

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF SEPTEMBER, 2021

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.59487 OF 2016 (T- TAR)

BETWEEN

1. M/S. XYLEM RESOURCES MANAGEMENT PVT. LTD.,
NO.115/1, KRISHNAPPA LAYOUT,
LALBAGH ROAD,
WILSON GARDEN,
BENGALURU -- 560 027,

(REPRESENTED BY MR. GAUTHAM CHOWDHURY,
MANAGING DIRECTOR AND CEO,
AGED ABOUT 57 YEARS,
S/O. SHRI. S.R. CHOWDHURY)

2. MR. GAUTAM CHOWDHURY
MANAGING DIRECTOR AND CEO,
M/S. XYLEM RESOURCES MANAGEMENT PVT. LTD.,
NO.115/1, KRISHNAPPA LAYOUT,
LALBAGH ROAD, WILSON GARDEN,
BENGALURU -560 027.

... PETITIONERS

(BY SRI V. RAGHURAMAN, ADVOCATE)

AND

1. THE DEPUTY DIRECTOR
DIRECTORATE GENERAL OF CENTRAL EXCISE
INTELLIGENCE (DGCEI), BELAGAVI REGIONAL UNIT,
"BHUSHANA", PLOT NO.324, IIIRD MAIN,
IIND STAGE, HANUMAN NAGAR,

NEAR HANUMAN TEMPLE,
BELAGAVI – 590 019.

2. SENIOR INTELLIGENCE OFFICER
DIRECTORATE GENERAL OF CENTRAL EXCISE
INTELLIGENCE (DGCEI), REGIONAL UNIT-BELGAUM,
"BHUSHANA", PLOT NO. 324, IIIRD MAIN,
IIND STAGE, HANUMAN NAGAR,
NEAR HANUMAN TEMPLE,
BELAGAVI – 590 019.
3. THE PRINCIPAL COMMISSIONER OF SERVICE TAX
SERVICE TAX I COMMISSIONERATE,
1ST FLOOR, TTMC, BMTC BUILDING,
KANAKAPURA ROAD,
BANASHANKARI,
BENGALURU -560 085.
4. UNION OF INDIA
MINISTRY OF FINANCE,
REPRESENTED BY SECRETARY,
NORTH BLOCK,
NEW DELHI-110 001.
5. THE PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF CENTRAL EXCISE
INTELLIGENCE
BENGALURU ZONAL UNIT,
#112, K.H.ROAD, SP ENCLAVE,
ADJ. TO KARNATAKA BANK,
BENGALURU - 560 027.

... RESPONDENTS

(BY SRI K.V.ARAVIND, ADVOCATE FOR R1-R3 & R5,
SRI Y HARIPRASAD, CGSC FOR R-4)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226
AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO
DECLARE THAT THE SUMMONS NO.44/2016

DTD.28.7.2016 ISSUED TO THE OFFICERS OF THE PETITIONER BY THE R-2 VIDE ANNEX-A ARE UNCONSTITUTIONAL, ILLEGAL AND BAD IN LAW BEING VIOLATIVE OF THE PROVISIONS OF THE FINANCE ACT, 1994 AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 25.05.2021, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING :-

ORDER

The petitioners, in this writ petition, seek the following prayers:

- (a) *Writ of certiorari or any other appropriate writ, order or direction to declare that the Summons No.44/2016 dated 28-07-2016 issued to the officers of the petitioner by the by respondent No.2, enclosed as Annexure-A are unconstitutional, illegal and bad in law being violative of the provisions of the Finance Act, 1994;*
- (b) *Writ or direction in the nature of a writ of certiorari or any other writ or order or direction quashing the summons No.44/2016 dated 28-07-2016 in Annexure-A as being arbitrary and oppressive being violative of Articles 14, 19,265 and 300A of the Constitution;*
- (c) *Writ or direction in the nature of a writ or certiorari or any other writ or direction to quash the notification No.22/2014-15 dated 16-09-2014 enclosed as Annexure-B issued by the respondent No.4 to the extent of*

appointment of officers of DGCEI as 'Central Excise Officers' having all India jurisdiction and declare it as illegal and ultra vires being violative of Articles 14, 19, 265, 300A of the Constitution;

- (d) *Writ or direction in the nature of a writ of certiorari or any other writ or direction to quash the show cause notice No.79/2016-17 dated 13-12-2016 enclosed to Annexure-N issued by the respondent No.5 as being arbitrary and oppressive being violative of Articles 14, 19, 265 and 300A of the Constitution;*
- (e) *Writ or direction in the nature of a writ of certiorari or any other writ or direction to quash the show cause notice No.79/2016-17 dated 13-12-2016 enclosed as Annexure-N issued by the respondent No.5 as being issued mechanically, with premeditated mind and lacking in judicial discipline as being contrary to settled decisions;*

