2024 INSC 854

REPORTABLE

IN THE SUPREME COURT OF INDIA

INHERENT JURISDICTION

REVIEW PETITION NO. 400 OF 2021

IN

CIVIL APPEAL NO. 1827 OF 2018

COMMISSIONER OF CUSTOMS **...PETITIONER**

VERSUS

M/S CANON INDIA PVT. LTD. **...RESPONDENT**

WITH

C.A. No. 6142 OF 2019

C.A. No. 6161 OF 2019

C.A. No. 6160 OF 2019

C.A. No. 6159 OF 2019

C.A. No. 8828 OF 2016

C.A. No. 6157 OF 2019

C.A. No. 6158 OF 2019

C.A. No. 9313 OF 2016

C.A. No. 9406 OF 2016

C.A. No. 6153 OF 2019

C.A. No. 9315 OF 2016

C.A. No. 10140 OF 2016

C.A. No. 9436 OF 2016

C.A. No. 9317 OF 2016

C.A. No. 10012 OF 2016

C.A. No. 10739 OF 2016

C.A. No. 10422 OF 2016

C.A. No. 10421 OF 2016

C.A. No. 10991 OF 2016

C.A. No. 10952 OF 2016

C.A. No. 12345 OF 2016

C.A. No. 6149-6152 OF 2019

C.A. No. 430 OF 2017

C.A. No. 8749 OF 2016

C.A. No. 6127 OF 2019

C.A. No. 8752 OF 2017

C.A. No. 6139-6140 OF 2019

C.A. No. 6143 OF 2019

C.A. No. 6148 OF 2019

C.A. No. 6248 OF 2019

C.A. No. 6156 OF 2019

C.A. No. 7292 OF 2019

C.A. No. 2666-2695 OF 2020

C.A. No. 1738 OF 2021

R.P.(C) No. 402 OF 2021 in C.A. No. 1875 OF 2018

R.P.(C) No. 403 OF 2021 in C.A. No. 1832 OF 2018

R.P.(C) No. 401 OF 2021 in C.A. No. 3213 OF 2018

S.L.P.(C) No. 2504 OF 2022

C.A. No. 2367-2368 OF 2022

C.A. No. 10788 OF 2024

C.A. No. 3253 OF 2017

C.A. No. 10873 OF 2024

C.A. No. 10819 OF 2024

C.A. No. 4559 OF 2022

C.A. NO. OF 2024 @ SLP(C) No. 12970 OF 2022

W.P.(C) No. 501 OF 2022

W.P.(C) No. 499 OF 2022

W.P.(C) No. 502 OF 2022

W.P.(C) No. 504 OF 2022

W.P.(C) No. 522 OF 2022

W.P.(C) No. 507 OF 2022

W.P.(C) No. 526 OF 2022

W.P.(C) No. 534 OF 2022

W.P.(C) No. 537 OF 2022

W.P.(C) No. 548 OF 2022

W.P.(C) No. 575 OF 2022

W.P.(C) No. 566 OF 2022

W.P.(C) No. 568 OF 2022

C.A. No. 10698 OF 2024

C.A. No. 10693 OF 2024

C.A. NO. 10752 OF 2024

C.A. NO. 10697 OF 2024

C.A. No. 10753 OF 2024

C.A. No. 10754 OF 2024

C.A. No. 10755 OF 2024

C.A. No. 10712 OF 2024

C.A. No. 10756 OF 2024

C.A. No. 10757 OF 2024

C.A. No. 10710 – 10711 OF 2024

C.A. No. 10758 OF 2024

C.A. No. 10759 OF 2024

C.A. No. 10760 OF 2024

C.A. No. 10709 OF 2024

C.A. No. 10761 OF 2024

C.A. No. 10762 OF 2024

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C.A. No. 10765 OF 2024

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C.A. No. 10767 OF 2024

C.A. No. 10768 OF 2024

C.A. No. 10769 OF 2024

C.A. No. 10770 OF 2024

C.A. No. 10771 OF 2024

C.A. No. 10772 OF 2024

C.A. No. 10774 OF 2024

C.A. No. 4566 OF 2022

C.A. No. OF 2024 @ S.L.P. OF 2024 @ Diary No. 33597/2022

C.A. No. 10707 - 10708 OF 2024

C.A. No. 10781 OF 2024

C.A. No. 10854 OF 2024

C.A. No. 10694-10695 OF 2024

R.P.(C) No. 155 OF 2022 in C.A. No. 3411 OF 2020

R.P.(C) No. 1289 OF 2021 in C.A. No. 5053 OF 2021

C.A. No. 10782 OF 2024

C.A. No. 10784 OF 2024

C.A. No. 10785 OF 2024

C.A. No. 10706 OF 2024

C.A. No. 10705 OF 2024

C.A. No. OF 2024 @ SLP(C) No. OF 2024 @ Diary No. 30895 OF 2022

C.A. No. 10699 - 10704 OF 2024

C.A. No. 10786 OF 2024

C.A. No. 10787 OF 2024

C.A. No. OF 2024 @ S.L.P.(C) No. OF 2024 D. No. 38691 OF 2022

C.A. NO.10845 OF 2024

C.A. No. 10809 OF 2024

T.P.(C) No. 1576-1597/2023

WP (C) D. No. 37678 OF 2024

WP (C) D. No. 37700 OF 2024

J U D G M E N T

J.B. PARDIWALA, J.:

For the convenience of exposition, this judgment is divided into the following parts: -

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1. Since the pivotal question of law involved in all the captioned petitions is the same, they were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Review Petition No. 400 of 2021 filed by the Customs Department is treated as the lead matter.

3. This Review Petition has been filed by the Customs Department through the Commissioner of Customs, New Delhi (the "**Department**") under Order XLVII of the Supreme Court Rules, 2013 seeking review of the judgment and order dated 09.03.2021 passed by this Court in Civil Appeal No. 1827 of 2018 titled ***M/s Canon India Private Ltd. v. Commissioner of Customs***.

A. FACTUAL BACKGROUND OF THE REVIEW PETITION

4. A two-Judge Bench of this Court in the case of ***Commissioner of Customs v. Sayed Ali and Another*** reported in **(2011) SCC 537,** had held that the Commissioner of Customs (Preventive) is not a "proper officer" as defined in Section 2(34) of the Customs Act, 1962 ("**the Act, 1962**") and therefore did not have the jurisdiction to issue a show cause notice in terms of Section 28 of the Act, 1962. The Court observed that while all proper officers must be "officers of customs", all "officers of customs" are not proper officers. It also held that only those officers of customs who were assigned the functions of assessment, which would include re-assessment, working under the

jurisdictional collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and consignments had been cleared for home consumption, would have the jurisdiction to issue show cause notice under Section 28 or else it would lead to a situation of utter chaos and confusion, in as much as all officers of customs in a particular area, be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would fall under the definition of "proper officers". Section 2(34) is extracted below:

> *"(34) proper officer in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs"*

5. As a result of the decision in ***Sayed Ali*** *(supra)*, the Central Board of Excise and Customs (the "**Board**") issued Notification No. 44/2011-Cus-NT dated 06.07.2011 under Section 2(34) of the Act, 1962, assigning the functions of the "proper officers" to the Commissioners of Customs (Preventive), Directorate of Revenue Intelligence ("**DRI**"), Directorate General of Anti Evasion ("**DGAE**") and Officers of Central Excise. The notification specified that it would operate prospectively. With a view to account for the past periods, Section 28(11) was introduced *vide* the Customs (Amendment and Validation) Act, 2011 (Act No.14 of 2011) dated 16.09.2011 by virtue of which all persons appointed as Officers of Customs under sub-section (1)

of Section 4 before the 06.07.2011 were deemed to have and always had the power of assessment under Section 17 and were deemed to be and always have been "proper officers" for the purpose of the said section.

6. The constitutional validity of Section 28(11) of the Act, 1962, came to be challenged before the High Court of Delhi in the case of ***Mangali Impex Ltd. v. Union of India*** reported in **(2016) SCC Online Del 2597** and a batch of matters were disposed of by the High Court *vide* a common judgment on 03.05.2016.

7. The High Court held that although Section 28(11) of the Act, 1962 begins with a *non-obstante* clause, it neither explicitly nor implicitly seeks to overcome the legal position brought about by Explanation 2 which states that the cases of non-levy, short-levy or erroneous refund prior to 08.04.2011 would continue to be governed by the unamended Section 28 of the Act, 1962 as it stood prior to said date. On this basis, it held that the newly enacted Section 28(11) would not empower officers of DRI or DGAE to either to adjudicate the show-cause notices already issued by them for the period prior to 08.04.2011 or to issue fresh show-cause notices for said period.

8. The High Court also held that Section 28(11) of the Act, 1962 is overbroad in as much as it confers jurisdiction on a plurality of officers on the same subject matter which may result in utter chaos, unnecessary harassment and

conflicting decisions. It held that such untrammelled power would be arbitrary and violative of Article 14 of the Constitution. The issue as to the constitutional validity and effect of Section 28(11) of the Act, 1962 was answered accordingly. The Department preferred an appeal against the decision in ***Mangali Impex*** *(supra)* in Civil Appeal No. 6142 of 2019 before this Court and *vide* order dated 01.08.2016, a two-Judge Bench of this Court stayed the operation of that decision.

9. The constitutional validity of Section 28 (11) of the Act, 1962 was also challenged before the High Court of Bombay in the case of ***Sunil Gupta v. Union of India and Others*** reported in **(2014) SCC Online Bom 1742**. The two-Judge Bench *vide* its Judgement dated 03.11.2014 held thus:

> *"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities. Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28(11) is distinct and that is about competence of the officer. The*

> *officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail."*

10. Since the decision in ***Sunil Gupta*** *(supra)* was anterior in time, the same was relied upon by the Department before the High Court of Delhi during the hearing in ***Mangali Impex*** *(supra)*. However, the High Court of Delhi did not agree with the view taken therein.

11. A batch of four statutory appeals came to be decided by this Court on 09.03.2021 in ***Canon India*** *(supra)* wherein this Court decided the following two issues – *first*, whether the officers of DRI would be "proper officers" under Section 2(34) for the purposes of Sections 17 and 28 of the Act, 1962 respectively; and *second*, whether such officers are empowered to issue show cause notices demanding customs duty under section 28 of the Act, 1962. To elaborate:

    (a) Whether the Directorate of Revenue Intelligence (DRI) had the legal authority to issue a show cause notice under Section 28(4) of the Act, 1962, when the goods were cleared for import by a Deputy Commissioner of Customs (who had decided that the goods are exempted from being taxed on import)?

(b) Whether an Additional Director General of DRI, who has been appointed as an "officer of Customs" under the Notification dated 07.03.2002, has been entrusted with the functions of "the proper officer" for the purpose of Section 28 of the Act, 1962?

12. This Court while disposing of the aforesaid batch of matters proceeded to reiterate the principles laid down in ***Sayed Ali*** *(supra)* that only such officers who are vested with the power of assessment under Section 17 can be empowered to issue show cause notices under Section 28 or else this would result in a state of chaos and confusion. It also held that unless it is shown that the officers of DRI are at the first instance, customs officers under the Act, 1962 and are entrusted with the functions of a proper officer under Section 6 of the Act, 1962, they would not be competent to issue show-cause notices. It was held that, since no entrustment was made under Section 6 of the Act, 1962, the officers of DRI who were not otherwise officers of customs, could not have been assigned as the "proper officers".

13. It also observed that from a conjoint reading of Section 2(34) and Section 28 respectively of the Act, 1962, it is manifest that only such a custom officer who has been assigned the specific functions of assessment and reassessment in the jurisdictional area where the import concerned has been affected, either by the Board or the Commissioner of Customs, in terms of

Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.

14. It appears from the decision in ***Canon India*** *(supra)* that the Notification No. 44/2011-Cus-NT dated 06.07.2011 designating officers of DRI as "proper officers" for the purposes of both Sections 17 and 28 of the Act, 1962 respectively; the introduction of Section 28(11) *vide* the Validation Act, 2011 introducing Section 28(11) empowering such officers for the period prior to 06.07.2011; the statutory scheme as envisaged under Sections 3, 4, 5 and 2(34) of the Act, 1962 respectively; and the pendency of the appeal against the decision in ***Mangali Impex*** *(supra)* and the stay of the operation of the said decision by this Court was either not noticed or not brought to the notice of the Court.

15. The Department preferred the present Review Petition against the judgement delivered in ***Canon India*** *(supra)* on 09.03.2021. This judgement was followed in other cases adjudicated by this Court and the High Courts, resulting in various other Review Petitions, Special Leave Petitions and Civil Appeals. This Court *vide* order dated 15.02.2022 in the present Review Petition allowed an open court hearing to be conducted and after hearing the parties, issued notice on the Review Petition *vide* order dated 19.05.2022. A co-ordinate Bench of this Court later in ***Union of India and Another v.***

Godrej and Boyce Manufacturing **(SLP (C) No. 1513/2022)** through order dated 11.02.2022 also issued notice.

16. The aforesaid developments led to a hiatus. As a result, the appeals pending before the Tribunals and other authorities could not be decided. This necessitated the introduction of the following provisions by Parliament: Sections 86, 87 and 88 in the Finance Act, 2022 (Act No. 6 of 2022) to amend Sections 2(34), 3 and 5 of the Act, 1962 respectively. Further, Sections 94 and 97 of the Finance Act, 2022 introduced a new Section 110AA and a validation enactment respectively. These amendments came to be challenged before this Court in **W.P. (C) 526 of 2022** titled ***Daikin Air Conditioning India Pvt. Ltd v. Union of India.***

17. The present batch comprises of three clusters of matters:

    (i) The Review Petitions in the ***Canon India*** *(supra)* batch;

    (ii) The ***Mangali Impex*** *(supra)* appeal and other appeals pending before this Court on the issue of whether the officers of DRI would be proper officers in light of Section 28(11); and

    (iii) The petitions challenging the constitutional validity of Section 97 of the Finance Act, 2022.

B. SUBMISSIONS ON BEHALF OF THE DEPARTMENT

18. Mr. N. Venkataraman, the learned Additional Solicitor General of India, made extensive submissions on the following broad issues –

(i) The Review Petitions filed in the case of ***Canon India*** *(supra)* are maintainable as there is an error apparent on the face of the record.

(ii) The decision rendered by this Court in ***Sayed Ali*** *(supra)* requires reconsideration.

(iii) The decision rendered by the Delhi High Court in ***Mangali Impex*** *(supra)* should be overruled and the view expressed by the Bombay High Court in ***Sunil Gupta*** *(supra)* should be upheld.

(iv) The changes introduced by the Finance Act, 2022 are merely clarificatory in nature and the crux of the issue before the Court can be answered without reference to and reliance upon the changes introduced by the said Act.

i. Error apparent in the judgment under review

19. It was submitted that the judgement rendered by this Court in ***Canon India*** *(supra)* requires review as there are errors apparent on the face of the record. The Ld. ASG submitted that it is equally important that the legality and validity of the decision rendered by the High Court of Delhi in ***Mangali Impex*** *(supra)* which is a part of the present batch of pending appeals be considered since the issues in both ***Canon India*** *(supra)* and ***Mangali Impex***

(supra) are one and the same. He submitted that the fact that an appeal against ***Mangali Impex*** *(supra)* was pending before this Court and that the operation of the said judgement was stayed went unnoticed in ***Canon India*** *(supra)*. He submitted that this would have a direct bearing both in the review and in the batch of appeals before this Court.

20. He submitted that ***Canon India*** *(supra)* proceeded on the assumption that DRI officers are not officers of Customs and therefore need to be entrusted with such powers under Section 6 of the Act, 1962 and only upon such entrustment, the functions of a proper officer can be assigned to them. This, he submitted, is in the teeth of the provisions of the Act, 1962 more particularly Sections 3, 4, and 5 thereof. He further submitted that there is no discussion worth the name on these provisions as regards its applicability to the DRI officers who are none other than a class of officers of customs under Section 3 appointed pursuant to Section 4 and consequently, no entrustment is required under Section 6. He submitted that Section 6 would come into play for such of those officers of the Central or State Government or Local Authority, who are not a class of officers of customs under Section 3 appointed in accordance with Section 4 of the Act, 1962. He explained this clear distinction between the two provisions by relying on the notifications issued under Section 4 of the Act, 1962 proclaiming DRI officers to be a class of officers of Customs under Section 3 of the Act.

21. He submitted that this Court erred in not taking into consideration Sections 3, 4 and 5 of the Act, 1962 respectively and its interplay, if any, with Section 6, as duly indicated by the notifications issued from time to time. More particularly, the Court did not take into account the origin and history of the DRI and how it was always a part of the Ministry of Finance since its inception except for a brief period between 1970 and 1977.

22. He adverted to Sections 3, 4, 5 and 6 of the Act, 1962 respectively along with the relevant notifications issued under the respective provisions. The provisions and relevant notifications are reproduced hereinbelow:

Section 3 as introduced in 1962:

"3. There shall be the following classes of officers of custom namely: —
(a) Collectors of Customs;
(b) Appellate Collectors of Customs;
(c) Deputy Collectors of Customs;
(d) Assistant Collectors of Customs; and
(e) such other class of officers of customs as may be appointed for the purposes of this Act."

