty or non payment of interest, part payment thereof or erroneous refund thereof for any reason other than the reason by collusion or any willful misstatement or suppression of facts. It then also enables by subsection (4) to deal with cases where such an Act of omission and commission is with collusion or any willful misstatement or suppression of facts and subsection (4) takes care of those cases. Subsection (11) has been inserted by Act 14 of 2011 w.e.f. 16th September, 2011 and overrides anything to the contrary contained in any Judgment, Decree or Order of any Court of law, Tribunal or authority. It empowers all persons appointed as officers of Customs under subsection 2(4) before 6th July, 2011 as "proper officers" for the purposes of section 28. They also are deemed to be possessing the power of assessment under section 17.
>
> 20) In the present case, if the show cause notice has been issued by the Director of Intelligence, then, we have to find as to whether he was competent to do so. In that regard, we have on record the Notification dated 26th April, 1990 Exhibit-I at page 369 of the paper book. That reads as under:
>
> "Notification: 19/89-Cus. (NT) dated 26 Apr 1990
>
> Appointment of D. R. I. Officials as Customs Officers
>
> In exercise of the powers conferred by subsection (1) of Section (4) of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 186-Cus., dated 4th August, 1981 (as amended), the Central Government hereby appoints the officers mentioned in column (2) of the Table below to be the Collector of Customs, the officers mentioned in column (3) thereof to be Deputy Collectors of Customs, and officers mentioned in column (4) thereof to be Assistant Collector of Customs for the areas mentioned in the corresponding entry in column (1) of the said Table:
>
> Table
>
> Area/Jurisdiction Designation of the officer

	1	2	3	4
1	Whole India	Addl. Director General, Directorate of Rervenue Intelligence, Headquarters, New Delhi	All Deputy Directors, Directorate of Revenue Intelligence posted Headquarters.	All Assistant Collectors/ Assistant Directors in Directorate of revenue Intelligence posted at Headquarters, Investigating Officers (police)/ Assistant Directors (Police) and Investigating Officers (Income Tax)/ Assistant Director (Income Tax).
2	Delhi, State of Uttar Pradesh, Bihar, West Bengal, Sikkim, Assam, Manipur, Tripura, Meghalaya, Mizoram, Nagaland and Arunachal Pradesh.		Officers on Special Duty with Headquarters at Delhi.	All Assistant Directors/ Assistant Collectors posted in the Nepal Cell at Delhi.
3	States of Maharashtra, Gujarat, Madhya Pradesh, and the territory of Daman and Diu, Dadra and Nagar Haveli	Additional Director General, Directorate of Revenue Intelligence, Bombay		
4	States of Maharashtra, Madhya Pradesh and Goa		Deputy Director, Directorate of Revenue Inteligence, Bombay Zone.	Assistant Collectors/ Assistant Directors, Directorate of Revenue Intelligence, Bombay Zone."

21) A perusal thereof indicates that the same supersedes the earlier Notification dated 4th August, 1981, which itself was a amended Notification. By this Notification, the DRI officials are appointed as Customs Officers and are Collector of Customs. They are appointed for the purposes of the Customs Act, 1962 and in the area mentioned in the corresponding entry. The table is comprehensive. It gives the area/jurisdiction and the description of the officer. Insofar as whole of India is concerned, it designates the Additional Director General, Directorate of Revenue Intelligence, Headquarters, New Delhi to be the Collector of Customs and all Deputy Directors posted at Headquarters to be the Deputy Collectors and etc. Insofar as the State of Maharashtra, Gujrat, Madhya Pradesh etc., it is the Additional Director General, Directorate of Revenue Intelligence,

Bombay, who is a Customs officer. Nothing contrary to the above having been brought to our notice, we do not see any force in the contention of Mr. Singh that the Additional Director General was incompetent to issue the show cause notice. There is no force in the argument that despite such Notification and the subsequent one issued on 6th July, 2011, the Central Government and the Board have not entrusted or assigned the functions of the proper officer to this Additional Director. Now, the further Notification at page 373 of the paper book proceeds to assign the functions of the proper officer to Additional Director General of this Directorate. **In these circumstances and when section 17 and 28 are specifically referred to in the Notification at page 373, then, we do not see any force in the argument of the Petitioner that the DRI was not competent to issue the subject show cause notice.** The Notifications clearly indicate that the officers of this directorate have been entrusted or assigned the functions of the Customs Officers for the purpose of these sections. They could have therefore set the law in motion.

22) There is no need to decide any wider question or controversy after these Notifications, which have been brought to our notice. That apart, we do not find any force in the argument of Mr.Singh that though subsection (11) has been inserted in the statute book w.e.f. 16th September, 2011 and section 28 has been amended accordingly, the Explanation 2 is a explanation and for the entire section. He submits that the same clarifies that it is only those officers who are proper officers within the meaning of section 2(34) who could deal with the cases governed by section 28.