And

- (f) *Grant such other reliefs as this Hon'ble High Court may think fit including the cost of this writ petition.*

2. Brief facts leading to the filing of the writ petition, as borne out from the pleadings, are as follows:-

In this writ petition, M/s.Xylem Resources Management Private Limited and its Managing Director are separately arrayed as petitioner Nos.1 and 2 and for the sake of convenience, they will be referred to as 'the petitioner' in this order. The petitioner is into the services of merchandising and raising invoices on its customer for the management agency, supervision, reimbursement expenses, other expenses and charged along with service tax except reimbursement expenses. This has been the business of the petitioner since 08.02.2008, under the caption 'Management Consultancy Services'.

3. On 01.07.2012, a new method of taxation was introduced for levy of service tax referred to as negative list of taxation. This replaced the erstwhile taxation levy where service tax was levied on specified taxable services. The petitioner continues to pay service tax only on the management fee agency commission and

claims to have been filing periodical returns in the necessary Form-ST3. That service tax was introduced in the year 1994 until 01.07.2012, and it was being levied on specified services which were listed in the Finance Act, 1994 and with effect from 01.07.2012, Finance Act was amended wherein new method of taxation was introduced for the levy of service tax referred to as 'Negative List of Taxation Services'. The new scheme of taxation replaced the erstwhile provisions of levy of service tax on individuals defining services. Under the negative list of taxation all those activities which are covered under the definition of service would become subject to service tax with the exception of those services listed under Section 66D of the Act which was again referred to as negative list.

4. The Central Board of Excise and Customs (EBEC' for short) issued a notification on 16.09.2014 in exercise of powers conferred on it under clause (b) of

Section 2 of the Central Excise Act, 1944 ('the Act' for short) read with clause 44 of Section 65B of the Finance Act, 1994 and Rule 3 of the Central Excise Rules, 2002 read with Rule 3 of the Service Tax Rules, 1994 specifying officers who were invested with all powers under Chapter-V of the Finance Act, 1994 and the Rules made there under to have jurisdiction over PAN India. Those officers were Director General of Audit; Directorate General of Central Excise Intelligence; and Directorate General of Service Tax. This notification come into effect from 15.10.2014, which was in supersession of the earlier notifications dated 28.01.1998 and 11.03.2004, which had till then held the field.

5. In 28.07.2016, investigations were initiated by a Senior Intelligence Officer, Director General of Central Excise Investigations, Belagavi, against the petitioner for the following payment of service tax on the

reimbursement of expenses such as salaries to staff and associates and other additional expenditure. The DGCEI, Belagavi Unit, issued summons to the petitioner seeking the following information:

- (1) Form 26AS for the Financial year 2011-12 to 2015-16.
- (2) Balance Sheets (P&L) IT returns and audit report u/s 44AB for 2011-12 to 2015-16.
- (3) Duly attested copies of random bills raised for each financial year.
- (4) Work order copies/agreements.
- (5) To tender evidence.

After seeking the aforesaid information, the petitioner was directed to appear before the Senior Intelligence Officer of the DGCEI on 28.07.2016. The 2nd respondent/officer recorded the statement of the petitioner and requested submission of all the documents while referring to the summons and directed the petitioner to appear on 14.10.2016. Further, statement of the petitioner was recorded on 14.10.2016.

6. After appearance before the 2nd respondent, the petitioner now calls in question all these proceedings instituted on the ground of the allegation that the petitioner is not paying service tax on reimbursement of expenses, the summons issued for proceedings are illegal, unconstitutional and invalid and the petitioner is being forced to pay service tax by alleging that service tax has to be paid on reimbursement of expenses without resorting to normal assessment procedure. Above all, it is the claim of the petitioner that the petitioner is registered under service tax law with the jurisdictional Commissionerate of Service Tax-1, Commissionerate, Bangalore. Respondents 1 and 2 who are located in Belagavi have assumed jurisdiction over the petitioner, which according to the petitioner has led to assumption of jurisdiction leading to illegal and duplication of jurisdiction over the petitioner.

7. Head Sri V.Raghuraman, learned counsel appearing for petitioners and Sri K.V.Aravind, learned counsel appearing for the respondents 1 to 3 and 5 and Sri.Y.Hariprasad, learned Central Government Standing Counsel appearing for respondent No.4.