The provision was amended by the Finance Act, 1995 and underwent only one change wherein the expression 'collector' was replaced by the expression 'commissioner'. The amended provision reads as under:

"3. Classes of officers of customs.-
There shall be the following classes of officers of customs, namely.-
(a) Chief Commissioners of Customs;
(b) Commissioners of Customs;
(c) Commissioners of Customs (Appeals);

(d) Deputy Commissioners of Customs;"

23. He submitted that Section 3 refers to the class of officers of customs. All officers of the same rank irrespective of the functions and roles they play would fall under Section 3 as class of officers of customs. Class in this sense would refer to the same rank.

24. Sections 4 and 5 of the Act, 1962 are extracted below:

> **Section 4:**
> *"(1) The Board may appoint such persons as it thinks fit to be officers of customs.*
>
> *(2) Without prejudice to the provisions of sub-section (7), the Board may authorise a Commissioner of Customs or a Deputy or Assistant Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.*"
>
> **Section 5:**
> *"(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge custom the duties conferred or imposed on him under this Act.*
>
> *(2) 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.*
>
> *(3) Notwithstanding anything contained in this section, an Appellate Collector of Customs shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and section 108."*

25. Section 4 relates to appointment of officers of customs and Section 5 deals with the powers and duties of officers of customs. There is only one significant change carried out in Section 4 on 11.05.2002. Prior to that date, the appointing Authority was the Central Government and post 11.05.2002, the Board became the appointing Authority.

26. Some of the relevant notifications issued under Sections 4 and 5 of the Act, 1962 respectively are reproduced below:

> *"**G.S.R. 214–** In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints—*
>
> *(a) the officers specified below to be Collectors of Customs within their respective jurisdictions, namely:—*
>
> *1. Director, Directorate of Revenue Intelligence.*
>
> *2. Collector of Customs and Central Excise, Cochin.*
>
> *3. Collectors of Land Customs and Central Excise, Delhi, Calcutta and Shillong.*
>
> *4. Collectors of Central Excise, Baroda, Bombay, Poona, Bangalore, Madras, Hyderabad, Calcutta, Nagpur, Patna, Allahabad and Kanpur.*
>
> *(b) the Deputy Collectors posted under the Collectors specified in clause (a) to be Deputy Collectors of Customs within their respective jurisdictions;*
>
> *(b) the Assistant Collectors posted under the Collectors specified in clause (a) to be Assistant Collectors of Customs within their respective jurisdictions.*
>
> *[No. 37/F. No. 4/1/63-CAR]*

G.S.R. 215*-In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints the following persons to be officers of Customs, namely:-*

1. Principal Appraisers, Appraisers, Examiners, Chief Inspectors, Additional Chief Inspectors, Inspectors, Preventive Officers, Women searches, Mnisterial officers and Class IV officer in the Customs Department at Bombay, Calcutta, Madras, Cochin, Visakhapatnum and Kandla.

2. Reverificadors, Verficiadores, Appraisers, Preventive Inspectors, Preventive Officers, Officials Probationary Officials, Fiscal Guards, Cabos, Sub-Chefes, and Auxiliaries of the Technical Cadre, borne on the establishment of Customs and Central Excise Admnistration, Goa.

3. Superintendents, Deputy Superintendent, Inspectors, Sub-Inspectors, women searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs-port, Customs-airport, land-customs station, coastal port, Customs Preventive post, Customs Intelligence post or a Customs warehouse.

4. Superintendents, Duty Superintendents and Inspectors of Central Excise Department in any place in India.

5. All officers of the Directorate of Revenue Intelligence.

[No. 38/F. No. 4/1/63-CAR.]"

27. Our attention was specifically drawn to S. No. 1 of GSR 214 as extracted above wherein the Central Government appointed the Director, Directorate of Revenue Intelligence as an officer of customs and also to S. No. 5 of GSR

215 by which the Central Government appointed all the officers of DRI as officers of customs.

28. He also placed before us the origin and history of the DRI as a part of the Ministry of Finance. From 04.12.1957 till 24.06.1970, DRI was with the Ministry of Finance. From 25.06.1970 to 28.07.1970, it was with the Ministry of Home Affairs. Between 29.07.1970 and 06.04.1977, it was with the Cabinet Secretariat and from 07.04.1977 onwards, DRI has remained with the Ministry of Finance.

29. Placing reliance on the decision of the Delhi High Court in the case of ***S.K. Srivastava v. Union of India*** reported in **1971 SCC OnLine Del 134**, he submitted that DRI was always a part of the Customs Department, working under a common Board and the Ministry of Finance. The relevant paragraphs from this decision are extracted below:

> *"(2) Therefore, on 3-12-1970 the order dated 27-7-1970 was cancelled.*
> *(3) On 16-12-1970 the President was pleased to order that the petitioner "be posted as Collector of Central Excise, Hyderabad".*
> *The petitioner however refused to join his posting at Hyderabad and has filed the present writ petition challenging his transfer from the post of Director of Revenue Intelligence to the post of Collector of Customs as being illegal and unconstitutional.*
> *Let us first consider the legality of the transfer. Under Article 310 of the Constitution, the petitioner held office during the pleasure of the President. The conditions of service of the petitioner could be regulated by Parliament by legislation under Article 309 of the*

Constitution. In the absence of such legislation the President could also frame rules to do so under the proviso to Article 309. But neither any such legislation nor any such rules exist. The formation of the Indian Customs and Central Excise Service Class I was itself brought about by purely executive action. It is well-established that the administration of service by the Government of India can be carried on by executive instructions and executive action even though no statute or statutory rules may have been made.

The distinction between the personnel forming a Service and the posts which may be manned by the members of such a Service has to be noted at the outset in this case. The petitioner along with others belong to the Indian Customs and Central Excise Service Class I. The members of this Service stood in relation to each other in a particular order of seniority. There was no statute or rules, however, restricting the appointments of the members of the Service to any particular post. Initially the officers of the Collectorate of Customs and Excise working under the Ministry of Finance, Department of Revenue, used to do all the work relating to customs and excise. In 1939, the work of inspection in the Departments of Customs and Central Excise which was till then performed by the departments themselves as carved out and given to a separate Directorate of Inspection (Customs and Central Excise) as a part of the office of the Central Board of Revenue which was formed by an Act of 1924 and which was split later by an Act of 1963 into two Boards, namely:—

(a) Board of Direct Taxes under which functions the Department of Income-tax;

(b) The Central Board of Excise and Customs under which functioned the Collectorates of Customs and Central Excise, Directorate of Inspection and Directorate of Revenue Intelligence.

It was in 1957 that the intelligence work till then performed by the Central Revenue Intelligence Bureau functioning as a unit in the Directorate of Inspection, was constituted as a third unit in the Department of Revenue, Ministry of Finance styled as

Directorate of Revenue, Intelligence. All this and more information is contained in the Government publication Organisation Set-up and Functions of the Ministries/Departments of the Government of India ", 4th Edition, 1968, pages 68-70 (Annexure R XIII).

As the work of Directorates of Inspection and Revenue Intelligence has been carved out from the work originally performed by the Collectorates of Customs and Central Excise and as no separate personnel was recruited to man the posts in these two Directorates, the members of the Indian Customs and Central Excise Service Class I have been manning those posts. There have been therefore numerous transfers of officers of the Indian Customs and Central Excise Service Class I from their posts in the Collectorates to the subsequently created posts in the Directorates. Equally frequently these officers have been transferred back to the posts in the Collectorates. The important fact to be noted is that only one set of personnel originally recruited for the Customs and Central Excise Collectorates has been used to fill the posts not only in the Collectorates but also in the Directorates. The reason is obvious. The Central Board of Excise and Customs in 1963 and prior to that the Central Board of Revenue functioning as a part of the Department of Revenue, Ministry of Finance of the Government of India administered and controlled the work of the Collectorates of Customs and Central Excise as well as of the Directorates of Inspection and Revenue Intelligence. These three units form one whole working under the Board and the Ministry. This position is reflected in the following documents:—

(1) The Central Civil Services [Revised Pay Rules, 1960 (Annexure R xiv)] have a Schedule in which the various posts which could be manned by the Central Civil Services are shown with the emoluments attached to those posts. In this Schedule section 10 forms the Ministry of Finance (Department of Revenue)…."

[emphasis supplied]

30. Having adverted to Sections 3, 4 and 5 of the Act, 1962, he submitted that the officers of DRI would fall under Section 3 as "class of officers" and under Section 4 as "officers of customs" and that the Board is empowered to assign and fix powers and assign duties to such DRI officers similar to other classes of officers and officers of customs.

31. In the aforesaid context, he submitted that having failed to advert to these three sections and the various notifications referred to above, this Court erred in placing sole reliance on Section 6 of the Act, 1962 to conclude that DRI officers are not officers of customs as they belong to a different department and require specific entrustment under Section 6 of the Act, 1962 by the Central Government before the powers of a proper officer under Section 2(34) of the Act, 1962 can be assigned to them. Section 6 is reproduced below:

> "*(6) The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act.*"

32. He submitted that the question of entrustment would arise only in relation to an officer of Central or State Government or Local Authority who does not fall within the class of officers of customs under Section 3 appointed under Section 4 of the Act, 1962. Some instances of the Central Government entrusting such functions of customs officers under Section 6 are M.F.

(D.R.) Notification No. 161-Cus dated 22.06.1963 and M.F.(D.R.&I.) Notification No. 33-Cus., dated 27.04.1974 which entrusted functions of customs officer to police officers in a particular jurisdiction and officers of the Border Security Force respectively. However, in the case of DRI officers, they would clearly fall under Sections 3, 4 and 5 of the Act, 1962 and the notifications conferring powers and duties are already on record.

33. Our attention was also drawn to Notification 161-Cus dated 22.06.1963 issued under Section 6 entrusting powers of search to DRI officers. As per Notifications GSR 214 and GSR 215 issued in the same year under Section 4 of the Act, 1962, all officers of DRI were appointed as officers of customs. Therefore, an inadvertent reference to Section 6 under Notification No. 161 dated 22.06.1963 should not lead to the drawing of any adverse inferences as at the highest, it may only be a case of misquoting of a Section. Secondly, till 11.05.2002, it was the Central Government which was the appointing authority under Section 4 for officers of customs as well as for entrustment under Section 6. It is only from 11.05.2002 that the powers under Section 4 were delegated to the Board since Notification No. 161 dated 22.06.1963 was issued prior to 11.05.2002 and the authority being the Central Government under both Sections, any incorrect reference to a provision would be totally inconsequential.

34. He submitted that by virtue of the aforesaid and also without reference to the Notification No. 44/2011 – Cus (N.T.) dated 06.07.2011, erroneous conclusions came to be rendered in paragraphs 17 to 23 of the decision under review. The findings in ***Canon India*** *(supra)* in paragraphs 13 and 14 respectively that DRI officers belong to a different department and therefore cannot become proper officers under Section 28, and if done so, would result in anarchical and unruly operation of the statute, too, is erroneous in light of the aforesaid submissions.

35. He further submitted that despite being a conceded position that issuance of a show cause notice under Section 28 is a quasi-judicial exercise of power, this Court fell in error in holding the same to be an administrative review in paragraph 15. The Court also erred in concluding that the expression "the proper officer" can only signify an officer empowered to undertake assessment and re-assessment under Section 17, by placing unfounded reliance on the decision in ***Consolidated Coffee Ltd. and Anr. v. Coffee Board, Bangalore*** reported in **1980 AIR 1468** as it relates to a totally different scenario envisaged under Article 286 read with Section 5 of the Central Sales Tax Act, 1956.

36. After pointing out the aforesaid aspects as errors apparent on the face of the record, he prayed that the present review petition be allowed.

ii. Why the decision in Sayed Ali (supra) requires reconsideration

37. He submitted that there are two fundamental errors in the dictum laid in ***Sayed Ali*** *(supra)* –

(i) *Firstly*, it casts an obligation that an officer of customs who is empowered to undertake assessment or reassessment under Section 17 alone is qualified to become a proper officer under Section 28 for the purpose of raising demand of short levy, non-levy or erroneous refund. No other officer can be assigned the functions of the proper officer under Section 28.

(ii) *Secondly*, the judgment was rendered in connection with officers of the Customs (Preventive), who were not assigned the powers and duties of a proper officer, and no notifications to this effect were produced or brought to the notice of this Court.

38. It was pointed out by him that ***Sayed Ali*** *(supra)* did not deal with DRI officers who were indeed vested with the powers of proper officers *vide* the Circular No. 437/9/98-Cus.IV dated 15.02.1999 issued by the Board in terms of Section 2(34). Under Section 2(34), the power of assigning functions of a proper officer to an officer of customs vests with the Board or the Commissioner of Customs. Since the Board issued this assignment, the DRI officers became proper officers with effect from 15.02.1999. As a result, the decision rendered in ***Sayed Ali*** *(supra)* which was with reference to only

Customs (Preventive) would have no application to the DRI and DGAE officers. The circular dated 15.02.1999 is reproduced hereinbelow:

"F. No. 437/9/98-Cus.IV

Circular No. 4/99-Cus
Dated 15/2/1999

Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Issuance of Show Cause Notice by the Officers of directorate of Revenue Intelligence - regarding-

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.

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.

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.

4. The Board has also decided that these instructions may kindly be brought to the notice of all departmental officers by issuing suitable standing orders.

Sd/-
(Rajendra Singh)
Under Secretary to the Government of India"

39. As regards the observations in ***Sayed Ali*** *(supra)* on the *inter se* link between Sections 17 and 28 of the Act, 1962 respectively, he submitted that no such mandate flows from either of the two sections and reading any such linkage into the scheme of the Act, 1962 would directly undermine the powers of search, seizure and investigation of the DRI officers under the Act, 1962 along with the assignment of functions as proper officers to issue show cause notices post such search and investigation. Although no disability is to be found in any provisions of the Act, 1962, yet ***Sayed Ali*** *(supra)* creates such an embargo and also proceeds to hold that empowering such officers to issue

show cause notices would result in multiple persons dealing with the same issue leading to utter chaos and confusion. He submitted that the Board has been issuing circulars and notifications from time to time with a view to ensure that no such overlap occurs. He also argued that the respondents have not adduced any evidence or empirical statistics to even remotely indicate that an importer has been visited with either multiple show cause notices or adjudication orders on the same subject.

40. He further submitted that the Board had vested DRI with the power to issue only show cause notices and the adjudication orders in furtherance of the show cause notices were to be passed by the respective port officers. In cases involving multiple ports, common adjudicators were assigned powers by the Board and later also by the DRI and these adjudicators never involved themselves either in the investigation of the case or in the issuance of show cause notices. In such circumstances, he submitted that both the findings in ***Sayed Ali*** *(supra)* require reconsideration.

41. He further drew our attention to Circular No. 18/2015 – Customs dated 09.06.2015 issued by the Board pertaining to the appointment of common adjudicating authority and the mode and manner of assignment of functions for adjudication with a view to avoid multiplicity or plurality. The same is extracted below:

"Circular No. 18/2015- Customs
F.No. 450/145/2014- Cus IV
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs

To
All Chief Commissioner of Customs / Customs (Preventive)
All Chief Commissioners of Customs and Central Excise
All Commissioners of Customs
All Commissioners of Customs and Central Excise

Sir / Madam,

Subject: Appointment of common adjudicating authority -regarding

Reference is invited to Notification No 60/2015-Customs (N.T.), dated 04.06.2015 whereby the power to appoint common adjudicating authority in cases investigated by DRI upto the level of Commissioner of Customs has been delegated to Principal Director General of Directorate of Revenue Intelligence in terms of section 152 of the Customs Act, 1962. This notification was issued in the interest of expediting decision making with resultant benefits to both trade and revenue in terms of faster settlement of outstanding disputes. These appointments were done hitherto by the Central Board of Excise and Customs under sections 4 and 5 of the Customs Act 1962.

2. In the light of the aforementioned notification, all cases of appointment of common adjudicating authority in respect of cases investigated by DRI will be handled by Principal DG, DRI. In this regard, the Board has prescribed the following guidelines for Principal DG, DRI:

(a) The following cases initiated by DRI shall be assigned to Additional Director General (Adjudication), DRI:

(i) Cases involving duty of Rs.5 crores and above;

(ii) Group of cases on identical issues involving aggregate duty of Rs.5 crores or more;
(iii) Cases involving seizure value of Rs.5 crores or more;
(iv) Cases of over-valuation irrespective of value involved; and
(v) Existing DRI cases with erstwhile Commissioner (Adjudication).
(b) Cases other than at (a) above involving more than one Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs on the basis of the maximum duty evaded;
(c) Cases other than at (a) above involving a single Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs;
(d) Non-DRI cases pending with erstwhile Commissioner (Adjudication) would be assigned to Additional Director General (Adjudication), DRI;
(e) Past DRI cases pending for adjudication with jurisdictional Commissioners of Customs would continue with these officers;
(f) Remand cases would be decided by the original adjudicating authority.
3. All other cases of appointment of common adjudicator i.e. other than the cases mentioned in paragraph 2 above would continue to be dealt by the Board. This would include cases made by Commissionerates or cases made by DRI wherein the adjudicating officer is an officer below the level of Additional Director General (Adjudication), DRI.
4. Board has also decided that all the pending cases where common adjudicating authorities have not been appointed so far or where the common adjudicating authorities have been appointed but adjudications have not been done should be disposed of expeditiously in terms of aforementioned guidelines. However, while doing so in regard to the latter category of cases, Principal DG, DRI will take into consideration the fact whether or not personal hearings have taken place and the stage of passing the adjudication order. This is to ensure that cases about to be finalized are not reallocated to another adjudicating authority thereby

defeating the objective of expediting the finalization of disputes.
5. Difficulty faced, if any, may be brought to the notice of the Board at an early date.