23) We have found that section 28(11) was inserted by Act 14 of 2011 w.e.f. 16th September, 2011. That alters the basis of the Judgments, which have been delivered by any Court of law, Tribunal or other authority. Once this section says that all persons appointed as officers of Customs under section 1(4) before 6th July, 2011 shall be deemed to have been and always to be the proper officers for the purpose of this section, then, the Notifications, which are referred by us above at page 369 and 373 of the paper book are specifically saved and validated. They have been given a retrospective effect. These Notifications were holding the field and were not quashed or set aside. In the teeth of such Notifications, the legislature stepped in to clarify the position that if the functions of the Customs officer can be entrusted or assigned by the Central Government or the Board in terms of section 6 of the Customs Act, 1962, then, all such Notifications, have been validly issued and enforced. **They enable the parliament to clarify that the officers mentioned therein shall be deemed to be the proper officers for the purposes of section 17 and 28 of the Act. Precisely, that has been done in the instant case.**

24) **If that has been done, then, no assistance can be derived from the Judgment of the Hon'ble Supreme Court in the case of Sayed Ali (supra).** There, for want of jurisdiction or competence in the Collector of Customs (Preventive), the show cause notice was quashed by the Tribunal and that order was upheld by the Supreme Court. Before us, the issue is not whether any Collector of Customs (Preventive) could be said to be on par with the officers mentioned in the earlier Notification dated 26th April, 1990. The assignment of functions to these officers, who were earlier carrying on preventive work came w.e.f. 6th July, 2011. That Notification was not, at the relevant time, given retrospective effect. It is in such circumstances that the Hon'ble Supreme Court held that in terms of the Notifications, which were

> issued and holding the field, not designating the Collector of Customs (Preventive) as a proper officer for the purpose of section 28 as it then stood, he was not competent to issue show cause notice (see para 24 of Sayed Ali's Judgment). **This position has now undergone a change and from 6th July, 2011, admittedly, they have been assigned these functions and of the Custom officers.** They are therefore competent and the Notification in that behalf at page 373 of the paper book has been given a retrospective effect. It is not the argument of Mr. Singh that the law cannot be amended retrospectively. It is also not his argument that the validating Act does not validate anything which may be or is invalid. In the circumstances and the Parliament being competent to make such a law, we find no force in the arguments canvassed before us. Once the above view is taken, then, no reference is required to be made to the other Judgments cited by both Mr. Singh and Mr. Jetly.
>
> (emphasis added)

The judgment hence found that officers of DRI were competent to issue a SCN under Section 28 of the Act.

12. We find that the Tribunal in the case of **M/S. Monte International** (supra), relied on the Hon'ble Supreme Court's judgment in Sayed Ali (supra), the Hon'ble Bombay High Court's judgment in **Sunil Gupta** (supra), and which was approved of by the Hon'ble Supreme Court in its Review judgment in Canon India – II, both held that 'Sayed Ali' did not deal with the issue of SCN issued by DRI officers, hence removing the main plank on which **M/S. Monte International** stood. The review judgment in **Canon India - II**, has now laid down the law with regard to the issue of SCN by DRI officers. Hence this Tribunals order in **Manasa Impex Services, Cargomar** (supra) which relied on **M/S. Monte International,** and did not have the benefit of going through the said Supreme Court judgment, does not constitute a binding precedent.

13. We find that the Hon'ble Karnataka High Court in its judgement in the case of **SRI MEENAKSHI APPARELS PVT LTD** [2010-TIOL-938-HC-KAR-CUS], had an occasion to examine the issue of SCN by DRI in a drawback matter. Relevant portions of the judgment are extracted below.

“5. In the light of the aforesaid facts and the rival contentions, the short point that arises for our consideration is,

"Whether the Directorate of Revenue Intelligence had the jurisdiction to adjudicate the dispute regarding drawback and whether such order adjudicating the duty drawback is appealable to the Tribunal?"

Rule 16-A of the Rules deals with Recovery of the amount of drawback where export proceeds are not realized. Section 75 of the Act supersedes for Drawback on imported materials used in the manufacture of goods which are exported. However, if the export value is not received, or received less than the value of the imported materials, then, the Revenue can recover the amount of drawback paid to the assessee. **Rule 16-A of the Rules provides for the manner in which it could be recovered. It provides that a show cause notice is to be issued to the exporter for production of evidence of realization of export proceeds** within, a period of thirty days from the date of receipt of such notice and where the exporter does not produce such evidence within the said period of thirty days, the Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, shall pass an order to recover the amount of drawback paid to the claimant and the exporter shall repay the amount so demanded within sixty days of the receipt of the said order. Section 4 of the Act deals with the appointment of Officers of Customs. Section 4(1) empowers the Board to appoint such persons as it thinks fit to be Officers of Customs. Sub-Section (2) of the said Section provides, without prejudice to the provisions of sub-Section (1), the Board may authorize a Chief Commissioner of Customs or a Commissioner of Customs or a Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint Officers of Customs below the rank of Assistant Commissioner of Customs or Deputy Commissioner of Customs. By virtue of the powers so conferred under sub-Sections (1) and (2) of Section 4 of the Act, the Board has issued the Notification No.17/2002 No.CUS (NT) dated 7th March 2002 which reads as under:

"Directorate of Revenue Intelligence (D.R.I.) officers appointed as Customs Officers - Notification No.19/90-Cus(N.T.) superseded.