Yours faithfully
(Pawan Khetan)

OSD (Customs IV)"

42. He also brought to our notice similar notifications and circulars issued subsequently to plead that all steps have been taken with a view to ensure that there is no overlap of jurisdiction. In the absence of any evidence or proof adduced by the importer, the dictum as laid in ***Sayed Ali*** *(supra)* declaring that this would result in utter chaos and confusion and only such officers vested with the power of assessment and re-assessment can issue notices under Section 28, requires reconsideration.

iii. <u>The decision in *Mangali Impex (supra)* is liable to be set aside and the decision in *Sunil Gupta (supra)* ought to be affirmed</u>

43. He submitted that the decision in ***Mangali Impex*** *(supra)* too observed that the assignment of powers to DRI officers for issuing show cause notices under Section 28 of the Act, 1962 would create a situation of utter confusion and chaos and declared Section 28(11) of the Act, 1962 to be unconstitutional for being violative of Article 14 owing to its inherent arbitrariness. The decision also directed the Department to issue suitable instructions and ensure avoidance of multiplicity or plurality of proceedings. He submitted that the instructions have been scrupulously followed and

complied with since 1999 through various notifications and Board circulars, thereby avoiding any overlap. He submitted that it was because of this reason that the importers were not able to produce any material to support such adverse inferences. Thus, he submitted that the decision in ***Mangali Impex*** *(supra)* also deserved to be set aside.

44. On the correctness of the decision in ***Mangali Impex*** *(supra)*, he further submitted that the reasoning in the decision i.e., the Validation Act, 2011 does not extend its non-obstante clause to anything contained elsewhere in the same statute or in any other law for the time being in force, is incorrect and not legally unsustainable. On the finding of the High Court that since Explanation 2 remains on the statute even after the insertion of Section 28(11), it places an embargo for the period prior to 08.04.2011, for the application of Section 28(11). The Ld. ASG submitted that Explanation 2, in no way, had interfered or can interfere with the validating power introduced *vide* Section 28(11). He delineated the sequence of events leading to the insertion of Section 28(11) in the Act, 1962 to make good his submission.

    (i) This Court delivered the judgment in ***Sayed Ali*** *(supra)* on 18.02.2011.

    (ii) Parliament *vide* the Finance Act, 2011 introduced certain amendments to Section 28 on 08.04.2011.

(iii) On 06.07.2011, the Central Government issued Notification 44/2011 assigning the functions of proper officers to officers of Customs (Preventive), DRI, DGAE and officers of Commissioner of Central Excise. The same is extracted below:

> ***"Proper officers for Customs Sections 17 and 28***
> *In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of section 17, section 28, section 28AAA and second proviso to Section 124 of the said Act, namely:-*

TABLE

Sl.No.	***Designation of the officers***
(1)	*(2)*
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*

3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise."*

[Notification No. 44/2011-Cus. (N.T.), dated 6-7-2011]

(iv) The Validation Bill, 2011, introducing Section 28(11) along with the Statement of Reasons came to be issued on 02.08.2011 and the same is extracted below:

> ***"Introduction of Sub-section 11 in Section 28 as per the Customs (Amendment And Validation) Bill, 2011***
>
> *"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*

STATEMENT OF OBJECTS AND REASONS

The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer. As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

> *3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.*
>
> *4. The Bill seeks to achieve the above objects."*

(v) Finally, the Validation Act came to be passed on 16.09.2011 and Sub-Section (11) became part of Section 28.

45. He contended that Explanation 2 and the introduction of Section 28(11) are for distinct purposes and are not connected to each other in any way. Prior to 08.04.2011, the period of limitation available under the statute for demanding short levy, non-levy or erroneous refund was six months. Whereas after 08.04.2011, it was enhanced to one year. As the amendment substituted the then-existing Section 28, it provided a saving provision to protect the notices issued prior to 08.04.2011 from the extension of limitation period from 6 months to one year. He submitted that the purport of Explanation 2 was only to ensure that those rights envisaged under old

Section 28 stand preserved. Explanation 2 did not deal with the jurisdictional exercise of the power of DRI officers in issuing show cause notices under Section 28, whereas, the Validation Act, 2011, introducing Section 28(11) addressed precisely only that issue.

46. He submitted that the conclusion drawn in ***Mangali Impex*** *(supra)* was legally incorrect for holding that Section 28(11) is overbroad in assuming every officer of customs to be deemed as proper officers both for Sections 17 and 28. The Validation Act, 2011, was enacted to regularize only past actions and not future actions, which are governed by Notification No. 44/2011 dated 06.07.2011 which even according to the High Court is valid and proper. Consequently, the validation has a very limited role to play as it travels back only to empower such of those officers of customs who had issued show cause notices in the past and vesting them also with the power under Section 17.

47. He submitted that the decision in ***Sunil Gupta*** *(supra)* clarifies the correct legal position and should be held to be so by this Court.

iv. <u>Changes introduced by the Finance Act, 2022 are in the nature of surplusage</u>

48. Lastly, he referred to the amendments brought about by the Finance Act, 2022, *vide* Sections 86, 87, 88, 94 and 97. The same are extracted below:

Section 86 - Amendment of section 2 of the Act, 1962

“86. In the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act), in section 2, in clause (34), after the words "Principal Commissioner of Customs or Commissioner of Customs", the words and figure "under section 5" shall be inserted.”

Section 87 - Substitution of new section for section 3 of the Act, 1962

“87. For section 3 of the Customs Act, the following section shall be substituted, namely:

3. Classes of officers of customs.-

"There shall be the following classes of officers of customs, namely:--

(a) Principal Chief Commissioner of Customs or Principal Chief Commissioner of Customs (Preventive) or Principal Director General of Revenue Intelligence;

(b) Chief Commissioner of Customs or Chief Commissioner of Customs (Preventive) or Director General of Revenue Intelligence;

(c) Principal Commissioner of Customs or Principal Commissioner of Customs (Preventive) or Principal Additional Director General of Revenue Intelligence or Principal Commissioner of Customs (Audit);

(d) Commissioner of Customs or Commissioner of Customs (Preventive) or Additional Director General of Revenue Intelligence or Commissioner of Customs (Audit);

(e) Principal Commissioner of Customs (Appeals);

(f) Commissioner of Customs (Appeals);

(g) Additional Commissioner of Customs or Additional Commissioner of Customs (Preventive) or Additional

Director of Revenue Intelligence or Additional Commissioner of Customs (Audit);

(h) Joint Commissioner of Customs or Joint Commissioner of Customs (Preventive) or Joint Director of Revenue Intelligence or Joint Commissioner of Customs (Audit);

(i) Deputy Commissioner of Customs or Deputy Commissioner of Customs (Preventive) or Deputy Director of Revenue Intelligence or Deputy Commissioner of Customs (Audit);

(j) Assistant Commissioner of Customs or Assistant Commissioner of Customs (Preventive) or Assistant Director of Revenue Intelligence or Assistant Commissioner of Customs (Audit);

(k) such other class of officers of customs as may be appointed for the purposes of this Act."

Section 88 - Amendment of section 5 of the Act, 1962

"88. In section 5 of the Customs Act,--

(a) after sub-section (1), the following sub-sections shall be inserted, namely:--
"(1A) Without prejudice to the provisions contained in sub-section (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.
(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.";
(b) after sub-section (3), the following sub-sections shall be inserted, namely:-

"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to--
(a) territorial jurisdiction;

(b) persons or class of persons;

(c) goods or class of goods;

(d) cases or class of cases;

(e) computer assigned random assignment;

(f) any other criterion as the Board may, by notification, specify.
(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act."

Section 94 - Insertion of new section 110AA to the Act, 1962

"94. After section 110A of the Customs Act, the following section shall be inserted, namely:--
110AA. Action subsequent to inquiry, investigation or audit or any other specified purpose.-
"Where in pursuance of any proceeding, in accordance with Chapter XIIA or this Chapter, if an officer of customs has reasons to believe that--
(a) any duty has been short-levied, not levied, short-paid or not paid in a case where assessment has already been made;
(b) any duty has been erroneously refunded;

(c) any drawback has been erroneously allowed; or

(d) any interest has been short-levied, not levied, short-paid or not paid, or erroneously refunded, then such officer of customs shall, after causing inquiry, investigation, or as the case may be, audit, transfer the relevant documents, along with a report in writing.

(i) to the proper officer having jurisdiction, as assigned under section 5 in respect of assessment of such duty, or to the officer who allowed such refund or drawback; or
(ii) in case of multiple jurisdictions, to an officer of customs to whom such matter is assigned by the Board, in exercise of the powers conferred under section 5, and thereupon, power exercisable under sections 28, 28AAA or Chapter X, shall be exercised by such proper officer or by an officer to whom the proper officer is subordinate in accordance with sub-section (2) of section 5."

Section 97 - Validation of certain actions taken under the Act, 1962

"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;
(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."

49. He submitted that the amendments carried out in the Act, 1962 *vide* Sections 87 and 88 of the Finance Act, 2022 respectively are a mere surplusage done *ex abundanti cautela* and are clarificatory in nature. He further submitted that Section 3 deals with classes of officers and officers of the same rank will constitute the same class. The amended Section 5 only expands the very same class with designation and functions and nothing more.

50. He submitted that Section 94 of the Finance Act, 2022 introducing Section 110AA to the Act, 1962 is only a way forward for the future wherein post search and investigation by the DRI, certain category of cases have now been directed to be handed over to the port authorities for issuing necessary show cause notices and this, in no way, can vitiate notices issued by DRI earlier especially in the absence of a constitutional or statutory embargo.

51. Finally, he submitted that a provision of law should appear arbitrary or abusive to be declared illegal or unconstitutional or invalid. A possible misuse of the provision by the authorities or a perceived misuse or mere presumptions and conjectures of a possible misuse cannot constitute basis to hold that a provision is arbitrary and violative of Article 14. He relied on the following decisions to fortify his submission:

    a. ***Collector of Customs v. Nathella Sampathu Chetty,*** **1962 SCC OnLine SC 30**

    b. ***Shreya Singhal v. Union of India,*** **(2015) 5 SCC 1**

c. ***Commissioner of Customs v. Dilip Kumar & Co.,*** **(2018) 9 SCC 1**

d. ***Goodyear India Ltd. v. State of Haryana,*** **(1990) 2 SCC 71**

C. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

52. Mr. Mukul Rohatgi, Mr. Arvind Datar and Mr. V. Lakshmikumaran, learned Senior Counsel appeared on behalf of the various importers and vehemently objected to the review of ***Canon India*** *(supra)* and also contended that both ***Sayed Ali*** *(supra)* and ***Mangali Impex*** *(supra)* are correct in their conclusions and need no interference.

53. Mr. Mukul Rohatgi contended that the power of review is extremely circumscribed and limited. It is not a means to provide a second innings to anyone. The Department in the guise of a review is seeking to re-argue the whole matter. Even if a different view is possible, the same cannot give rise to a review. He relied on the following decisions:

(i) ***Col. Avtar Singh Sekhon v. Union of India,*** **(1980) Supp SCC 562**

(ii) ***Lily Thomas Vs Union of India,*** **(2000) 6 SCC 224**

(iii) ***Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.,*** **(1923) SCC OnLine PC 10**

(iv) ***State of Telangana v. Mohd. Abdul Qasim,*** **(2024) 6 SCC 461.**

54. Mr. Arvind Datar too submitted that the scope of review is extremely limited and further contended that Section 97 of the Finance Act, 2022 is a clear overreach and needs to be considered separately.

55. Mr. V. Lakshmikumaran made the following submissions:

(i) The scheme of the Act, 1962 clearly indicates that Sections 17, 46, 47 and 28 of the Act, 1962 respectively are interlinked to and inter-dependent on each other. These provisions involve a sequential flow of events to be processed by a single officer, and therefore, empowering DRI officers who are not connected to this scheme, is illegal.

(ii) Section 17 deals with assessment and reassessment. Section 46 obligates filing of bills of entries. Section 47 allows clearance of goods for home consumption post the assessment under Section 17 and Section 28 pertains to demand of duty in the nature of short levy, short paid and erroneously refunded. Since all these statutory action points are interrelated, it is the same proper officer who should be empowered to perform all of these four functions and the same cannot be assigned to different sets of officers.

(iii) The amendment to Section 17 in 2011 allowing self-assessment is inconsequential since the power to assess and reassess and allow clearances is still with the officer of customs.

(iv) On the issue of whether there are any statutory limitations to the assignment of powers under Section 28 only to those officers who do assessment or re-assessment under Section 17, he submitted that the scheme of the Act, 1962 as explained in ***Sayed Ali*** *(supra)* and ***Mangali Impex*** *(supra)*, clearly indicates that Sections 17 and 28 of the Act, 1962 respectively are interconnected and interdependent.

(v) ***Canon India*** *(supra)* is correct in holding that DRI officers should be entrusted with the functions under Section 6 of the Act, 1962. Since the Central Government has not done so, they cannot be assigned the functions of proper officer.

(vi) Section 5 of the Act, 1962 deals only with powers and duties but not the functions, whereas, Section 6 deals with functions and thus, a notification under Section 6 is necessary. He emphasised on the different consequences arising from the use of the words "powers" and "duties" in Section 5 and use of the word "functions" in Section 6.

(vii) It was contended that Section 28 deals with short levy, non-levy and erroneous refund. Levy means determination of duty through a process of assessment/reassessment. Section 28 therefore involves rendering a finding that the earlier assessment was not correct. Section 28 is intended to revise or upset the original assessment done

under Section 17 and once an order gets passed under Section 28, the original assessment would not survive and therefore, the same officer can issue the show cause notice.

(viii) The Board's Circular dated 15.02.1999 cannot come to the rescue of the Department because there was no assignment of function of assessment/reassessment as required by ***Sayed Ali*** *(supra).* According to the learned counsel, both Notification No. 44/2011 dated 06.07.2011 and Section 28(11) were brought to the notice of this Court in ***Canon India*** *(supra).*

(ix) Having accepted the principles laid down in ***Sayed Ali*** *(supra)* on the interlinkage between Sections 17 and 28 of the Act, 1962 respectively, both *vide* Section 28(11) and Notification No. 44/2011 dated 06.07.2011, it is not open to the Department to now contend the contrary as reaffirmed in ***Canon India*** *(supra).*

(x) All proper officers are officers of customs, but all officers of customs are not proper officers. Mere conferment of power or assignment of functions of assessment/reassessment under Sections 17 and 28 of the Act, 1962 respectively is not enough. Out of the various proper officers who have been empowered under Sections 17 and 28, only that proper officer who had actually carried out the assessment will be the proper officer. There can be concurrent conferment of power

but there cannot be concurrent exercise of powers as the same may result in chaos and utter confusion.

(xi) The decision rendered by the High Court in ***Mangali Impex*** *(supra)* is correct and need not be disturbed for the following reasons:

a. Section 28(11) does not validate the show cause notices issued by various officers. It merely deems all officers who were appointed as officers of customs under Section 4(1) to have always had the powers under Sections 17 and 28 the Act, 1962 respectively. This would not automatically revive the show cause notices issued by such officers of customs.

b. In order to hold that Section 28(11) validates past actions, this Court will have to insert words in the statute, that too in a taxing statute which imposes liabilities on assesses, that too retrospectively.

c. Several unintended consequences may arise if it is held that show cause notices issued by other officers of customs will be revived. There are instances wherein many show cause notices have been issued after the ***Sayed Ali*** *(supra)* judgment by the jurisdictional commissionerate wherever the limitation period permitted for demands to be made. In those cases, assessees will be faced with two show cause notices. He laid emphasis on the

need to take an undertaking from the Department to avoid such a situation if it were to arise.

d. The High Court has correctly held that Section 28(11) perpetrates the very chaos that the judgment in ***Sayed Ali*** *(supra)* sought to prevent.

e. Explanation 2 to Section 28 should be given a plain meaning. It was in the statute before Section 28(11) was introduced, hence the framers of the statute were well aware of the implications of the Explanation 2.

f. On 08.4.2011, Section 28 of the Act, 1962 underwent a drastic change and not just a mere change in terms of time period being changed from six months to one year. The mode & manner of issuing the show cause notice, the manner of adjudication and payment of duty, etc. have been amended making it more beneficial to the assessee. That is the reason why the old notices were to be dealt with under the old Section.

g. It is impossible to read Section 28(11) and Explanation 2 together as validating any action prior to 08.04.2011. Such is the plain meaning and only such an interpretation is warranted in the present case.

(xii) Section 97 of the Finance Act, 2022 is liable to be struck down as manifestly arbitrary and thus violative of Article 14. According to him, the Finance Act, 2022 does not cure the defects pointed out by this Court in its decision rendered in ***Canon India*** *(supra)* for the following reasons:

a. The amendments introduced *vide* the Finance Act, 2022 continue to violate the principles laid down in the judgment of this Court in ***Sayed Ali*** *(supra)* wherein it was held that granting jurisdiction to multiple officers will create utter chaos and confusion. He highlighted that the review filed against the decision in ***Sayed Ali*** *(supra)* has already been dismissed.

b. The validation of past actions by way of Section 97(i) of the Finance Act, 2022 violates the principles enshrined in the judgment of ***Canon India*** *(supra)* since it will lead to a very anarchical and unruly operation of a statute which was sought to be avoided in ***Canon India*** *(supra)*.

c. A Validation Act can only validate the law but cannot validate a fact. Once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department. Thereafter, only that officer or his superiors (known as the

Customs group) who had undertaken assessment under Section 17 in the first place shall have the jurisdiction to issue notices for recovery of duty under Section 28.

d. This Court in its judgment in ***Canon India*** *(supra)* found that factually the assessments were initially not undertaken by officers of DRI and such a defect cannot be cured retrospectively by a validating law. Therefore, the present amendments seek to validate and effectively change a judicially determined fact, which cannot be done by a legislation.

(xiii) The Finance Act, 2022 also introduced a provision, i.e. Section 110AA, providing a mechanism for actions to be taken subsequent to inquiry, investigation or audit by any officer of customs. Section 110AA operates only prospectively. This provision is Parliament's recognition of the importance of maintaining the jurisdiction for issuing show cause notices within the assessing group.

(xiv) Further, by retrospectively modifying the scheme of appointment and assignment of functions to officers of customs, a larger lacuna has been created as there exist no valid notifications for assignment of functions of a 'proper officer' under Section 5 for the period prior to 01.04.2022. Thus, all actions performed by any officer of Customs prior to 01.04.2022 have in fact been performed without jurisdiction.

In such circumstances referred to above, it was prayed that there being no merit in the Review Petition filed by the Department, the same may be dismissed.

D. ISSUES FOR CONSIDERATION

56. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

(i) Whether there is an "error apparent on the face of the record" for the purpose of entertaining the review petition?

(ii) If the answer to the aforesaid question is in the affirmative, then whether the exposition of law propounded by this Court in ***Canon India*** *(supra)* as regards the power of the DRI to issue show cause notices could be said to be the correct statement of law?

This would entail addressal of the following questions:

a. Whether officers of DRI are the proper officers for the purposes of Section 28 of the Act, 1962?

b. What would be the extent, scope and domain of Section 6 of the Act, 1962 *vis-à-vis* Section 2(34), Section 3, Section 4 and Section 5 of the Act, 1962 and whether an entrustment by the Central Government under Section 6 of the Act, 1962 is mandatory to empower the Officers of the DRI for the purpose of issuing show cause notices?

c. Whether the power under Section 28 can be exercised only by someone who is empowered to exercise the power under Section

17 of the Act, 1962 for the goods in question? In other words, how best the meaning of the expression "proper officer" should be construed for the purposes of exercise of functions under Section 28?

d. Whether "the proper officer" in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962? If no, whether the use of the definite article "the" in the expression "the proper officer" in Section 28 is in the context of that proper officer who has been assigned the powers of discharging the functions under Section 28 by virtue of powers conferred under Section 5 of the Act, 1962?

e. Whether issuance of show cause notices followed by adjudication under Section 28 of the Act, 1962 is an administrative review as held in ***Canon India*** *(supra)* or a quasi-judicial exercise of power under administrative law?

(iii) Whether the introduction of Section 28(11) *vide* the Validation Act of 2011 which retrospectively validates the show cause notices issued under Section 28 with effect from 06.07.2011, is discriminatory and arbitrary for not curing the defect highlighted in ***Sayed Ali*** *(supra)* and, therefore, is violative of Article 14 of the Constitution of India?

(iv) Whether the judgment delivered by the High Court of Delhi in the case of ***Mangali Impex*** *(supra)* expounds the correct interpretation of Section 28(11)?

(v) Whether Section 97 of the Finance Act, 2022, which retrospectively validates the show cause notices with effect from 01.04.2023, is manifestly arbitrary and therefore, violative of Article 14 of the Constitution of India?

E. ANALYSIS

i. *Review jurisdiction*

57. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court. It reads as under:

> *"**137. Review of judgments or orders by the Supreme Court**. — Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."*

58. Further, Part IV Order XLVII of the Supreme Court Rules, 2013 deals with the review and consists of five rules. Rule 1 is relevant for our purposes. It reads as under:

> *"**1.** The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code and in a criminal proceeding except*

on the ground of an error apparent on the face of the record."

59. Order XLVII Rule 1(1) of the Code of Civil Procedure, 1908 provides for an application for review which reads as under:

> *"**1. Application for review of judgment**. — Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> *(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."*

60. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the

petitioner or could not be produced by him at the time when the decree was passed or order made;

(ii) Mistake or error apparent on the face of the record; or

(iii) Any other sufficient reason.

61. The words "any other sufficient reason" have been interpreted by the Privy Council in the case of ***Chhajju Ram v. Neki*** reported in **1922 SCC OnLine PC 11** and approved by this Court in ***Moran Mar Basselios Catholicos v. Mar Poulose Athanasius*** reported in **1954 SCC OnLine SC 49** to mean a reason sufficient on grounds, at least analogous to those specified in the rule.

62. In the case of ***Tinkari Sen v. Dulal Chandra Das*** reported in **1966 SCC OnLine Cal 103**, the Calcutta High Court held that if the court overlooks or fails to consider a legal provision that grants it the authority to act in a specific manner, this may amount to an error analogous to one apparent on the face of the record. Such an oversight would fall within the scope of Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 which allows for reviews. Relevant parts are extracted below:

> "*18. Consider, in this context, Sir Hari Sankar Pal v. Anath Nath Mitter, AIR 1949 FC 106. Mr. Chittatosh Mookerjee refers me to Mukherjee, J. (as his Lordship then was), observed, Kania C.J. Fazl Ali, Patanjali Sastri and Mahajan, JJ. (as their Lordships then were) agreeing:*
>
> *"**That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a***

point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it "When, however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47, rule 1 of the CPC.*"*

[Emphasis supplied]

63. *In* ***Girdhari Lal Gupta v. D. H. Mehta*** reported in **(1971) 3 SCC 189**, this Court allowed the review on the ground that its attention was not given to a particular provision of the statute. The relevant observations read as follows:

"15. The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. But we are unable to agree with this submission because at the time of the arguments our attention was not drawn specifically to sub-section 23-C(2) and the light it throws on the interpretation of sub-section (1)*.*

16. *In the result the review petition is partly allowed and the judgment of this Court in Criminal Appeal No. 211 of 1969 modified to the extent that the sentence of six months' rigorous imprisonment imposed on Girdharilal is set aside. The sentence of fine of Rs 2000 shall, however, stand."*

[Emphasis supplied]

64. In ***M/s Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*** reported in **(1980) 2 SCC 167**, the scope of the power of review was explained by this Court wherein it was held that:

> "***8.*** *It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case.* ***The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so****: Sajjan Singh v. State of Rajasthan [AIR 1965 SC 845 : (1965) 1 SCR 933, 948 : (1965) 1 SCJ 377] .* ***For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment****: G.L. Gupta v. D.N. Mehta [(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 750] . The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi [(1971) 3 SCC 5 : (1971) 2 SCR 11, 27]. ....*
>
> **[Emphasis supplied]**

65. This Court in ***Yashwant Sinha v. CBI*** reported in **(2020) 2 SCC 338**, has observed that if a relevant law has been ignored while arriving at a decision, it would make the decision amenable to review. The relevant observations read as follows:

> *"**78.** The view of this Court, in Girdhari Lal Gupta [Girdhari Lal Gupta v. D.H. Mehta, (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748] as also in Deo Narain Singh [Deo Narain Singh v. Daddan Singh, 1986 Supp SCC 530] , has been noticed to be that* ***if the relevant law is ignored or an inapplicable law forms the foundation for the judgment, it would provide a ground for review****. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be per incuriam. No doubt, the concept of per incuriam is apposite in the context of its value as the precedent but as between the parties,*

certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision*."*

[Emphasis supplied]

66. In ***Sow Chandra Kant and Anr. v. Sheikh Habib*** reported in **(1975) 1 SCC 674**, this Court held:

> *"1. Mr Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a re-hearing. May be, we were not right is refusing special leave in the first round; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained.* ***A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility****. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except*

> *a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."*
>
> **[Emphasis supplied]**

67. Thus, the decisions referred to above make it abundantly clear that when a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. In other words, if a court is oblivious to the relevant statutory provisions, the judgment would in fact be *per incuriam*. In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed.

68. From here onwards, our endeavour is to ascertain whether the relevant provisions of law including the notifications issued by the Board from time to time were brought to the notice of the Court while deciding ***Canon India*** *(supra).*

69. A three-Judge Bench in ***Canon India*** *(supra)* examined whether officers of the DRI are proper officers for the purpose of issuing recovery notices under the provisions of Section 28 of the Act, 1962.

70. The Court while deciding the aforesaid question held as under:

"11. *There are only two articles "a (or an)" and "the". "A (or an)" is known as the indefinite article because it does not specifically refer to a particular person or thing. On the other hand, "the" is called the definite article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word "any".*

12. *Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962 ["**2. Definitions**.—In this Act, unless the context otherwise requires—***(2) "**assessment**" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—(a)-(b)***(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;"] .*

13. *The nature of the power to recover the duty, not paid or short-paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper*

> *officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to reopen assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.*
>
> ***14.** Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute."*

71. The aforesaid observations are in line with the decision of this Court in ***Sayed Ali*** *(supra)*. However, it is relevant to note that when ***Sayed Ali*** *(supra)* was decided, Section 17 read differently and the true purport of Section 4 of the Act, 1962 was not considered. We shall deal with this aspect subsequently.

72. The Court further held as under:

> *"16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that*

he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act. 17. Shri Sanjay Jain, Learned Additional Solicitor General, relied on a Notification No. 17/2002-Customs (N.T.), dated 7-3-2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7-3-2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, Learned Additional Solicitor General relied on a Notification No. 40/2012, dated 2-5-2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows :-

"[To be published in the Gazette of India,

Extraordinary, Part I, Section 3, Sub-section (i)]

Government of India

Ministry of Finance

(Department of Revenue)

Notification No. 40/2012-Customs (N.T.)

New Delhi, dated the 2nd May, 2012

S.O. (E). - In exercise of the powers conferred by subsection (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table :-

. No.	*Designation of the officers*	*Functions under Section of the Customs Act, 1962*
(1)	*(2)*	*(3)*
	Commissioner of Customs	*(i) Section 33*
	Additional Commissioner or Joint Commissioner of Customs	*(i) Sub-section (5) of section 46; and (ii) Section 149*
	Deputy Commissioner or Assistant Commissioner of Customs and Central Excise	*(i) ..... (ii) ..... (iii) ..... (iv)..... (v) .....* *(vi) Section 28; ……"*

19.It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No. 3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-section (34)

of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows :-

> *"2. Definitions. - In this Act, unless the context otherwise requires, - ... 136/163 https://www.mhc.tn.gov.in/judis W.P.Nos.33099 of 2015 & etc., (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs."*

20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-

> *"6. Entrustment of functions of Board and customs officers on certain other officers. - The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act."*

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 4-12-1957 issued by the Ministry of Finance and Customs officers who, till 11- 5-2002, were appointed by the Central Government. The notification

which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

22. In the above context, it would be useful to refer to the decision of this Court in the case of Commissioner of Customs v. Sayed Ali and Another [(2011) 3 SCC 537 = 2011 (265) E.L.T. 17 (S.C.)] wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder :-

> *"16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The Learned Counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).*
>
> *17. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that :*
>
> > *"**28. Notice for payment of duties, interest, etc. -** (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid*

or erroneously refunded, the proper officer may, -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

18. It is plain from the provision that the 'proper officer' being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that the notice under the said provision has to be issued by the 'proper officer'.

19. Section 2(34) of the Act defines a 'proper officer', thus :

'2. Definitions. –

……..

(34)'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;'

It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be 'proper officers' in terms of Section 2(34) the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an 'officer of customs' is the 'proper officer'.

20. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions."

23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set aside and the ensuing demands are also set aside."

73. It is not in dispute that ***Canon India*** *(supra)* is based on the decision of this Court in ***Sayed Ali*** *(supra)*. We say so because in ***Canon India*** *(supra)*, the petitioner had not questioned the jurisdiction of the officers of DRI either before the departmental authorities or before the Tribunal. We must, therefore, first look into the judgment rendered in ***Sayed Ali*** *(supra)*.

ii. ***The decision in Commissioner of Customs v. Sayed Ali***

74. In ***Sayed Ali*** *(supra)*, a show cause notice dated 28.08.1991 was issued by the Assistant Collector of Customs (Preventive), Mumbai, alleging a violation of the provisions of Section 111(d) of the Act, 1962. It culminated in an order dated 03.02.1993 which was appealed before the Collector of Customs (Appeals). An order was passed by the Collector of Customs (Appeals) on 14.12.1993. The Collector of Customs (Appeals) allowed the appeal by holding that the matter involved demand of duty beyond a period of six months and therefore the show cause notice could have been issued only by the Collector and not by the Assistant Collector of Customs (Preventive). At that point of time, there were circulars of the Board, which stipulated pecuniary limits for officers to exercise powers under various provisions of the Act. Thus, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.

75. The Collector of Customs (Preventive) thus issued a show cause notice dated 16.04.1994, calling upon the importer to show cause as to why the goods

seized should not be confiscated, why the customs duty amounting to Rs.5,07,274/- should not be levied in terms of Section 28(1) of the Act, 1962, by invoking the extended period of limitation, and why the penalties under Sections 112(a) and (b)(i) and (ii) of the Act, 1962, should not be imposed on the said importer.

76. The jurisdiction of the Collector of Customs (Preventive) to issue the show cause notice was questioned in the reply to the show cause notice by referring to Notification No. 251/83 and Notification No.250/83. The Collector of Customs (Preventive) rejected the submission on the point of jurisdiction. The demand was thus affirmed by the Collector of Customs (Preventive) *vide* Order dated 19.08.1996. The matter was taken up before the Tribunal, which held that the Commissioner of Customs (Preventive) had no jurisdiction to issue the show cause notice and therefore did not have the jurisdiction to adjudicate the matter when the imports had taken place within the Bombay Customs House.

77. This Court, after referring to Section 28 of the Act, 1962 as it stood during the period in dispute, concluded that from a conjoint reading of Section 2(34) and Section 28 of the Act, 1962, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been effected, either by the Board or the Commissioner of Customs, in terms

of Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.

78. This Court further held that *"…any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act of the Act is that of specific conferment of such functions"*. It further held that "*Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act, 1962 is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers"* ".

79. This Court concluded that *"It is only the officers of customs, who are assigned the functions of assessment, which of course, would include re-assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act"*. Thus, the proceedings impugned therein were set aside.

80. Thereafter, a Review Petition was filed by the Department in the aforesaid case. This Court dismissed the Review Petition on the ground of delay in filing the review.

81. The decision in ***Sayed Ali*** *(supra)* proceeds on the assumption that for the "proper officer" to exercise the functions under Section 28 of the Act, 1962, such officer must necessarily possess the power of assessment and reassessment under Section 17. However, a plain reading of Sections 17 and 28 of the Act, 1962 does not bring out any such inter-dependence between the two provisions. Having looked into the statutory scheme of the Act, 1962, we are of the view that the observations pertaining to the interlinkage between Sections 17 and 28 respectively of the Act, 1962 made in ***Sayed Ali*** *(supra)* do not lay down the correct position of law.

82. Even otherwise, the decision in ***Sayed Ali*** *(supra)* could have been arrived at without deciding on the interdependence of Section 17 and Section 28 of the Act, 1962 as the Customs (Preventive) officers, whose jurisdiction to issue show cause notices was under challenge in that case, were not assigned the functions of the "proper officer" for the purposes of Section 28 through a notification issued by the appropriate authority. As we have observed in the foregoing parts of this judgment, assignment of functions is a mandatory requirement for the exercise of jurisdiction by the "proper officer". The observations made in ***Sayed Ali*** *(supra)* on the connection between Sections

17 and 28 of the Act, 1962 are *obiter dicta* at best and do not constitute the binding *ratio decidendi* of that judgment.