In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of notification of the Government of India in the Ministry of finance (Department of Revenue) No.19/90/90-Customs (N.T.), dated the 26th April 1990, the Central Government appoints the officers mentioned in column (2) of the Table below to be the Commissioner of Customs, the Officers mentioned in column (3) thereof to be the Additional Commissioners or Joint commissioners of Customs and Officers mentioned in column (4) thereof to be the Deputy Commissioners or Assistant Commissioners of Customs for the areas mentioned in the corresponding entry in column (1) of the said Table with effect from the date to be notified by the Central Government in the Official Gazette:

Area of Jurisdiction	Designation of the officers		
(1)	(2)	(3)	(4)

Whole of India	Additional Director General of Revenue Intelligence posted at Headquarters and Zonal / regional units	Additional / Directors, or Joint Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal / regional units	Deputy Directors, or Assistant Directors of Directorate of Revenue Intelligence posted at Headquarters and Zonal / regional units

[Notification No.17/2002-Cus.(N.T.), dated 7.3.2002]

Therefore, the Director of Revenue Intelligence has been conferred with the power of the Commissioner of Customs. The power of such Officer to investigate and issue show cause notice calling upon the assessee to pay back the draw back is not disputed. What is disputed is the power of the said authority to adjudicate the dispute. Relying on the circular dated 15th February 1999, which is issued in pursuance of the Notification No.19/90 conferring the similar power where it has been held, though they have been conferred the power to investigate and issue show cause notice, adjudication is to be done as per Rule 16-A by the jurisdictional Commissioners, Additional Commissioners, Deputy Commissioners or Assistant Commissioners of Customs. The said circular which is issued to explain the effect of the Notification No.19/1990 has no legs to stand because the Notification No.19/1990 is superseded by Notification No.7/2002. Section 5 of the Act deals with powers of Officers of Customs. Sub-Section (2) of Section 5 provides, an Officer of Customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other Officer of Customs who is subordinate to him. Therefore, statutorily, it is provided that a higher Officer can perform the functions and duties of a subordinate Officer. It is by virtue of the statutory provision, the Director of Revenue Intelligence, who was appointed as Commissioner of Customs to investigate and issue show cause notice, has adjudicated the dispute regarding payment of duty draw back also. The Rule on which reliance is placed is attracted in the absence of a Notification. Once a Notification is issued in pursuance of Section 4 (1) of the Act. Then, the person so appointed has all the powers conferred under Section 5 (2) of the Act. That is precisely, what the Tribunal has said and therefore, it is not possible to accept the contention that the Director of Revenue Intelligence had no jurisdiction to adjudicate the dispute regarding duty drawback. Reliance is also placed on the judgment of the Apex Court which has held that when a statute specifically states who should exercise the power, how power should be exercised and the same fashion is concerned, there is no quarrel with the legal proposition. Section 5 (2) of the Act specifically provides that, a higher Officer of the Customs also has the power to perform functions and duties of a lower Officer. Therefore, a person appointed under Section 4 (1) of the Act, by virtue of Section 5 (2) of the Act, has the jurisdiction to exercise the power of a subordinate or a lower authority and therefore, the power exercised by the Director of Revenue Intelligence is as stipulated under the Act and therefore, he cannot be found fault with and therefore, he has the jurisdiction to adjudicate and he has adjudicated the said dispute." (emphasis added)

13.1 In the above judgment the power of DRI officers to investigate and issue show cause notice calling upon the assessee to pay back the draw back was not disputed. The question was whether the Directorate of Revenue Intelligence had the jurisdiction to adjudicate the dispute regarding drawback. The High Court held that once a Notification is issued in pursuance of Section 4 (1) of the Act. Then, the person so appointed has all the powers conferred under Section 5 (2) of the Act.

13.2 The said judgment was considered by the Third Member in **M/S. Monte International** (supra). It was held that Revenue has relied on the decision of Hon'ble Karnataka High Court in the case of **Meenakshi Apparels** (supra). However, it was felt that since the said decision which was prior to the decision of Apex Court in the case of Syed Ali (supra), it could not be relied upon. Now that the judgment in 'Sayed Ali' has been held to not deal with the issue of SCN issued by DRI officers, the judgment in **SRI MEENAKSHI APPARELS** (supra) gains binding force.

14. The Customs and Central Excise Duties Drawback Rules, 1995, was issued in exercise of the powers conferred by Section 75 of the Customs Act, 1962 (52 of 1962) and Section 37 of the Central Excises and Salt Act, 1944 (1 of 1944). Rule 16 of the Drawback Rules as it then stood, states as under:

> 16. Repayment of erroneous or excess payment of drawback and interest. - Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in sub-section (1) of Section 142 of the Customs Act, 1962 (52 if 1962).
>
> (emphasis added)

[The above Drawback Rule have been repealed w.e.f. 01.10.2017 and was replaced by The Customs and Central Excise Duties Drawback Rules, 2017. Rule 17 of the new Rules contains identical provisions]

14.1 The appellant at the outset had stated that the recent judgment of the Supreme Court in **Canon India - II**, deals with the powers of the DRI Officer with regard to section 17 and section 28 of the Act. The issue of notice by DRI in terms of Section 75 read with rules 16 and 16A of Rules, was not a question decided by the Hon'ble Supreme Court in the above case. This averment does not appear to be correct. The power under section 28 of the Act, pertains to a situation where any duty has not been levied or not paid or has been short-levied or short-paid or **erroneously refunded**, or any interest payable has not been paid, part-paid or **erroneously refunded**.