83. Further, ***Sayed Ali*** *(supra)* could not have been relied upon by this Court in ***Canon India*** *(supra)* as it could not have been applied for the period subsequent to 08.04.2011 in view of the fact that Section 17 of the Act, 1962 has undergone a radical change by virtue of the amendments made by the Finance Act, 2011.

iii. ***Changes to Section 17 w.e.f. 11.04.2011 – the assessment of bill(s) of entry and shipping bill(s)***

84. Section 17 of the Act, 1962 was amended by Section 38 of the Finance Act, 2011 with effect from 08.04.2011. The amendment altered the method of assessment of bill(s) of entry and shipping bill(s). This change appears not to have been brought to the notice of this Court while ***Canon India*** *(supra)* was heard.

85. We note that with effect from 08.04.2011, the functions of the proper officer under Section 17 also underwent certain changes. One such change is that the assessment of bill(s) of entry and shipping bill(s) was no longer the task of the "proper officer". With effect from 08.04.2011, Bill(s) of Entry and/or Shipping Bill(s) are self-assessed. This self-assessment is to be accepted or rejected by the proper officer subject to verification in certain cases.

86. The "proper officer" appointed for the purpose of Section 17 of the Act, 1962 under a notification issued under Section 2(34) of the Act, 1962 could only make a re-assessment of the bill(s) of entry and shipping bill(s) in case they did not agree with the self-assessment of the importer or the exporter as the case may be.

87. The purport of Section 17 as it stood before 08.04.2011 and after 08.04.2011 was analysed by a learned Single Judge of the Madras High Court in the case of ***M/s. N.C. Alexander v. The Commissioner of Customs, Chennai*** in W.P. Nos. 33099 of 2015. The relevant paragraphs of the judgment are reproduced below:

> *"207. Thus, there was a paradigm shift in the method of assessment with effect from 08.04.2011. Till 07.4.2011, the assessment of Bill of Entry(s) or the Shipping Bill(s) was by a "proper officer" appointed for that purpose under Section 2(34) of the Custom Act, 1962. The assessment was left to the Group 'B' Gazetted Officers and it is only such officers were appointed as "proper officers" for assessment under Section 17.*
>
> *208. However, after 08.04.2011, Bill(s) of Entry (in the case of import) or Shipping Bill(s) (in the case of export) are to be self assessed by an importer or an exporter under Sections 46 and 50 of the Customs Act, 1962 respectively. The changes are shown in bold in the above Table.*
>
> *209. A "proper officer" has to merely verify the entries made in the Bill(s) of Entry under Section 46 (in case of import) or Shipping Bill(s) under Section 50 (in case of export). The "Proper Officer" may examine or test imported goods or export goods or such part thereof as*

may be necessary. If required, such an officer can only re-assess the goods under Section 17 of the Act. ***Thus, a "Proper Officer" under Section 17(1) & 17(4) of the Act is merely required to re-assess the imported goods or export goods where he differs with the self assessment of an importer or an exporter. This important change was not brought to the attention of the Hon'ble Supreme Court in Canon India Pvt Ltd Case.***

210. As mentioned above, an importer or an exporter is merely required to make a self-assessment in the Bill(s) of Entry or Shipping Bill(s) as may be in the case of import or export respectively and file the same.

211. Officers who are appointed as "Proper Officers" for the purpose of Section 17 of the Customs Act, 1962 are "Officers of Customs" like any "Officer of Customs" as per Section 3 and 4 read with notification issued under these provisions. There is delegation of functions by the Board and senior officers to different class of officers by the Board. This is an internal arrangement with a view for better tax administration. Thus, officers of Directorate of Revenue Intelligence are also one among the class "Officers of Customs" like any Officer of Customs as per Section 3 and 4 read with notification issued for the said purpose are competent to issue show cause notice. ***The "proper officer" at the Port at the time of clearance of import or export, merely reassess the self-assessment already made on the Bill(s) of Entry and/or Shipping Bill(s). They are normally not assigned with the function to adjudicate Show Cause Notices and/or Demand Notices under the various provisions of the Customs Act, 1962.***

212. With effect from, 08.04.2011, there was no question of assessment of Bill(s) of Entry /Shipping Bill(s) by a "proper officer". There is only self assessment by an importer or an exporter. There could be only re-assessment of Bill of Entry(s) or the Shipping Bill(s) by the "proper officer" under Section 17 of the Customs Act,1962.

213. If the "proper officer" was inclined to disagree with the self assessment made by an importer or an exporter as the case may be, the "proper officer" could make a re-assessment and pass a speaking order under Section 17(5) of the Customs Act, 1962.

214. If the self assessment is accepted, the "proper officer" appointed under Section 17 of the Customs Act, 1962 becomes "functus officio" under the scheme of the Act and the Notification issued for the aforesaid purpose.

215. Likewise, where there was a re-assessment, again such an officer becomes "functus officio", after such an order of re-assessment and a speaking order under Section 17(5) of the Customs Act, 1962 is passed.

216. An importer or an exporter aggrieved by such an order of reassessment and the speaking order is entitled to file an appeal under Section 128 of the Custom Act,1962 before the Appellate Commissioner. Only circumstances, where such an officer who makes an order of reassessment can re-visit the re-assessment and/or speaking order is under Section 28 (if specifically authorized) or under Section 149 or under Section 154 of the Customs Act, 1962.

217. The power to issue Show Cause Notice whether under Section 28 or under Chapter XIV of Customs Act, 1962 or under any other provisions and to pass orders has been by and large exercised by the Superior Officers from Group 'A' Cadre Officer of the Custom Department in terms of Notification issued under Section 2(34) of the Act. The Officers from the Directorate of Revenue Intelligence (DRI) being "Officers of Custom" have been recognized as a "Proper Officer" for the aforesaid purpose.

218. ***The "proper officer" who is/was involved at the stage of assessment under Section 17 of the Act upto 08.04.2011 and reassessment after 08.04.2011 have rarely been involved in collateral adjudication of***

notices issued under Section 28 of the Act. *However, once again at the stage of recovery of duty or penalty under other provision of the Customs Act, 1962 or redemption fine under Section 125 of the Customs Act, 1962, they are authorized.*

219. Mostly, at the time of clearance of imported goods or export goods for the purpose of assessment under Section 17 of the Custom Act,1962, it is the Superintendent/Appraisers of Customs from Group 'B' Executive - Gazetted Officers who act as "proper officers". They are merely required to verify the entries made in the Bill(s) of Entry filed under Section 46 of the Act (in case of import) and or Shipping Bill(s) filed under Section 50 of the Act (in case of export). As "proper officers" are required to merely examine or test any imported or export goods or such parts thereof. Such Officer of Customs under the Scheme of the Act and Notification issued thereunder can only re-assess the self-assessment made by the importer or the exporter.

220. ***Earlier, the Officers from the Directorate of Revenue Intelligence (DRI) were mostly confined with the task of investigation. Over a period of time, they were empowered to issue Show Cause Notices and/or Demand Notices under various provisions of the Customs Act. Adjudication of the Show Cause Notices/Demand Notices were however left to the senior officer of customs from Group 'A' cadre of the Customs Department. However, they are empowered to act as "proper officers" not only for issuance of Show Cause Notice and/or Demand Notices but also for adjudication of such Show Cause Notices and/or Demand Notices.*** *"*

[Emphasis supplied]

88. In case of re-assessment, such a "proper officer" is bound to pass a "Speaking Order" to enable the aggrieved party to file an appeal. Section 17

as it read before 08.04.2011 and after 08.04.2011 is reproduced below to better appreciate the nuances of the issue:

Section 17: Assessment of Duty	
Before 08.04.2011	***Between 08.04.2011 and 28.03.2018***
(1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50, the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.	*(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*
(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed.	*(2) The proper officer may verify the **self-assessment** of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.*
(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or	*(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter*

such other person shall produce such document and furnish such information.	*or such other person shall produce such document or furnish such information.*
(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.	*(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods. Amendment of section 18.*
(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.	*(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*

	*[(6) Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.] * Explanation.— For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received."*

89. The examination of Section 17, as amended *vide* the Finance Act, 2011 vis-à-vis the provisions of the old Section 17 as it stood prior to 08.04.2011, highlights the following major changes:

(a) **Self-assessment of duty**: The concept of self-assessment of duty was introduced by way of the amendment to Section 17 wherein there is no role of the proper officer to assess the duty at the first instance. The onus for providing the duty leviable has been shifted to the assessee itself.

(b) **Discretion to verify**: Sub-section (2) of the new Section 17 states that "*The proper officer **may** verify the self-assessment of the goods…*". The use of the word "may" indicates two things:

(i) that the actions to be taken by the proper officer under the old Section 17 are no longer compulsory. The proper officer may choose to accept the self-assessment made by the assessee, thereby becoming *functus officio* and there is no compulsion on him or her to examine or test any goods for reaching a first instance assessment;

(ii) The proper officer is not involved in the assessment of duty under Section 17 at the first instance except for his or her role in accepting or not accepting the self-assessed duty. There can be three situations that may result from such limited role of the proper officer:

- The proper officer accepts the self-assessed duty without verification of such duty under sub-section (2) of the new Section 17,
- The proper officer accepts the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17,

- The proper officer does not accept the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17, in which case, the re-assessment of duty will be undertaken by the proper officer as per sub-sections (4) and (5) of the new Section 17.

In the first two cases, the scope of the function of the proper officer is limited. Such proper officer is not entitled to exercise the function of the assessment of duty, which is a noteworthy deviation from the earlier procedure.

The proper officer is entitled to exercise his or her functions of re-assessment of duty only if the verification process shows that the self-assessment done by the assessee was incorrect.

(c) **Condition precedent for re-assessment**: It is worthwhile to note that the old Section 17 allowed for self-assessment of duty, only under sub-section (4) and that too with the permission of the proper officer. However, upon a subsequent finding that the statements made by the assessee were not true, the proper officer was entitled to re-assess the duty so levied. Therefore, re-assessment was allowed under both the old and the new Section 17 only after a self-assessment by the assessee. The only point of difference with respect to re-assessment is that self-assessment was not a matter of course prior to the amendment and was

possible only upon the proper officer permitting for the same. After 08.04.2011, self-assessment is *ipso jure* the procedure and has replaced the assessment process previously undertaken by the proper officer.

(d) **Scheme of Section 17(5)**: The old Section 17(5) requires the proper officer to provide a speaking order within 15 days of the date of assessment of duty if the same is contrary to the claim of the assessee or is not accepted in writing by the assessee. The new Section 17(5) is analogous to the old sub-section (5) except that it requires a speaking order within 15 days from the date of the "re-assessment" of duty. Such change shows the legislative intent to transfer the process of "assessment" under the old Section 17 to the stage of "re-assessment" under the new Section 17 and replace the "assessment" to be done by the proper officer under the old Section 17 with the process of "self-assessment".

90. These changes highlight that the competence of the proper officer to conduct "assessment" is completely taken away by the legislature *vide* the amendment to Section 17. The new Section 17 empowers the proper officer to perform the functions of verification of self-assessment and subsequent re-assessment, if found necessary. However, such re-assessment is not a mandatory function on the same footing as "assessment" under the old

Section 17. Therefore, in our considered view the scope of the functions of the proper officer under the new Section 17 is limited.

91. It is evident from the aforesaid that the attention of this Court in ***Canon India*** (supra) was not drawn to the important changes brought to Section 17 of the Act, 1962 *vide* Section 38 of the Finance Act, 2011 with effect from 08.04.2011.

92. The observation in paragraph 13 in ***Canon India*** *(supra)* that *"where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank"* has been made without taking note of the changes to Section 17 of the Act, 1962 with effect from 08.04.2011.

93. Similarly, the observation in paragraph 14 in ***Canon India*** *(supra)* is erroneous. The relevant paragraph is reproduced below:

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

In other words, the conclusion that an officer who did the assessment, could only undertake reassessment under Section 28(4) was arrived at without taking note of the abovementioned amendment to Section 17 of the Act, 1962 with effect from 08.04.2011 *vide* Section 38 of the Finance Act, 2011. The judgment in ***Canon India*** *(supra)* also recorded an erroneous finding that the function of re-assessment is with reference to Section 28(4) when in fact it is an exercise of function under Section 17.

94. Further, in ***Canon India*** *(supra)* the subject show cause notice was dated 19.09.2014 in respect of the Bill of Entry filed on 20.03.2012. This Court appears to have erroneously applied the provisions of Section 17 of the Act, 1962, as they stood prior to 08.04.2011 as opposed to the amended Section 17 which ought to have been applied.

iv. ***Scheme of Sections 17 and 28 of the Act, 1962***

95. Section 17 read with Sections 46 and 47 of the Act, 1962 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bill(s) of entry. The amendment to Section 17 introduces the process of self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance.

96. The proceedings under Section 28 are subsequent to the completion of the process set out in Section 17 of the Act, 1962. The procedure envisaged

under Section 28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers. It is also worth noting that in the case of DRI, the proceedings under Section 28 start only after an investigation has been undertaken by DRI. This is reaffirmed by Circular No. 4/99-Cus dated 15.02.1999 and Circular No. 44/2011-Customs dated 23.11.2011. Therefore, the nature of review under Section 28 is significantly different from the nature of assessment and re-assessment under Section 17. The ambit of Section 28 has also been restricted to the review of assessments and re-assessments done under Section 17 for ascertaining if there has been a short-levy, non-levy, part-payment, non-payment or erroneous refund.

97. Keeping this statutory scheme in mind, we are unable to subscribe to the view taken in both ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)*, namely, that the vesting of the functions of assessment and re-assessment under Section 17 is a threshold, mandatory condition for a proper officer to perform functions under Section 28. This scheme does not flow from the scheme of the statute and was judicially read in to avoid the possibility of chaos and confusion due to the potential for multiple proper officers exercising jurisdiction under Section 28. We find that such apprehensions of misuse are unfounded considering that no substantial empirical evidence

has been brought forth by the respondents in this case to support such a view. Regardless, the the parameters under Section 28 cannot be reduced to an administrative review of assessment/re-assessment done under Section 17.

98. We are conscious of the fact that Section 110AA of the Act, 1962, which has been introduced by the Finance Act, 2022, stipulates that a show cause notice under Section 28 of the Act, 1962 can only be issued by that "proper officer" who has been conferred with the jurisdiction, by an assignment of functions under Section 5 of the Act, 1962, to conduct assessment under Section 17 of the Act in respect of such duty. However, we are of the view that the introduction of Section 110AA doesn't alter the statutory scheme of Sections 17 and 28 of the Act, 1962 as it stood prior to the introduction of Section 110AA. The legislature in its wisdom may introduce certain new provisions keeping in mind the exigencies of administration and taking into account the evolution of law. However, this would not by itself mean that the procedure which was being followed prior to the introduction of such changes was incorrect or in contravention of the law. The legality and correctness of an action has to be adjudged based on the statutory scheme prevailing at the time when such action took place, and incorrectness or invalidity cannot be imputed to it on the basis of subsequent changes in law. Seen thus, the contention of the respondents that Section 110AA of

the Act, 1962 amounts to an admission by the petitioner on the invalidity of the legal position existing prior to its introduction, deserves to be rejected.

99. Therefore, in our considered view, the scheme of Sections 17 and 28 of the Act, 1962 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the cases of ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)* is patently erroneous.

v. *Use of the article 'the' in the expression "the proper officer"*

100. This Court in ***Canon India*** *(supra)*, while laying much emphasis on the use of the expression "the proper officer" observed that the Parliament had employed the article "the" instead of "a/an" in Section 28 of the Act, 1962 so as to give effect to its intention of specifying that the proper officer referred to in Section 28 is the same officer as the one referred to in Section 17. The Court further observed that the use of a definite article instead of an indefinite article is indicative of the fact that the proper officer referred to in Section 28 is not "any" proper officer but "the" proper officer assigned with the function of assessment and reassessment under Section 17.

101. However, there is an error apparent in the aforesaid view. Undoubtedly, a definite article "the" has been used before "proper officer" with a view to limit the exercise of powers under Section 28 by a specific proper officer and not any proper officer. But, in the absence of any statutory linkage

between Sections 17 and 28 of the Act, 1962 respectively, there was no legal footing for this Court in ***Canon India*** *(supra)* to hold that "the proper officer" in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962.

102. As we have discussed in the foregoing parts of this judgment, the statutory scheme of the Act, 1962 necessitates that a proper officer can only perform specific functions under the Act if he has been assigned as "the proper officer" to perform such functions by an appropriate notification issued by the competent authority. Seen thus, it becomes clear that an officer of Customs can only perform the functions under Section 28 of the Act, 1962 if such officer has been designated as "the proper officer" for the purposes of Section 28 by an appropriate notification. The use of the article "the" in the expression "the proper officer" should be read in the context of that proper officer who has been conferred with the powers of discharging the functions under Section 28 by conferment under Section 5. In other words, the proper officer is *qua* the function or power to be discharged or exercised.

103. Thus, the definite article "the" in Section 28 refers to a "proper officer" who has been conferred with the powers to discharge functions under Section 28 by virtue of a notification issued by the competent authority under Section 5. In other words, the use of article "the" in Section 28 has no apparent relation with the proper officer referred to under Section 17. The proper

officer under Section 28 could be said to be determinable only in the sense that he is a proper officer who has been empowered to perform the functions under Section 28 by means of a notification issued under Section 5 of the Act, 1962.