14.2 It is hence clear that cases involving erroneous refund are also covered under the provisions of section 28 ibid. The Hon'ble Madras High Court **M/s. PGC Corporation Limited Vs The Assistant Commissioner of Customs, Tuticorin** [W.P.No.12480 of 2019 & WMP.No.12753 of 2019 DATED: 12.07.2022], had an occasion to examine a case of drawback, where it was argued that it does not amount to refund. The Hon'ble Justice Anita Sumanth, while deciding the matter held:

> "5. The submissions of Mr. S. Murugappan, learned counsel for the petitioner are that drawback and duty are different and hence the provisions of Section 129E would not be applicable to the former. In this context, he relies on the language of Section 129E which only calls for the deposit of a percentage of the duty demanded or penalty imposed prior to filing of appeal.
>
> 6. He also submits that drawback itself relates not just to customs duty but also to central excise duty and service tax and hence, would fall outside the scope of the term 'duty', as mentioned in Section 129E.
>
> 7. Per contra, Mr. Rajnish Pathiyil, learned Senior Panel Counsel for the respondents would point out that duty is defined under Section

2(15) of the Act to mean a duty of customs, drawback is nothing but duty, and there is hence no merit in the submission of the petitioner counsel.

8. I have heard learned counsel in detail and I agree with the respondents that there is no merit in the present writ petition. Section 75(1) of the Act provides for grant of drawback on imported materials used in the manufacture of goods that are exported, and is extracted below:

> Section 75. **Drawback on imported materials used in the manufacture of goods which are exported**. - (1) Where it appears to the Central Government that in respect of goods of any class or description [manufactured, processed or on which an operation has been carried out in India] [being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made under section 51 by the proper officer], [or being goods entered for export by post under section 82 and in respect of which an order permitting clearance for exportation has been made by the proper officer], **a drawback should be allowed of duties of customs chargeable under this Act** on any imported materials of a class or description used in the [manufacture or processing of such goods or carrying out any operation on such goods], the Central Government may, by notification in the Official Gazette, direct that **drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2)**: . . . . . .

9. That apart, the term 'drawback' is itself defined under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 as follows:

> **"drawback' in relation to any goods manufactured in India and exported, means the rebate of duty or tax, as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods."**

10. In my considered view, there is no merit in the distinction that is sought to be made by the petitioner between the concepts of 'duty' and 'drawback' since what the petitioner/assessee is permitted to draw-back is the duty paid by it on certain inputs, subject to the satisfaction of certain conditions.

11. The benefit of drawback is granted if the assessee in question satisfies the condition imposed, including receipt of the sales proceeds within a stipulated period. **The argument that there is a distinction between 'rebate of duty' and 'duty' and that, legally and functionally the two expressions refer to two different concepts is also misconceived as a rebate is nothing but a refund of duty and the nature of both remains the same.**

12. In fact, in **Circular No.993/17/20140CS dated 05.01.2015, the Central Board of Excise & Customs, New Delhi has clarified the position that drawback is a refund of duty on goods exported.** In fine, the rejection of the petitioner's appeal for want of compliance with the

> condition under Section 129E is well founded. For the aforesaid reasons this writ petition is dismissed. Connected miscellaneous petitions is closed. No costs." (emphasis added)

15. We had earlier stated that from the Review judgment in **Canon India - II**, it is clear that the amending Finance Act, 2022 validates anything done or any duty performed or any action taken or purported to have been taken or done among other chapter to Chapters X – 'Drawback' and Chapter XVII which includes Section 142 – 'Recovery of sums due to Government' also. Sub-section (1) of section 142 of the Act, provides for the recovery of drawback as per Rule 16 of 'Customs and Central Excise duty and Service Tax Drawback - 1995'. It further validates any notification issued under the Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6 – 'Entrustment of functions of Board and customs officers on certain other officers'. DRI officers came to be appointed as the officers of customs vide Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue. The notification was further amended but the appointment of DRI officers as Customs Officers was not disturbed. Once DRI officers are appointed as Customs Officers, full effect must be given to the notification, and it should be carried to its logical conclusion. The Apex Court judgments in **Video Electronics (P) Ltd. v. State of Punjab** [(1990) 3 SCC 87] and **TN Electricity Board v. Status Spinning Mills Limited** [(2008) 7 SCC 353] support the principle that subordinate legislation validly made in pursuance of a legislative provision is to be read as if it is a part of the enactment. Hence wherever an officer of Customs is a 'proper officer' to issue a SCN, the same power would vest with an officer of DRI also.

15.1 Rule 16 of the Rules pertaining to the repayment of erroneous or excess payment of drawback and interest, states that where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid is in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer repay the amount so paid. Hence in the light of the discussion above an officer of DRI would have the jurisdiction to issue show cause notices under rule 16 of the Rules also.

16. A similar issue was examined by the Hon'ble Madras High Court in **M/S. Redington (India) Limited vs Principal Additional Director, Directorate General of Goods and Services Tax, Chennai** [2022 (62) GSTL 406 (Mad)]. The issue involved the validity of SCN's issued by the Additional Director General, Directorate of GST Intelligence of, Chennai Zonal Unit among others. It appeared to the Cort that the argument were inspired from the decision of the Hon'ble Supreme Court in **Commissioner v. Sayed Ali** [2011 (265) E.L.T. 17 (S.C.)] and in **Canon India Pvt. Ltd. Vs. Commissioner** [2021 (376) E.L.T. 3 (S.C.)]. After examining the issue the Hon'ble Court held that it is the "Central Excise Officer" as defined in Section 2(b) of the Central Excise Act, 1944 who can be appointed as the "Central Excise Officers" for the purpose of Rule 3 of the Service Tax Rules, 1944. Under Notification No.38/2001-C.E. (N.T), dated 26.06.2001, the Board, invested the officers mentioned therein with all the powers to be exercised by them throughout the territory of India as an officer of Central Excise of the rank specified in the corresponding entry in column (3) of the said Table, such powers being the powers of a Central Excise Officers conferred under the said Act and rules made thereunder with effect from 1st July, 2001. Therefore, without doubt, the officers

from the Directorate are "Central Excise Officers" as they have been vested with the powers of central excise officers. The officers of the Directorate of Central Excise Intelligence are empowered to act as "Central Excise Officer".