104. In ***Canon India*** *(supra)*, this Court held that DRI officers did not have the power of issuing show cause notices under Section 28 as they did not fall within the meaning of the expression "the proper officers" used in Section 28 for the reason that they did not possess the power of assessment under Section 17 of the Act, 1962. However, as we have discussed in the previous parts of this judgment, contrary to the aforesaid observations of the Court, DRI officers were notified as "the proper officer" for the purposes of Sections 17 and 28 of the Act, 1962 respectively *vide* Notification No. 44/2011–Cus–N.T. dated 06.07.2011 issued by the Central Government. Hence, those officers of DRI who were designated as "the proper officer" for the purpose of Section 28 by the aforesaid notification were competent to issue show cause notices under Section 28.

105. Craies on Statute Law[1] has stated that "*the language of statutes is not always that which a rigid grammarian would use, it must be borne in mind that a statute consists of two parts, the letter and the sense*". It was observed by this Court in ***State of Andhra Pradesh v. Ganesweara Rao***, reported in **AIR**

[1] 7th Ed., Page 83

1963 SC 1850 that the aforesaid rule of construction that the provisions of a statute are to be read together and given effect to and that it is the duty of the court to construe a statute harmoniously has gained general acceptance. In ***Management, S.S.L. Rly. Co. v. S.S.R.W. Union*** reported in **AIR 1969 SC 513**, this Court observed that the principle that literal meaning of the word in a statute is to be preferred is subject to the exception that if such literal sense would give rise to any anomaly or would result in something which would defeat the purpose of the Act, a strict grammatical adherence to the words should be avoided as far as possible. The above principles would help us to desist from affording undue stress on the definite article "the" used before the expression "proper officer" in Section 28 of the Act, 1962.

vi. ***DRI officers as proper officers under section 2(34)***

106. In ***Canon India*** *(supra)*, this Court erroneously concluded that an officer from the Directorate of Revenue Intelligence (DRI) was not an officer of customs and therefore cannot function as a "Proper Officer". The finding of the Court that the power conferred by the Board under Notification No. 40/2012-Customs (N.T.) dated 02.05.2012 was ill-founded is an error apparent.

107. By way of Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, the Board appointed several persons including the Officers of Directorate of

Revenue Intelligence (DRI) as "Proper Officers" under Section 2(34) of the Act, 1962.

108. Section 2(34) of the Act, 1962 also stood amended under the Finance Act, 2022. Section 2(34) of the Act, 1962 together with the amendment is reproduced below:

Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022	***Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022***
"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022	*"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022*
Customs.	*Customs under Section 5.*

109. The Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, issued under Section 2(34) of the Act, 1962 cannot be read in isolation. It has to be read in conjunction with Section 4(1) of the Act, 1962 and the Notification issued thereunder.

110. The view that the "Proper Officer" for the purpose of Section 28 and other provisions of the Act, 1962 could only mean the person who cleared the goods or the officer who succeeds such officer and not any other officer

from any other department requires reconsideration in view of the changes to the Act, 1962 *vide* the Finance Act, 2011 and also in the light of Section 4 and the notification issued thereunder.

111. This Court in paragraphs 11 to 15 of ***Canon India*** *(supra)* proceeded on the footing that under the provisions of the Act, 1962, the Board has no power to appoint "Proper Officers".

112. As per Section 4 of the Act, 1962, the Board constituted under the provisions of Central Board of Revenue Act, 1963 is vested with the power to appoint such persons as it thinks fit to be "officers of customs".

113. Under sub-section (1) to Section 4(1) of the Act, 1962, the Board may appoint such person as Officers of Customs as it thinks fit. Under Section 4(2) of the Act, 1962 the Board can even authorize a Chief Commissioner of Customs or a Joint or Assistant or Deputy Commissioner of Customs to appoint any officers below the rank of Assistant Commissioner of Customs as an "officer of customs". It appears that this aspect was also not brought to the notice of this Court in ***Canon India*** *(supra)*.

vii. ***Section 4 of the Act, 1962***

114. For an easy reference, Section 4 of the Act, 1962 is reproduced below:

> *"Section 4 : Appointment of "Officers of Customs":*
>
> *1) The Board may appoint such persons as it thinks fit to be Officers of Customs.*

> *2) Without prejudice to the provisions of subsection (1), [Board may authorise a* ***Principal Chief Commissioner of Customs or a Chief Commissioner of Customs Principal Commissioner of Customs or Commissioner of Customs)*** *or Joint or Assistant Commissioner of Customs or Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.]"*

115. It is relevant to note that it is only an officer of customs, appointed under Section 4(1) of the Act, 1962 who can be designated as the "proper officer" as defined in Section 2(34) of the Act, 1962 by a notification. The notifications issued under Section 2(34) and 4(1) of the Act, 1962 are nothing but an internal arrangement for the purpose of allocation of work among the officers of customs.

116. In ***M/s. N.C. Alexander*** *(supra)*, the High Court has extensively explained how officers of the DRI are officers of customs. We quote the relevant observations:

> *"236. The officers of the Directorate of Revenue Intelligence (DRI) have already been appointed as "Officers of Customs" under Notification issued under Section 4(1) of the Customs Act, 1962 vide Notification of the Government of India in the Ministry of Finance (Department of Revenue) No.186-Cus, dated 4 th August, 1981. The said Notification was later superseded by Notification No.19/90- Cus (N.T.), dated 26.04.1990.*

237. By Notification No.19/90- Cus (N.T.), dated 26.04.1990, the officers from the Directorate of Revenue Intelligence (DRI) were appointed as Collectors and Assistant Collectors of Customs in the area mentioned in Column-I of the said notification.

238. Notification No.19/90- Cus (N.T.), dated 26.04.1990 was later superseded by Notification No.17/2002-Cus. (N.T.) dated 07.03.2002, whereby, various officers from the Directorate General of Revenue Intelligence and Directorate of Revenue Intelligence were appointed as Commissioner of Customs and as Additional Commissioner and Joint Commissioner of Customs and Deputy Commissioner/Assistant Commissioner of Customs. Thus, they were appointed as Officers of Customs. Relevant portion Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 is reproduced below:- 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- Customs (N.T.), dated the 26th April, 1990, the Central Government appoints the officers mentioned in Column (2) of the Table below to 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*	*Additional Directors or Joint*	*Deputy Directors, or*
	General, Directorate General of Revenue Intelligence posted at Headquarters and Zonal/regional units	*Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal/regional units.*	*Assistant Directors of Directorate of Revenue Intelligence posted at Headquarters and Zonal/regional units*

239. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 came into force on 25.10.2002 vide Notification No.63/2002-Cus. (N.T.) dated 03.10.2002. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 was further amended by Notification No.82/2014-Cus. (N.T.), dated 16.09.2014.

240. Thus, the officers from the Directorate of Revenue Intelligence have been appointed as "Officers of Customs" under Section 4 of the Customs Act, 1962 and therefore they are "Proper Officers" for the purpose of Section 2(34) of the Customs Act, 1962. This aspect was not brought to the attention of the Hon'ble Supreme Court in Canon India Private Ltd. case referred to supra.

241. With a view to streamline the allocation of work and for the purposes of Section 17 and Section 28 of the Customs Act, 1962, Notification No. 44/2011-Cus. (N.T.), dated 06.07.2011 was issued by the Board under Section 2(34) of the Act.

242. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was issued under Section 2(34) of the Customs Act, 1962 for the purpose of identifying officers of customs for exercising the power and function under the Customs Act,1962.

243. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was later amended by Notification No.53/2012-Cus. (N.T.) dated 21.06.2012 and still later by Notification No.43/2019-Cus. (N.T.) dated 18.06.2019 and eventually has been rescinded/superseded by Notification No.25/2022-Cus. (N.T.) dated 31.03.2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.

244. Among various officers of the Customs, following officers were also assigned to act and function as the "Proper Officer" under Notification No.44/2011 – Cus. (N.T.) dated 06.07.2011:-

TABLE

Sl.No.	***Designation of the officers***
(1)	***(2)***
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*
3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.*

245. Thus, over a period of time, the officers of Directorate of Revenue Intelligence (DRI) who are primarily drawn from the Customs Department were

also given the task of issuing show cause notice and adjudicating the same in terms of Notifications issued as "Proper Officer", as defined in Section 2(34) of the Customs Act, 1962.

246. Now, under the amended Section 2(34), the word "under Section 5" has been inserted. Thus, what was implicit in the Customs Act, 1962 has now been made explicit in the amendment to the Customs Act, 1962 vide Finance Act, 2022.

247. As per Section 5(1) of the Act, an "Officer of Customs" may exercise the powers and discharge the duties conferred or imposed on him under the Customs Act, 1962, subject to such conditions and limitations as the Board may impose.

248. The power to be exercised may be subject to such conditions and limitations as the Board may impose on such an "Officer of Customs". Such officers can also exercise the powers and discharge the duties conferred or imposed on any other officers of customs who is subordinate to such officers. This aspect was also not brought to the attention of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs case referred to supra.

249. Only exception that has been provided was in Sub-Section (3) to Section 5 of the Act. As per Sub-Section 3 to Section 5 of the Act, a Commissioner (Appeals) cannot exercise the power and discharge the duties conferred or imposed on an "Officer of Customs" other than those specified in Section 108 of the Act and Chapter XV deals with the Appeals and Revisions.

250. Section 5 of the Customs Act, 1962 has also been amended in the Finance Act, 2022. Sub-Section (1A), (1B) and Sub-Section (4) and (5) to Section 5 of the Customs Act, 1962 have been now inserted. Section 5 as it stood prior to amendment and as it stands after amendment read as under:-

TABLE

5. Powers of Officers of Customs of the Customs Act, 1962	
Before the amendment Section	***After the 2022 amendment***
(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.	
	1(A) : Without prejudice to the provisions contained in subsection (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, 91 who shall be the proper officer in relation to such functions.
	(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an "Officer of Customs", who shall be the "Proper Officer" in relation to such functions."
(2) An Officer of Customs may excise the powers and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him.	
(3) Notwithstanding anything contained in this Section, a Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and Section 108.	
	"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions

	under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to— a) territorial jurisdiction; b) persons or class of persons; c) goods or class of goods; *d) cases or class of cases; e) computer assigned random assignment; f) any other criterion as the Board may, by notification, specify.*
	(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act.".

251. ***During the interregnum in 2012, a more comprehensive notification was issued vide Notification No.40/2012-Cus. (N.T.), dated 02.05.2012. This notification fell for consideration in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C). However, No.40/2012-Cus. (N.T.), dated 02.05.2012 cannot be read in isolation. It had to be read along with notifications issued under Section 4 of the Customs Act, 1962.***

252. Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was also amended from time to time and has now been eventually rescinded/superseded by Notification No.26/2022-Cus. (N.T.), dated 31- 3-2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.

> *253. Both Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 and Notification No. 40/2012-Cus. (N.T.), dated 02.05.2012 as amended from time to time have also not been challenged directly by any of the petitioners.*
>
> *254.* ***Although, the vires of Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was neither challenged or questioned before the Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C) nor the issue of jurisdiction was canvassed before the Tribunal, the Hon'ble Supreme has held that the officers of the Directorate of Revenue Intelligence were not "Proper Officers" as they are not Officers of Customs and therefore there had to be issue of an independent Notification under Section 6 of the Customs Act, 1962****."*
>
> **[Emphasis supplied]**

viii. ***Section 6 of the Act, 1962***

117. This Court in ***Canon India*** *(supra)* made certain observations on the purport of Section 6 of the Act, 1962 and held that the Notification No. 40/2012 dated 02.05.2012 which empowered the DRI officers to perform functions under Section 28 was invalid. The relevant portion of the judgment is reproduced below:

> *"21.* ***If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act.*** *The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is*

> *the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government.* ***The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2 (34) of the Customs Act. The notification is obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power."***
>
> **[Emphasis supplied]**

118. It was held that Section 6 is the only section which provides for the entrustment of the functions of customs officers to other officers of the Central or State Government or local authority. As a result of the judgment in ***Canon India*** *(supra)*, the respondents herein vociferously argued that Section 5 of the Act, 1962 only deals with the powers and duties and not functions and it is Section 6 which refers to functions. Such argument proceeded on the erroneous footing that any notification empowering the DRI should have been issued under Section 6 of the Act, 1962 and not having been done so, the show cause notice issued by the DRI was without jurisdiction.

119. Section 6 of the Act, 1962 reads thus:

> *"**6. Entrustment of functions of Board and customs officers on certain other officers**.—The Central Government may, by notification in the Official Gazette,*

entrust either conditionally or unconditionally ***to any officer of the Central or the State Government or a local authority*** *any functions of the Board or any officer of customs under this Act."*

[Emphasis supplied]

120. It is evident on a plain reading of Section 6 of the Act, 1962 referred to above that the same contemplates the entrustment of the functions of the Board or any officer of customs under the Act, 1962 to any of the officers of the Central or the State Government or a local authority. Such entrustment could be either conditional or unconditional. As per Section 6 of the Act, 1962, the Central Government may by notification in the Official Gazette entrust the functions of the Board or the officers of Customs to any of the following officers, namely, any officer of:

(i) The Central Government; or

(ii) The State Government; or

(iii) A local authority.

121. Section 6 replaced Section 8 of the erstwhile Sea Customs Act, 1878 under which the powers of officers of customs, at places where there is no Customs House, are exercised by the land revenue officers of the district. This is no longer necessary as the Central Excise officers are available all over the country. Further the powers of customs officers at times need to be conferred on other officers, like police officers. Section 6, therefore, makes a general provision empowering the Central Government to entrust the functions of

the Board or an officer of customs to any officer of the Central or State government or a local authority.

122. The object of this Section is to confer powers of search, seizure, arrest and recording of statements, to the officers working in border states like officers of police service, Border Security Force, Tehsildar, Indo Tibet Border Police Force and others. Similarly, officers working in the coast guard or the navy may also be given such powers as they may be involved in anti-smuggling operations.

123. The Board has notified entrustment of powers to various officers working in different departments either under the State services or Central services from time to time. An illustration of this is M.F.(D.R.) Notification No. 161-Cus. dated the 22.06.1963 which empowered specified officers of DRI with the power to search premises. It is worth noting that this notification under Section 6 was issued prior to the notification no. 17/2002 dated 07.03.2002.

124. Notification No. 17/2002 dated 07.03.2002 was issued under Section 4(1) of the Act appointing DRI officers as officers of customs. The powers of officers of customs to discharge duties under the Act is derived from Section 5.

125. A plain reading of Section 6 of the Act, 1962 referred to above, makes it abundantly clear that it applies only to officers from departments other than

the officers of the customs under Section 4 of the Act, 1962. The officers of DRI are not any other officers of the Central Government or the State Government or the local authority to be entrusted with the functions of the Board and the Customs Officers. It has been rightly observed by the High Court of Madras in ***M/s N.C. Alexander*** *(supra)* that post 07.03.2002, a notification of the Central Government under Section 6 is not required to recognise the officers from DRI as officers of customs.

126. The observations of the High Court in ***M/s N.C. Alexander*** *(supra)* in the aforesaid context with which we are in complete agreement are reproduced hereinbelow:

> *"269.* ***By such entrustment, these officers of other Departments do not become Officers of Customs. They can merely function as such officers. Since entrustment under Section 6 is on the officers from other department, the Parliament by design has given the powers to the Central Government and not to the Board.***
>
> *270. As the Officers from the Directorate of Revenue Intelligence, Ministry of Finance (MOF) are already "Officers of Customs" before their induction and deputation to the Board in various Directorates, there is no impediment on their being appointed as proper officers for the purpose of Section 2(34) of the Customs Act, 1962.*
>
> *271. Merely because the Officers of the Customs and Central Excise Department are selected and are deputed in the respective Directorates does not mean that they cease to be Officers of the respective Departments as these Directorates are created only to*

assist the Board to implement the object of respective fiscal enactments. It is an internal arrangement within the Ministry of Finance, Department of Revenue (DRI).

272. If Section 3 and Section 4 of the Act and the Notification issued thereunder referred to supra were perhaps brought to the attention of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.), the Hon'ble Supreme Court would have given a different interpretation. In any event, these discussion are academic in the light of the validation in Section 97 of the Finance Act, 2022.

273. It must also be remembered that the "Officers of Customs" in Section 3(1)(a) to (h) of the Customs Act, 1962 (as amended under Section 3(1) (a) to (j) after 2022 amendment) are Officers from Group 'A' Cadre of the Customs Department (IRS) like their counterparts from the Central Excise Department as Central Tax Officers under GST.

274. ***A reading of Section 2(34) with Section 4 of the Customs Act, 1962 also makes it clear that the expression "proper officer" means the "Officer of Customs" who has been assigned those functions either by the Board or by the Principal Commissioner of Customs or by Commissioner of Customs in relation to any function to be performed under the Act.***

275. ***Notifications which have been issued to appoint these officers from Directorate of Revenue Intelligence (DRI) to act as "Proper Officers" are enabling Notification notwithstanding the fact that they are already "Officers of Customs" under Notification issued under Section 4(1) of the Customs Act,1962.***

276. Further, the Board can also authorize the Principal Commissioner of Customs or Chief Commissioner of Customs or Principal Chief Commissioner or Commissioner of Customs or Joint or Assistant or

Deputy Commissioner of Customs, to appoint Officers of Customs below the rank of Assistant Commissioner of Customs. Thus, the following Group 'B' Executive - Gazetted and Non-Gazetted Officers assist in the initial stage of assessment of goods as:-

Sl. No.	*Group 'B' Executive Gazetted Officer*	*Group 'B' Executive Non – Gazetted Officer*
1	*Superintendent of Customs (Preventive)*	*Preventive Officers (Customs)*
2	*Appraiser of Customs*	*Examiner (Customs)*

277. As mentioned above, assessment is neither by the Group 'B' Executive – Gazetted Officer nor by Group 'B' Executive – Non-Gazetted Officer after 08.04.2011. Only, prior to 08.04.2011, the assessment of goods at the port was vested with the Group 'B' Executive – Gazetted Officer. However, after the said date, the fundamental of assessment has undergone a sea change and changed permanently as mentioned above.

278. These fundamental changes brought to the manner of the assessment under the Customs Act, 1962 with effect from 08.04.2011 appear to have not been brought to the attention of the Hon'ble Supreme Court and therefore the assumption in the paragraph Nos.12 to 15 in the case of Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.) may require a re-consideration insofar as pending cases before the Hon'ble Supreme Court and other Courts."

[Emphasis supplied]

127. Mr. N. Venkataraman, the Ld. ASG is correct in his submission that the distinction sought to be made between Section 5 and Section 6 of the Act,

1962 (powers and duties *vis-à-vis* functions) could be said to be imaginary and may have very serious legal implications.

128. The assignment of functions of the proper officer for the purposes of any section under the Act to an officer of customs is expressly mentioned in Section 2(34). Section 5 empowers the customs officer to discharge the duties of proper officer so conferred. Even prior to the amendment to Sections 2(34) and 5, this could be the only understanding with respect to the question of entrustment of functions of the proper officer to a customs officer.

129. In our view, the assignment of functions of proper officers as mentioned in Section 2(34) and entrustment of functions of customs officers as mentioned in Section 6 operate on different planes. The assignment of functions of the proper officer is to be done only to officers of customs (whether they be appointed under Section 4 or entrusted with certain functions under Section 6). There may be some overlap between the assignment of functions of proper officers under Section 2(34) read with Section 5 and the entrustment of functions of officers of customs under Section 6 in some instances but there can be no scenario in which we can hold that the "functions" under Section 6 and Section 2(34) are congruent.

130. One of the bases for the decision in ***Canon India*** *(supra)* was that no entrustment of functions under Section 6 was done in favour of the DRI

officers. This, however, is a glaring misapplication of Section 6 of the Act and is in ignorance of the applicable law which is in fact Sections 2(34) read with Section 5 of the Act, 1962. Therefore, in light of the judgment of this Court in ***Yashwant Sinha (supra)***, we find that it is necessary to allow this review petition to do complete justice.

ix. ***Observations on the constitutional validity of Section 28 (11) of the Act, 1962***

131. The question as to who are the "proper officers" for the purpose of issuance of show cause notices under Section 28 was raised before the High Court of Delhi in the case of ***Mangali Impex*** *(supra).* The specific challenge therein was to the constitutional validity of Section 28(11) of the Act which was inserted by the Customs (Amendment and Validation) Act, 2011 (the "**Validation Act**") with effect from 16.09.2011.

132. A Division Bench of the High Court held that sub-section (11) of Section 28 could not validate the show cause notices issued by the DRI officers prior to 08.04.2011, i.e., the date when Section 28 was amended.

133. With a view to understanding the true purport of Section 28(11) and the issues pertaining thereto, it is necessary to first examine the changes to Section 28 that were introduced prior to the Validation Act. Section 28 as it stood prior to the Finance Bill 2011 is reproduced below:

> *"**28. Notice for payment of duties, interest, etc.** (1) When any duty has not been levied or has been short-*

levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months,

from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him:

Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this subsection shall

be served except with the prior approval of the Chief Commissioner of Customs.

Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(2A) Where any notice has been served on a person under subsection (1), the proper officer –

(i) in case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and

(ii) in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months,

from the date of service of the notice on the person under subsection (1).

(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before

service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:

Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.

(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.

(3) For the purposes of sub-section (1), the expression "relevant date" means,-

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;
(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;
(c) in a case where duty or interest has been erroneously refunded, the date of refund;
(d) in any other case, the date of payment of duty or interest."

134. Thereafter, Section 28 was re-cast and a new scheme of the section was introduced *vide* the Finance Act, 2011 promulgated with effect from 08.04.2011. Section 28, as it stands after the amendment, is reproduced below:

> "***28. Recovery of duties not levied or short-levied or erroneously refunded.***
> *(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-*
> *(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*
> *(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-*
> *(i) his own ascertainment of such duty; or*
> *(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*
>
> *(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.*

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-
(a) collusion; or
(b) any wilful mis-statement; or
(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty five per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),- (a) within six months from the date of notice in respect of cases falling

under clause (a) of sub- section (1); (b) within one year from the date of notice in respect of cases falling under sub-section (4).

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

Explanation 1 -- For the purposes of this section, "relevant date" means,-
(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;
(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;
(c) in a case where duty or interest has been erroneously refunded, the date of refund;
(d) in any other case, the date of payment of duty or interest.

Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."

135. Parliament, therefore, made changes to the scheme of Section 28 and added the Explanation 2 which stated that any non-levy, short-levy or erroneous refund before the date of presidential assent to the Finance Bill, 2011 shall be governed by the provisions of Section 28 as it stood prior to the amendment.

136. On 06.07.2011, Customs Notification No. 44/2011 was issued under Section 2(34), which designated *inter alia* DRI officers as proper officers for the purposes of Sections 17 and 28 of the Act, 1962 and empowered such officers to perform functions under Section 28 including the function of issuing show cause notices.

137. Subsequently, on 16.09.2011, sub-section (11) of Section 28 came to be enacted *vide* the Validation Act. It provided that:

> "*(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*

138. As stated in the foregoing extract, sub-section (11) was introduced in the statute to remedy the defects highlighted by this Court in the case of ***Sayed Ali*** *(supra)* and the same retrospectively empowered all officers of customs appointed under Section 4(1) before 06.07.2011 to conduct assessments under Section 17 of the Act and to be proper officers for the purpose of Section 28.

139. The Statement of Objects and Reasons of the Validation Act explained that the introduction of Section 28(11) was necessary because the position of law on the functions of proper officers as interpreted by this Court in ***Sayed Ali***

(supra) and the consequent invalidation of show cause notices issued by the Commissionerates of Customs (Preventive), DRI and others, was not the legislative intent. Parliament clarified that show cause notices issued by officers of the Commissionerates of Customs (Preventive), DRI, Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded under Section 28 in respect of goods imported are valid, irrespective of whether any specific assignment as proper officer was issued.

140. The Validation Act was first challenged before the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)* on the grounds that it is violative of Articles 14, 19 and 21 of the Constitution and that it fails to take note of Explanation 2 to Section 28. Relying on ***Sayed Ali*** *(supra)*, the petitioners therein challenged the Validation Act on the ground that it is only the officers of customs who are assigned functions of assessment including the reassessment and they alone are competent to issue notice under Section 28.

x. *Bombay High Court decision in Sunil Gupta (supra)*

141. Similar grounds were taken by the petitioners before the High Court of Delhi in the case of ***Mangali Impex*** *(supra)* wherein it was submitted that there was an apparent conflict between Explanation 2 and Section 28(11) which rendered the Validation Act inapplicable to show cause notices issued prior

to 08.04.2011 i.e., the date on which the new Section 28 came into force. It was further submitted that Section 28(11), by conferring powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit, would result in utter chaos and confusion as envisaged in ***Sayed Ali*** *(supra)* and therefore, does not cure the defects pointed out therein.

142. The very same argument has been canvassed before us by the respondents herein. To comprehensively address the submissions made before us, we find it necessary to address the following three issues:

(i) What is the scope of Explanation 2 to Section 28?

(ii) Whether the field of operation of Section 28(11) and Explanation 2 overlaps? In other words, what is the scope of the non-obstante clause in sub-section (11)?

(iii) Whether Section 28(11) cures the defect pointed out in ***Sayed Ali*** *(supra)*?

143. Explanation 2 was introduced as a part of the new Section 28 enacted by the Finance Act, 2011 with effect from 08.04.2011. Explanation 2 to Section 28 reads as follows:

> "*Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood*

immediately before the date on which such assent is received."

144. It was vehemently argued on behalf of the respondents that reading Section 28(11) with Explanation 2 narrows down the period for the purposes of retrospective validation of the show cause notices issued and limits the application of sub-section (11) to the period from 08.04.2011 (enactment of new Section 28) to 16.09.2011 (enactment of the Validation Act). This challenge is based on the reasoning that the non-obstante clause contained in Section 28(11) is limited to "*…judgment, decree or order of any court of law, tribunal or other authority…*" and does not oust the application of other provisions of the Act including Explanation 2. It was argued that the phrase "*…this section…*" in sub-section (11) when read harmoniously with Explanation 2 refers to the new Section 28 only and will not be applicable to the old provision as it stood prior to 08.04.2011.

145. The determination of the soundness of the aforesaid argument necessitates a comparison of Section 28, prior to the amendment and subsequent to the amendment.

Provisions of old Section 28 [running in continuation from sub-sections (1) to (3)]	**Corresponding provisions of new Section 28**	**Comparison and Remarks**
28. Notice for payment of duties, interest, etc.	***28. Recovery of duties not levied or short-levied or erroneously refunded.***	

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer ***may****,* *(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;* *(b) in any other case,* ***within six months****, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*	*(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,* *(a) the proper officer* ***shall****, within* ***one year*** *from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*	The legislature *vide* the amendment, has removed the distinction between the purposes for which the imports are to be used. Sub-section (1)(b) of the old Section 28 is analogous to the sub-section (1)(a) of the new Section 28. The only change that has been made herein is the period of limitation for service of show cause notice which has been increased from six months to one year.
Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.	*(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-* *(a) collusion; or* *(b) any wilful mis-statement; or* *(c) suppression of facts, by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.* *(5) Where any duty has not been levied or has been short- levied or the interest has not been charged*	In respect of the provision relating to issuance of show cause notice for non-levy, short-levy, not-paid, part-paid and erroneous refund of duty by reasons of collusion, wilful mis-statement or suppression of facts, no change has been made and the time period of five years for service of notice has been retained. The legislature has further clarified the procedure following the service of notice. Sub-section (5) of the new Section 28 provides for the levy of interest on the amount due and permits part-payment of the amount mentioned in the notice to the extent that the short-fall in duty has

	or has been part- paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty- five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing. *(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-* *(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or* *(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such*	been accepted by the noticee. Sub-section (6) of the new Section 28 lays down the manner in which the proceedings following the service of the show cause notice will be either closed on payment of the full amount mentioned in the notice or adjudication and determination of the total amount to be recovered if part-payment has been made by the noticee.

	amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).	
Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him: *Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub- section shall be served except with the prior approval of the Chief Commissioner of Customs.*		The legislature has removed the pecuniary distinction and the consequent approvals from different authorities for issuance of show cause notices.
Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.	*(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.*	This is an analogous provision.
(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and	*(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in*	This is an analogous provision and pertains to the adjudication / determination of the amount specified in the show-cause notice when issued under sub-section (1) of the new Section 28.

thereupon such person shall pay the amount so determined.	*excess of the amount specified in the notice.*	
(2A) Where any notice has been served on a person under sub-section (1), the proper officer - *(i) in case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and* *(ii) in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub- section (1).*	*(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-* *(a) within six months from the date of notice in respect of cases falling under clause (a) of sub- section (1);* *(b) within one year from the date of notice in respect of cases falling under sub-section (4).*	This is an analogous provision. Sub-section (9)(a) of the new Section 28 is analogous to sub-section (2A)(ii) of the old provision and provides for a time period of six months for adjudication of notices issued under new Section 28(1)(a). Sub-section (9)(b) of the new Section 28 is analogous to sub-section (2A)(i) of the old provision and provides for a time period of one year for adjudication of notices issued in cases of collusion, wilful mis-statement and suppression of facts.
(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:	*(1) ...* *(a) ...* *(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-* *<u>(i) his own ascertainment of such duty; or</u>* *<u>(ii) the duty ascertained by the proper officer</u>, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.*	In both the old and new Section 28, the law has provided an opportunity to the person chargeable with duty or interest to make payment before the show cause notice is issued to him and inform the proper officer of such payment in writing. The legislature, in the new Section 28(1)(b) has clarified the basis for ascertainment of amount to be paid prior to issuance of show cause notice.

	(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.	
Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.	*(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).*	These provisions are analogous.
Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.	*(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.*	This provision is for the recovery of interest.
(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.		
(3) For the purposes of sub-section (1), the expression "relevant date" means,-	*Explanation 1 - For the purposes of this section, "relevant date" means,-*	This provision is identical to the old provision.

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods; *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;* *(c) in a case where duty or interest has been erroneously refunded, the date of refund;* *(d) in any other case, the date of payment of duty or interest."*	*(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;* *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;* *(c) in a case where duty or interest has been erroneously refunded, the date of refund;* *(d) in any other case, the date of payment of duty or interest.*	
	Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."	The Explanation 2 was added to the new Section 28 to demarcate the date from which the said section shall become applicable and any recoveries of duty prior to such date would be governed by the old Section 28.

146. What is discernible from the aforesaid modifications made by the Parliament is as under:

(a) **Distinction in the time-period**: In sub-section (1) of new Section 28, the difference in the purpose of the duty has been removed and for all cases of short-levy, non-levy, part-payment, non-payment and erroneous refund except for cases falling under new Section 28(4), the

period of one year has been provided for the service of the show cause notice, which under the old provision was six months.

(b) **Additional provision in respect of short-levy, non-levy, part-payment, non-payment and erroneous refund by reasons of collusion, willful misstatement and suppression of facts**: An additional provision has been inserted by way of Section 28(5) stipulating that, to the extent the amount mentioned in the show cause notice has been accepted by the person chargeable with payment of such duty, the payment of a part of such amount is allowed.

(c) **Self-ascertainment of recovery amount before the issuance of a show cause notice**: Parliament introduced the mechanism of self-ascertainment of the recovery amount by the person chargeable with the payment of duty and payment of such amounts before the service of a show cause notice, subject to final adjudication or determination by the proper officer.

(d) **Insertion of Explanation 2**: For the removal of doubts regarding the applicable provision for recoveries of duty arising before and after the enactment of new Section 28, Parliament added Explanation 2 to clarify that recoveries arising prior to 08.04.2011 shall be governed by old Section 28 of the Act.

147. Having analysed the aforesaid modifications made by Parliament to old Section 28, we can say with certainty that none of the changes made by the amendments to Section 28 has any impact on the competence of the proper officer for the purposes of fulfilment of functions under Section 28. In our considered view, the only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices.

148. Therefore, the application of sub-section (11), which pertains only to the empowerment of proper officers to issue show cause notices under Section 28, cannot be said to be limited only to new Section 28 but also to the provision as it stood prior to 08.04.2011. The legislative intent is that sub-section (11) was meant to apply to Section 28 without any restriction as to time. This is apparent from the Statement of Objects and Reasons of the Validation Act. Therefore, the contention of the respondent that the phrase *"…this section…"* in sub-section (11) means only new Section 28, which was also accepted by the High Court of Delhi in ***Mangali Impex*** *(supra)*, is erroneous.

149. Since, there is no overlap in the field of operation of Section 28(11) and Explanation 2, the interpretation of the non-obstante clause in Section 28(11) and the consequent harmonious construction of the two provisions in ***Mangali Impex*** *(supra)* is otiose.

150. Thus, we are in complete agreement with the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)* with respect to the first two questions raised by us in this case. The relevant portion of that judgment is reproduced below:

> *"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities.* ***Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28 (11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail.****"*
>
> **[Emphasis supplied]**

151. Further, the finding in ***Mangali Impex*** *(supra)* that Section 28(11) is overbroad and confers the powers of the proper officer to multiple sets of

customs officers without any territorial or pecuniary jurisdictional limit which in turn may lead to "utter chaos and confusion" as highlighted in ***Sayed Ali*** *(supra)*, is misconceived in our view. The apprehension of the petitioner therein was that plurality of proper officers empowered under Section 28 would result in more than one show cause notice and a consequent misuse of the provision, which would be detrimental to the interests of the persons chargeable with the payment of duty. Although, ***Mangali Impex*** *(supra)* declared Section 28(11) to be invalid on this ground, it suggested that the Board should issue instructions in its administrative capacity that once a show cause notice is issued specifying an adjudicating authority subject to such an officer being the proper officer for the purposes of Section 28, then he or she alone should proceed to adjudicate that particular show cause notice to the exclusion of all other officers who may have power in relation to that subject matter. We find this to be a reasonable construal of the import and application of Section 28(11).