17. The issue can be looked at from another angle. In **M/S. Monte International** (supra), the Tribunal relied upon Board's Circular No. 24/2011-Cus., dated 31.05.2011 and the majority opinion was that while Section 28 was amended retrospectively with effect from 16.09.2011, the Boards Circular No. 24/2011 was issued on 31.05.2011, wherein the issuance of show cause notice in terms of Rule 16 of Drawback Rules was considered and the proper officers were specified only in relation to the monetary limits. In the said circular, DRI officers were not mentioned to be proper officers for demanding drawback under Rule 16. There was no retrospective amendment carried out in the said Rule 16 so as to confer jurisdiction on the DRI officer for issuance of show cause notices.

17.1 Operative portion of the Boards Circular 24/2011-Cus., dated 31.05.2011 is reproduced below, for easy reference:

> "**Subject: Revision in the powers of adjudication of the officers of Customs.**
>
> Sir / Madam,
>
> Attention is invited to Board Circular No.23/2009-Customs dated 1.9.2009 which provides for monetary limits of adjudication of cases by officers of various grades where SCNs are issued under section 28 of the Customs Act, 1962.
>
> 2. References have been received from the field formations for specifying the 'proper officer' for issuance of show cause Notice and adjudication of cases of export under the drawback and Export Promotion Schemes.
>
> *****. *****. *****
>
> 5. Further, it has been decided that the proper officer for the issuance of Show Cause Notice and adjudication of cases under the provisions of Rule 16 of the Customs, **Central Excise and Service Tax Drawback Rules, 1995** shall, henceforth, be as under:
>
> (i) In case of simple demand of erroneously paid drawback, the present practice of issuing Show Cause Notice and adjudication of

case without any limit by Assistant / Deputy Commissioner of Customs shall continue.

(ii) In cases involving collusion, wilful misstatement or suppression of facts etc., the adjudication powers will be as under:

Level of Adjudication Officer	Amount of Drawback
Additional / Joint Commissioner of Customs	Without any limit
Deputy / Assistant Commissioner of Customs	Upto Rs.5 lakhs

6. In case of Export Promotion Scheme. . . "

It is seen that the circular only refers to officers of Customs. Since DRI officers were also appointed as officers of Customs, as per the law laid down by the Hon'ble Supreme Court in its Review Judgment on **Canon India - II**, the circular would also be applicable to them and it cannot be said that they do not have jurisdiction to issue SCN in the case of drawback. Moreover a circular does not have the same force as that of a notification issued under the Act, appointing officers of Customs and cannot over ride it.

17.2 The Hon'ble Supreme Court in **Pahwa Chemicals Private Limited Vs Commissioner of Central Excise, Delhi,** [2005 (181) E.L.T. 339 (S.C).] examined a similar matter and held:

"13. In order to consider the powers of the Board one needs to see certain provisions of the Act. Section 2(b) defines the "Central Excise Officer" and it is mentioned therein that any Officer of the Central Excise Department or any person who has been invested by the Board with any of the powers of the Central Excise Officer would be a Central Excise Officer. Thus, the Board has power to invest any Central Excise Officer or any other Officer with powers of Central Excise Officer. By virtue of Section 37B the Board can issue orders, instructions or directions to the Central Excise Officers and such Officers must follow such orders, instructions or directions of the Board. However, these directions can only be for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. It is thus clear that the Board has no power to issue instructions or orders contrary to the provisions of the Act or in derogation of the provisions of the Act. The Board can only issue such directions as is necessary for the purpose of and in furtherance of the provisions of the Act. The instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show

cause notices and to adjudicate, the Board has no power to cut down that jurisdiction. However, for the purposes of better administration of levy and collection of duty and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers. The Circulars relied upon are, therefore, nothing more than administrative directions allocating various types of works to various classes of Officers. These administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act. At the highest all that can be said is Central Excise Officers, as a matter of propriety, must follow the directions and only deal with the work which has been allotted to them by virtue of these Circulars. But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.

14. The Tribunal has in its order dated 25th June, 2003, *inter alia,* held as follows :-

> "....Further, at the relevant time as per the provisions of Section 11A(1) proper officer which includes Superintendent is competent to issue the show cause notice. Board's Circular is only the administrative directions which does not cause any prejudice to the Appellants..."

In our view this is absolutely correct. We, therefore, see no infirmity in the Judgment dated 25th June, 2003. We hold that the Superintendent had jurisdiction to issue show cause notice and the Deputy Commissioner had jurisdiction to adjudicate."

17.3 The above judgment of the Supreme Court in **PAHWA CHEMICALS** was affirmed by a three Judge Bench of the Hon'ble Supreme Court in **AEON'S CONSTRUCTION PRODUCTS LTD. Vs COMMR. OF C. EX., CHENNAI** [2005 (184) E.L.T. 120 (S.C.)]. The Hon'ble Court held;

> "6. . . . In our view, Section 33 makes no difference to the position of law as enumerated in Pahwa Chemicals' case (supra). To the extent Section 33 permits the Board to reduce limits or confer power on other Officers the Board may do so. **But this is in respect of adjudication. Significantly in respect of issuance of show-cause notices, no such power has been given to the Board.** This itself indicates that where the Legislature so intended it specifically so provided. Thus where the Legislature has purposely omitted to so provide it clearly indicates that the Board was not authorised to limit powers under the Act. Section 37 merely gives rule making power to the Central Government. **No Rule could be shown to us under which the Board could whittle down the jurisdiction of a Central Excise Officer as given to that Officer under the Act.**
>
> **7. We, therefore, see no reason to take a different view and we reaffirm the decision given in Pahwa Chemicals' case (supra)**."
>
> (emphasis added)

The principle of law declared by the Apex Court in the two judgments above would be applicable under the Customs Act also.

17.4 Further the hierarchy of laws has been explained by the Hon'ble Supreme Court in **M/S. Ispat Industries Ltd Vs Commissioner Of Customs, Mumbai** [AIRONLINE 2006 SC 69 / (2006) 202 ELT 561]. The Court held:

> "27. In this connection, it may be mentioned that according to the theory of the eminent positivist jurist Kelsen (The Pure Theory of Law) **in every legal system there is a hierarchy of laws, and whenever there is conflict between a norm in a higher layer in this hierarchy and a norm in a lower layer the norm in the higher layer will prevail** (see Kelsen's. 'The General Theory of Law and State') -
>
> 28. In our country this hierarchy is as follows:
>
> (1) The Constitution of India;
>
> (2) The Statutory Law, which may be either Parliamentary Law or Law made by the State Legislature;
>
> (3) Delegated or subordinate legislation, which may be in the form of rules made under the Act, regulations made under the Act, etc.;
>
> 4) Administrative orders or executive instructions without any statutory backing.
>
> 29. **The Customs Act falls in the second layer in this hierarchy whereas the rules made under the Act fall in the third layer. Hence, if there is any conflict between the provisions of the Act and the provisions of the Rules, the former will prevail.** However, every effort should be made to give an interpretation to the Rules to uphold its validity. This can only be possible if the rules can be interpreted in a manner as to be in conformity with the provisions in the Act, which can be done by giving it an interpretation which may be different from the interpretation which the rule could have if it was construed independently of the provisions in the Act. In other words, to uphold the validity of the rule sometimes a strained meaning can be given to it, which may depart from the ordinary meaning, if that is necessary to make the rule in conformity with the provisions of the Act. This is because it is a well settled principle of interpretation that if there two interpretations possible of a rule, one of which would uphold its validity while the other which would invalidate it, the former should be preferred."
>
> (emphasis added)

In the light of the above judgment in case of any conflict between the provisions of a notification, (which has to be read as a part of the Act

– See **Video Electronics** and **TN Electricity Board** cited above), and the provisions of a circular, the former will prevail.

18. Based on the discussions above the plea of the appellant on this issue of jurisdiction of DRI officers to issue a SCN in the case of drawback, must fail.

19. We now examine the second issue as to whether a penalty can be imposed on the CHA. The chart below summarises the various case in which the CHA was involved and is a subject matter of the appeals being covered by this order.

Fraudulent Availment of Drawback - Similar Issue					
S. No.	Appeal No.	Appellant Name	Impugned order	Penalty	Penalty Under sections
1.	C/290/2009	Manasa Impex Services	06/2009 dt. 27.5.2009	5,00,000	Sec. 114(iii)
2.	C/291/2009	Manasa Impex Services	07/2009 dt. 27.5.2009	10,00,000	Sec. 114(iii) and 117
3.	C/292/2009	Manasa Impex Services	08/2009 dt. 28.5.2009	1,50,000	Sec. 114(iii)
4.	C/293/2009	Manasa Impex Services	09/2009 dt. 28.5.2009	70,000	Sec. 114(iii)
5.	C/294/2009	Manasa Impex Services	10/2009 dt. 28.5.2009	80,000	Sec. 114(iii)
6.	C/295/2009	Manasa Impex Services	11/2009 dt. 29.5.2009	60,000	Sec. 114(iii)
7.	C/296/2009	Manasa Impex Services	12/2009 dt. 29.5.2009	2,60,000	Sec. 114(iii)
8.	C/297/2009	Manasa Impex Services	13/2009 dt. 29.5.2009	40,000	Sec. 114(iii)
9.	C/298/2009	Manasa Impex Services	14/2009 dt. 29.5.2009	60,000	Sec. 114(iii)

19.1 Section 114 of the Act, is reproduced below for easy reference;

> **114. Penalty for attempt to export goods improperly, etc.** - Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 113, or **abets the doing or omission of such an act, shall be liable**,-
>
> (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act] *[Substituted by Act 32 of 2003, Section 117, for " not exceeding the value of the goods or five thousand rupees" (w.e.f. 14.5.2003). Earlier, these words were substituted by Act 14 of 2001, Section 108 (w.e.f. 11.5.2001).],* whichever is the greater;

> (ii) in the case of dutiable goods, other than prohibited goods, to a penalty [not exceeding the duty sought to be evaded or five thousand rupees] *[Substituted by Act 14 of 2001, Section 107, for certain words (w.e.f. 11.5.2001).]*, whichever is the greater;
>
> (iii) [in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.] *[Substituted by Act 32 of 2003, Section 117, for Clause (iii) (w.e.f. 14.5.2003).]*
>
> (emphasis added)

20. Appeal No. C/290/2009 was taken as the lead case and argued at the Bar by the rival parties, hence, it would be relevant to go through the findings in the said OIO. The findings against the appellant in the other OIO's are also near identical.