152. It is a settled position of law that the possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it. This principle of law has been expounded by this Court in the case of ***Shreya Singhal v. Union of India*** reported in **(2015) 5 SCC 1**. The relevant portion of the judgment is reproduced below:

> *"In The* ***Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr., [1962] 3 S.C.R. 786****, this*

Court observed: "....This Court has held in numerous rulings, to which it is unnecessary to refer, that ***the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void.*** *Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:*

> *"If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably" and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [1960 AC 490 at pp. 520-521] : "It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute."*
>
> ***The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid*** *and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (at page 825)"*

[Emphasis supplied]

153. We were apprised by the learned Additional Solicitor General during the course of the hearing that the Customs department has been following the protocol suggested in ***Mangali Impex*** *(supra)* since 1999. Further, no substantial empirical evidence of the misuse of Section 28(11) which was enacted over a decade ago, was presented by the parties. Therefore, we are inclined to accept the policy of the Customs department that once a show cause notice is issued, the jurisdiction of other empowered proper officers shall be excluded for such notice. We find that such policy acts as a sufficient safeguard against the apprehension of chaos or confusion or misuse.

154. Thus, we are of the considered view that the enactment of sub-section (11) of Section 28 cures the defect pointed out in ***Sayed Ali*** *(supra)* and the judgment in ***Mangali Impex*** *(supra)* deserves to be set aside.

155. It follows from the above discussion that sub-section (11) of Section 28 is constitutionally valid, and its application is not limited to the period between 08.04.2011 and 16.09.2011.

156. For the reasons in the foregoing paragraphs, we hold that the Bombay High Court judgment in ***Sunil Gupta*** *(supra)* lays down the correct position of law, whereas the Delhi High Court decision in ***Mangali Impex*** *(supra)* is incorrect and is consequently set aside.

xi. ***Amendments made by the Finance Act, 2022***

157. The third cluster of the present batch of cases relates to the challenge to the constitutional validity of Sections 86, 87, 88, 94 and 97 of the Finance Act, 2022 respectively. We take this opportunity to consider this issue as the constitutional validity of the said provisions has been challenged with specific reference to the findings made in ***Canon India*** *(supra)*, which is the judgment under review herein.

158. The validation amendment *vide* Section 97 has been challenged before this Court specifically in **WP (C) 526 of 2022** titled ***Daikin Air Conditioning India Pvt. Ltd. v. Union of*** **India**. The respondent herein has canvassed the following grounds for declaring the provision unconstitutional on the touchstone of Article 14 of the Constitution:

(i) The Finance Act, 2022 does not cure the defect pointed out in ***Canon India*** *(supra)* and no notification or amendment of law deeming DRI officers to be the proper officers would cure the defect of ouster of jurisdiction of DRI once the original act of assessment has been undertaken by a different group of officers. The Finance Act, 2022 is manifestly arbitrary as no attempt has been made to cure the defect highlighted in ***Canon India*** *(supra)*.

(ii) This Court in ***Canon India*** *(supra)* made a determination of fact that the DRI officers did not have jurisdiction to perform functions under

Section 28 of the Act, 1962. Such judicial determination of fact relating to actual exercise of jurisdiction cannot be retrospectively overruled.

(iii) The legislature has selectively adhered to the legal findings made in ***Canon India*** *(supra)* only for future actions by enactment of Section 110AA and has proceeded to ignore the findings for past show cause notices by validating the same *vide* Section 97 of the Finance Act, 2022. Such a distinction creates two classes of assessees without any reasonable basis for this differentiation.

(iv) Section 97 of the Finance Act, 2022 fails the test of proportionality as it is a sweeping validation of all acts under the chapters specified in the section and does not provide certainty to the assessees as to which rights have been abrogated.

(v) The writ petitioner in the **WP (C) No. 520 of 2022** titled ***Dish TV India Ltd. v. Union of India and Ors.*** has also challenged the application of Section 97 on the ground that Section 97(iii) of the Finance Act, 2022 gives the amendments made to Sections 2, 3 and 5 retrospective effect which would make sub-sections (4) and (5) of Section 5 applicable to the show cause notices issued in the past. It is the case of the writ petitioner that Customs Notifications Nos. 44/2011 dated 06.07.2011 and 40/2012 dated 02.05.2012 do not in any way satisfy the mandatory and salutary criteria laid down in Sections 5(4) and 5(5).

159. From the grounds summarized above, we find that the writ petitioners have challenged the constitutionality of the validation of past actions by Section 97 of the Finance Act, 2022. Therefore, we shall limit our ruling to this provision alone.

160. It is a settled position of law that the legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted.

161. This Court in the case of ***Empire Industries Ltd. v. Union of India*** reported in **(1985) 3 SCC 314** observed that:

> "*51. In the view we have taken of the expression "manufacture", the concept of process being embodied in certain situation in the idea of manufacture, the impugned legislation is only making "small repairs" and that is a permissible mode of legislation. In 73rd vol. of Harvard Law Review p. 692 at p. 795, it has been stated as follows:*
>
> > *"**It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small repairs". Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the***

> ***individual's interest in benefiting from the defect*** *.... The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it…*"
>
> **[Emphasis supplied]**

162. This Court has laid down the tests for determining whether a validating law is enacted within permissible limits in the case of ***Indian Aluminium Company Co.*** **vs.** ***State of Kerala*** reported in **(1996) 7 SCC 637** and the relevant observations therein are reproduced below:

> *"**56.** From a resume of the above decisions the following salient principles would emerge:*
> *...*
> *(3) In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.*
> *(4) The Court, therefore, need to carefully scan the law to find out:* ***(a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution****.*
> *(5) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not an encroachment on judicial power.*

> *(6)* ***In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decisions ineffective by enacting valid law on the topic within its legislative field, fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as including power to amend the law.*** *It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date."*
>
> **[Emphasis supplied]**

163. We shall now proceed to determine whether the enactment of Section 97 of the Finance Act, 2022 fulfils the tests laid down by this Court for a validation Act to be legally sustainable. The first leg of such determination would be to satisfy ourselves as to whether Section 97 cures the defect pointed out by this Court in ***Canon India*** *(supra)*. In this respect, the following aspects are relevant:

a) The Coordinate Bench in ***Canon India*** *(supra)* observed that:

> *"**14.** It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28 (4) to recover duties which have escaped assessment is in the*

nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or ***any other officer who has been assigned the function of assessment****. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28 (4)]*"

[Emphasis supplied]

b) According to ***Canon India*** *(supra)*, only "the proper officer" empowered to undertake the exercise of assessment or re-assessment under Section 17 in a jurisdictional area can perform the functions of "the proper officer" under Section 28 of the Act, 1962 as the exercise involved in Section 28 is the re-assessment of duty. The defect pointed out by the Court in ***Canon India*** *(supra)* is that the DRI officers were not "the proper officers" who undertook the exercise of assessment under Section 17. Hence, they lacked the jurisdiction to issue show cause notices under Section 28. The reasoning given by the Court was that any other reading of the expression "proper officers" would lead to a multiplicity of proper officers competent to perform functions under Section 28, which would result in the perpetuation of chaos and confusion as pointed out in ***Sayed Ali*** *(supra).*

c) However, the apprehension expressed is unfounded in our opinion especially in context of the Customs department's policy of exclusion of jurisdiction of other competent proper officers once a particular

proper officer empowered to issue a show cause notice under Section 28 has issued it. Such a policy acts as an adequate safeguard in our view.

d) We find that the ouster of jurisdiction of DRI to issue show cause notices under Section 28 once an assessment has been done under Section 17 is not a defect at all in light of Notification No. 44/2011 dated 06.07.2011 and new Section 17 as amended by the Finance Act, 2011. We have already recorded a finding in the foregoing segments of this judgment that these facts were not considered in ***Canon India*** *(supra)* and therefore, become the basis of the review petition herein.

e) Notification No. 44/2011 dated 06.07.2011 specifically assigned the functions of the proper officers under Sections 17 and 28 to DRI officers. Such assignment of functions of assessment is sufficient for the DRI officers to fall in the category of "*any other officer who has been assigned the function of assessment*" as mentioned in ***Canon India*** *(supra).*

f) Furthermore, as discussed previously, the functions of assessment and re-assessment under Section 17 and recovery of duty under Section 28 are distinct. ***Canon India*** *(supra)* held erroneously that Section 28(4) involves the function of re-assessment. The function of recovery of short-levy, non-levy, part-paid, non-paid and erroneous

refund under Section 28 is not the same as the assessment or re-assessment of the bill(s) of entry. It necessarily has to be a process subsequent to the completion of functions under Section 17. Further, such function of determining duty to be recovered requires application of judicial mind and therefore, cannot be an administrative review of an act. This is especially so after the introduction of self-assessment in Section 17 *vide* the Finance Act, 2011.

g) Therefore, the validating provision under Section 97 of the Finance Act, 2022 is a mere surplusage with respect to validation of the show cause notices issued by DRI officers under Section 28. It cannot be challenged on the ground that it does not cure the defect pointed out in ***Canon India*** *(supra)* when no defect can be made out therein as a result of this review petition.

164. The contention that Section 97 could not have overruled the finding of fact relating to the actual exercise of jurisdiction in ***Canon India*** *(supra)* is untenable for the following reasons:

(a) The argument that once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department and therefore, only that officer or his superiors, who had undertaken assessment under

Section 17 in the first place, shall have the jurisdiction to issue notices for recovery of duty under Section 28, does not hold water.

(b) As discussed above, the functions of assessment and re-assessment under Section 17 and the recovery of duty under Section 28 are distinct. Therefore, the exercise of functions under Section 17 can only act as a "jurisdictional fact" for the purpose of excluding the jurisdiction of other proper officers empowered under that section for the exercise of the rest of the functions specified therein. Similarly, the exercise of the function of issuing show cause notices under Section 28 by a particular proper officer serves as a jurisdictional fact which would exclude the jurisdiction of other proper officers empowered under Section 28.

(c) ***Canon India*** *(supra)* proceeded on an erroneous assumption that the jurisdiction of the proper officer under Sections 17 and 28 is linked. This is due to the erroneous understanding of the provisions of Act, 1962 that functions under Section 28 involve re-assessment.

(d) Therefore, the very basis of the determination of jurisdictional fact for exercise of functions under Section 28 has been clarified by us. Thus, we are of the considered view that the challenge to Section 97, on the ground of inability of a validating Act to overrule a finding of fact, is unfounded and liable to be dismissed.

165. While challenging the constitutional validity, it was argued that the insertion of Section 110AA for future actions while validating the past actions (which in words of the writ petitioners was contrary to the intent of Section 110AA) does not create a reasonable classification as there is no intelligible differentia. It was further argued that Section 97 is manifestly arbitrary and fails the test of proportionality under Article 14. In our view, these submissions are not tenable in law for the following reasons:

a) It is a settled position of law that matters of economic policy are best left to the wisdom of the legislature and in policy matters, the accepted principle is that the courts should not interfere. This principle has been laid down in the case of ***Bhavesh D. Parish v. Union and India*** reported in **(2000) 5 SCC 471**, wherein this Court held that:

> *"26. The services rendered by certain informal sectors of the India economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question.* ***Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic scenario the expertise of people dealing with the subject should not be lightly interfered with.*** *The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation station of the infirmities in the economy can be put in serious jeopardy and, therefore, it is*

necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all."

[Emphasis supplied]

b) A Constitution Bench of this Court in the case of ***Shri Prithvi Cotton Mills Ltd. and Ors.* v. *Broach Borough Municipality & Ors.***, reported in **(1969) 2 SCC 283** set out the modus of validation of tax through validating statutes and observed as follows:

"4. ...
Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. ***Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts.*** *The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence*

which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."

[Emphasis supplied]

c) We are of the opinion that the introduction of Section 110AA was a valid exercise of legislative power to amend the provisions of the Act, 1962 and it was done with the objective of following the principle of comity to give effect to the suggestions of this Court in ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)*. However, we clarify that a change in law, which the legislature was competent to enact, having prospective application cannot be a ground for the writ petitioners to question the sanctity and wisdom of the legislature in following a different mechanism to assess/re-assess bills of entry(s) and recover duty under Sections 17 and 28 respectively.

d) No occasion arises for us to discuss the validity of Section 97 with respect to the test of reasonable classification as the introduction of Section 110AA does not create a class of assessees to whom the law would apply differentially to, at the same point in time. The differential mechanism for the exercise of functions under Section 28 is not for a different class of assessees but rather for the show cause notices issued during different periods of time that is, prior to the Finance Act, 2022 and after its enactment.

e) On the strength of such reasoning, we are of the view that Section 97 is not manifestly arbitrary and discriminatory and is not disproportional to the object sought to be achieved by it.

166. It is also the contention of the writ petitioners that Section 97 (iii) gives retrospective effect to the amendments made in Section 5 thereby making previous show cause notices subject to the provisions of the newly inserted provisions, i.e., sub-sections (4) and (5) of Section 5. It is their case that the previous notifications empowering DRI officers to issue show cause notices under Section 28 do not fulfil the mandate of Section 5(4) as they cannot be placed in any of the criteria envisaged therein. We find no merit in the said contention:

a) Section 5(4) reads as follows:

> *"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board **may** consider any one or more of the following criteria, including, **but not limited to***
> *(a) territorial jurisdiction;*
> *(b) persons or class of persons;*
> *(c) goods or class of goods;*
> *(d) cases or class of cases;*
> *(e) computer assigned random assignment;*
> *(f) **any other criterion as the Board may, by notification, specify**."*
>
> **[Emphasis supplied]**

b) From a plain reading of the above-referred sub-section, we find that the Board has been entrusted with wide powers in respect of determination

of criteria and the use of the word "may" is indicative of the Board's discretion in this regard. Therefore, the writ petitioners are wrong in construing the sub-section as a mandatory provision for the purpose of invalidation of the show cause notices issued.

c) A purposive interpretation of Section 97 indicates that clause (i) therein is the object of its enactment and clause (iii) is an extension thereof to further clarify that any deficiencies in law under Sections 2, 3 and 5 of the Act, 1962 as they stood prior to the Finance Act, 2022 would not be an obstacle to the validating act under clause (i).

d) Therefore, the retrospective application of Sections 2, 3 and 5 of the Act, 1962 respectively is not stand-alone but is restricted to achievement of the ultimate object of validation under clause (i) of Section 97. Any interpretation of the amended Sections 2, 3 and 5 arising from the retrospective application thereof, which is contrary to or not in furtherance of the Section 97 (i) would not hold good in law.

e) This Court in the case of ***Vivek Narayan v. Union of India*** reported in **(2023) 3 SCC 1** has held that:

> *"**140.** The principle of purposive interpretation has also been expounded through a catena of judgments of this Court. A Constitution Bench of this Court in M. Pentiah v. Muddala Veeramallappa [M. Pentiah v. Muddala Veeramallappa, (1961) 2 SCR 295 : AIR 1961 SC 1107] was considering a question, as to whether the term prescribed in Section 34 would apply to a member of a "deemed" committee under the provisions of the*

Hyderabad District Municipalities Act, 1956. An argument was put forth that, upon a correct interpretation of the provisions of Section 16, the same would be permissible. Rejecting the said argument, K. Subba Rao, J., observed thus : (AIR pp. 1110-11, para 6)

"6. Before we consider this argument in some detail, it will be convenient at this stage to notice some of the well-established rules of construction which would help us to steer clear of the complications created by the Act. Maxwell on the Interpretation of Statutes, 10th Edn., says at p. 7 thus:

'… if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.'*…"*

[Emphasis supplied]

f) A seven-Judge Bench of this Court in the case of ***Abhiram Singh v. C.D. Commachen (Dead) By Lrs. & Ors.,*** reported in **(2017) 2 SCC 629** has held that:

"***36.*** *The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. This was articulated rather felicitously by Lord Bingham of Cornhill in R. (Quintavalle) v. Secy. of State for Health [R. (Quintavalle) v. Secy. of State for Health, 2003 UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR*

692 (HL)] when it was said : (AC p. 695 C-H, paras 8-9)

> *"8.* ***The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise.*** *It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute.* ***Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment****."*
>
> **[Emphasis supplied]**

g) Thus, we are of the opinion that the retrospective application of Section 5(4) cannot be the basis for the challenge to the validity of Section 97 of the Finance Act, 2022.

167. For the foregoing reasons, we hold that the challenge to the constitutional validity of the Finance Act, 2022 and more particularly Section 97 thereof, being unfounded should fail. We say so more particularly in light of the

judgment in the review of ***Canon India*** *(supra)* and the various judicial pronouncements of this Court. Therefore, we hold that Section 97 of the Finance Act, 2022 is constitutionally valid and the challenge to it is rejected accordingly.

F. CONCLUSION

168. In view of the aforesaid discussion, we conclude that:

(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.

(ii) The petition seeking review of the decision in ***Canon India*** *(supra)* is allowed for the following reasons:

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

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,

1962 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

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)*

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

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

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.

171. The Registry shall take steps to list the connected civil appeals and writ petitions before the appropriate Bench and they shall be disposed in terms of the observations made in this judgment.

172. The review petitions are accordingly disposed of.

..... CJI.
(Dr. Dhananjaya Y. Chandrachud)

..... J.
(J.B. Pardiwala)

..... J.
(Manoj Misra)

New Delhi;
7th November, 2024