> "51. M/s. Manasa Impex Services, Coimbatore the CHA have failed to get authorization of the exporter and has not observed due diligence in verifying the correctness of the information given by their clients with regard to the particulars in the Shipping Bills. The conduct of the CHA is with total disregard to the trust vested with him by the statute, and such breach of trust is to be viewed seriously. The Hon'ble High Court of Delhi, in the case of Satish Gupta Vs. UOI (2007 (112) ELT 178 (Del)) and the Hon'ble High Court of Madras in the case of Sri Kamakshi Agency Vs. CC Madras [2001 (129) ELT 29 (Mad)) have come down heavily upon such erring CHAS. Both these cases have been upheld by the Hon'ble Supreme Court. M/s. Manasa Impex Have failed to exercise due diligence to ascertain the correctness of the information provided by the exporter, which is mandated upon them by statute. In the case R. Adhikesavan Vs. Commissioner of Customs, Chennai [2007(219) ELT 417 (Tri-Chennai)] the Hon'ble CESTAT, Chennai has observed that "the CHAs are not insignificant cogs in the wheel that moves the machinery of clearance of goods in India's trade with the rest of the world". They have also been instrumental in liasoning with the freight forwarders in getting the port of discharge changed, which has led to the goods becoming liable for confiscation and hence are liable for penal action under Section 114(iii) of the Customs Act, 1962."

21. Just as section 114 relates to exports, section 112 relates to the import of goods. This Tribunal has examined a similar issue with regard to section 112 of the Act, on the role of a CHA in the case of import of goods, in **M/s. Meticulous Forwarders Vs Commissioner of Customs, Chennai** [FINAL ORDER NOS. 40725 & 40726/2025, Dated: 14.07.2025]. The Tribunal speaking through one of us [Member (Technical), M Ajit Kumar], held as under;

"5. Blameworthy conduct by a CB can be subject to penal action both under the Customs Act 1962 and the Custom House Agents Licensing Regulations, 2004 (**Regulations**) as was in vogue at the relevant time. Any contravention by the CB of the obligations under the Regulations, even without intent would be sufficient to invite a penalty upon the CHA as stated in the Regulations, which could also extend to the more stringent provision of revocation of the Customs Brokers Licence. Hence the Regulations carves out a special treatment for acts of delinquency by the CB. Such actions are in essence disciplinary proceedings to ensure compliance with the regulatory provisions. [See: **SMS Logistics Vs Commissioner of Customs (General), New Customs House, New Delhi** - 2024 (387) E.L.T. 157 (Del.); **M/s. Raj Brothers Shipping Pvt. Ltd. Vs Commissioner of Customs (Import)** – CESTAT, Chennai, FINAL ORDER NO. 40631/2025, Dated: 20.06.2025]. However, any person including a CHA may be involved in blame worthy acts with the intention of helping the importer/ exporter evade payment of duty, by entering into a conspiracy/ collusion with an importer/ exporter or abetting them to defraud the exchequer etc. In such cases the cause of action is different from the role of a CHA under the Regulations and penal action can be taken under the Customs Act 1962. Moreover, if violations of both the laws are evident then action taken under the Customs Act shall be without prejudice to the action taken under the Regulations and the proceedings can, if the situation warrants, go on simultaneously.

6. When the legislature makes a special law, the presumption is that a general enactment is not intended to interfere with the special provision unless that intention of the legislature is stated very clearly. The specific prevails over the general. Each enactment must be construed in that respect according to its own subject matter and its own terms. The Hon'ble Supreme Court in **COMMERCIAL TAX OFFICER, RAJASTHAN v. M/S BINANI CEMENT LTD. & ANR.** [(2014) 3 S.C.R. 1] while examining this issue sated as under;

> 29. **It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed.** This principle finds its origins in the Latin maxim of *generalia specialibus non derogant*, i.e., general law yields to special law should they operate in the same field on same subject. (Vepa P. Sarathi, Interpretation of Statutes, 5th Ed., Eastern Book Company; N. S. Bindra's Interpretation of Statutes, 8th Ed., The Law Book Company; Craies on Statute Law, S.G.G.Edkar, 7th Ed., Sweet & Maxwell; Justice G.P. Singh, Principles of Statutory Interpretation, 13th Ed., LexisNexis; Craies on Legislation, Daniel Greenberg, 9th Ed., Thomson Sweet & Maxwell, Maxwell on Interpretation of Statutes, 12th Ed., Lexis Nexis)
>
> (emphasis added)

Based on this understanding we can examine the facts of this case.

*****. *****. *****

8. The penal provision of section112(a) of the Customs Act, 1962 which has been invoked in the impugned order, is reproduced below for ease of reference;

> **112. Penalty for improper importation of goods, etc.**
> Any person,-
>
> (a) who, in relation to any goods, **does or omits to do any act** which act or omission would **render such goods liable to confiscation** under section 111, or **abets** the doing or **omission** of such an act, or
>
> (b) . . . .
>
> (emphasis added)

9. An agreement between two or more persons to do an illegal act or legal acts by illegal means is a criminal conspiracy. The impugned order speaks of "active collusion" with the High Sea Sellers. Collusion involves a 'conspiracy' or an act of 'abetment'.

10. It is seen that words like 'omission' and 'abets' appearing in section 112(a)are not defined under the Customs Act, 1962. When a word is not defined under a Central Act, its meaning can be ascertained from the definition given under clause 3 of the **General Clauses Act**, **1897**, unless there is anything repugnant in the subject or context. The said Act defines 'abet' to have the same meaning as in the Indian Penal Code,1860 (IPC). The provisions of the Indian Penal Code, as they then stood, are not strictly applicable in quasi-judicial proceedings, as it was the main criminal code for the country while the Customs Act is a special statute dealing with tax matters. However, since the Customs Act does not define acts done by persons acting jointly to commit an offence or an actionable wrong, as is being made out in the above case, it may be relevant to look at certain sections of the Indian Penal Code as it then stood, to understand the legal issues involved;

> **S. 34. Acts done by several persons in furtherance of common intention. --** When a criminal act is done by several persons in furtherance of the **common intention** of all, each of such persons is liable for that act in the same manner as if it were done by him alone.
>
> *****. *****. *****
>
> **S.107. Abetment of a thing** – A person **abets** the doing of a thing, who –
>
> First. – Instigates any person to do that thing; or
>
> Secondly. – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or **illegal omission** takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly. – **Intentionally aids**, by any act or **illegal omission**, the doing of that thing.
>
> Explanation 1. – A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or

> procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
>
> Explanation 2.– Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."
>
> *****. *****. *****
>
> **S. 120-A. Definition of criminal conspiracy**. - **When two or more persons agree to do, or cause to be done**,-
>
> (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.
>
> Explanation - It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.
>
> (emphasis added)

> "The above provisions apart from showing the requirement of mens rea also involve a 'common intention'. Hence to show 'active collusion' it has to also be shown that there was a common intention amongst the alleged collaborators involved in the evasion of duty. Further abetment involves a process of instigating or aiding another person to do a particular thing.
>
> 11. It is true that the provisions of the IPC are not directly applicable to the Customs Act, 1962. The two Acts operate in their own fields. One deal with criminal matter and the other with issue of taxation, where mens rea may not always require to be shown for the imposition of penalty. Further, it is seen that sec. 112 of the Customs Act, 1962 speaks of 'omission' only whereas section 107 of the IPC refer to 'illegal omission'. Hence there is a difference in subject or context between the two Acts. Even if that be so, the sections of the IPC mentioned above gives a sense of the basic ingredients of the terms 'abet' and 'omission' which would approximate to the use of term 'active collusion' mentioned in the impugned order."

After examining the law, the order went on to state that the situations in which section 112 ibid would be applicable in the case of a CHA. It held:

> "14. It may be gainfully shown that some of the omissions and commissions of the appellant, as alleged above, ultimately facilitated or aided the clandestine clearance of the imported goods. However when the legislature makes a special law in the form of a Regulation, it is not enough that the CB did not do what is lawfully expected of him under the Regulations and which others have made an unlawful

> use of, to rope the CB under the penal provision of the Customs Act. It has to be shown that the act was done in reference to their common intention to do an illegal act or that the CB had a stake in the outcome of the illegality. In other words, the act or stake was not just a violation of his obligation as a CB but was done with knowledge of the illegality. The evidence in this regard can be both / either, direct or circumstantial so long as common intent is discernable."

22. There is nothing in para 51 of the OIO, extracted above, to show that the CHA/ CB had allegedly not only failed to act as per his responsibilities under the CHALR, but beyond it as well. The alleged mastermind, Shri Gunasekhar nor Shri R. Soundrajan have implicated the appellant, nor did the appellant admit to any wrongdoing, in abetting the offence or of colluding with the said persons etc or benefitting from any blame worthy act. If a CHA/CB fails to act within his duties, disciplinary action falls under CHALR; only abetting or collusion or wrongful involvement beyond those duties will call for invoking section 114 of the Act, as discussed in **M/s. Meticulous Forwarders** (supra). Therefore, the penalty against the appellant-CHA/CB does not stand and requires to be set aside.

23. In one of the OIO's [07/2009 dt. 27.5.2009], a penalty has been imposed on the appellant under section 117 of the Act. The section reads as under;

> 117. **Penalties for contravention, etc., not expressly mentioned**.
>
> - Any person who contravenes any provision of this Act **or abets any such contravention** or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding [one lakh rupees] [Substituted by Act 18 of 2008, Section 70, for " ten thousand rupees" .]. (emphasis added)

We find that the section pertains to an act for which no express penalty is elsewhere provided for such contravention or failure. The section will not apply to the present case where allegations against the appellant pertain to their duties as a CHA/ CB and are covered by the CHALR

which is a special law and will prevail over a general provision. Further the section also includes the act of abetment, which has not been demonstrated by revenue to have been done by the appellant. Hence the charge fails and the section is of no relevance to the facts of the case.

24. For the reasons discussed and based on the facts of each case, the penalty imposed on the appellant in the OIO's listed above, is set aside. The appellant is eligible for consequential relief, if any, as per law. The appeals are disposed of accordingly.

(Order pronounced in open court on 21.08.2025)

(**M. AJIT KUMAR**)
Member (Technical)

(**P. DINESHA**)
Member (Judicial)

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