8. Learned counsel Sri V.Raghuraman, appearing for the petitioner would submit that the proceedings instituted and summons issued are ex-facie illegal and without jurisdiction as the issue of service tax on reimbursement of expenses is the subject matter of interpretation and, therefore, the petitioner cannot be coerced to pay service tax and there is duplication of jurisdiction as the Senior Intelligence Officer of Belagavi has assumed jurisdiction over the petitioner notwithstanding the fact that the jurisdiction is with the Service Commissionerate, Bangalore and would further submit that since the entire issue is with regard to without jurisdiction, alternate remedy is not a bar. It is

his further contention that without there being an iota of assessment prior, the demand of service tax upon reimbursement of expenses is unsustainable. Respondents 1 and 2 having been appointed as Central Excise Officers having all over India jurisdiction in addition to specific jurisdiction conferred upon the 3rd respondent, the notification conferring such jurisdiction is called in question on the ground that it is contrary to the Act.

9. On the other hand, the learned counsel Sri.K.V.Aravind, appearing for the revenue would vehemently argue and oppose the submissions contending that what has been done by issuance of summons is only to record the statement of the petitioner and transfer the case to the jurisdictional Commissionerate. The proceeding is not conducted by the 2nd respondent/Senior Intelligence Officer but only by the competent authority in the Commissionerate of

Service Tax. The very document that the petitioner would rely as a testimony for the fact that the proceedings are now instituted only by the competent authority and not by the 2nd respondent as is contended. The petitioner has now called in question notices and a writ calling in question a notice would not be maintainable as he has to reply to the same unless it is without jurisdiction. The learned counsel submits that the proceedings instituted are within the jurisdiction and who is conducting is also jurisdictional Commissionerate even according to the petitioner.

10. I have given my anxious consideration to the respective submissions and the only issue that falls for my consideration is as to, *whether proceedings instituted are without jurisdiction?*

11. Facts afore-narrated, not being in dispute, are not reiterated. The impugned summons issued against

the petitioner by the 2nd respondent insofar as necessary reads as follows:

“Whereas I, P.T.Bidari, Senior Intelligence Officer, DGCEI, empowered in the prevention of evasion of Service Tax, consider your attendance necessary for giving evidence and/or to produce the documents as per schedule which are in your possession, custody or control in respect of an enquiry being held by this Directorate in connection with evasion/short payment of service tax by M/s Xylem Resource Management Private Limited, Bangalore.

Now, therefore, in exercise of the powers conferred on me under Section 14 of the Central Excise Act, 1944, as made applicable vide Section 83 of the Finance Act, 1994 as amended, I hereby summon you to appear before the undersigned in person or with a duly authorized representative at 15.00 hrs on 28-07-2016 at your office.

You are not to leave the above said office/premises without permission and if the case is adjourned, without ascertaining the date of adjournment. Non-compliance with this summons is an offence under Section 174 of the Indian Penal Code 1860.

You are warned that giving false evidence in these proceedings is an offence punishable under Section 193 of the Indian Penal Code.

*Given under my hand and seal of office
on 28-07-2016.*

*To
Shri Gautam Chowdhury,
Managing Director & Chief Executive Officer,
M/s Xylem Resource Management Pvt.Ltd.,
Bangalore, 115/ 1, Krishnappa Lay-out
Lalbagh Road, Wilsongarden,
Bangalore-27.*

OFFICE SEAL

Sd/-

*P.T. BIDARI,
Senior Intelligence Officer,
DGCEI, Regional Unit,
Belgaum
Camp: Bengaluru”*

*Place, Bengaluru
Date: 28-07-2016.”*

And the notification that is called in question is the one issued on 15-10-2014, which permits PAN India operations to the officers mentioned therein. The Notification reads as follows:

“Central Excise Officer – Appointment of officers of Directorate General of Audit, Directorate General of Central Excise Intelligence and Directorate General of

Service Tax as Central Excise Officers – Notification Nos. 46/98 – S.T. and 7/2004-C.E. (N.T) rescinded.

In exercise of the powers conferred by clause (b) of Section 2 of the Central Excise Act, 1944 (1 of 1944), read with clause (55) of Section 65B of the Finance Act, 1994 (32 of 1994), rule 3 of the Central Excise Rules, 2002 and Rule 3 of the Service Tax Rules, 1994 and in supersession of the Notification No.46/98-SERVICE TAX, dated the 28th January 1998, published vide number G.S.R. 59(E), dated the 28th January, 1998 and No.7/2004-C.E., dated the 11th March 2004, published vide number G.S.R. 187(E), dated the 11th March, 2004, the Central Board of Excise and Customs hereby appoint the officers in the Directorate General of Audit, Directorate General of Central Excise Intelligence and Directorate General of Service Tax specified in column (2) of the Table below as Central Excise Officers and invests them with all the powers under Chapter V of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, throughout the territory of India, as are exercisable by the Central Excise Officers of the corresponding rank as specified in column (3) of the said Table, namely:-

TABLE

Sl. No.	Officers	Officers whose powers are to exercised
1.	Principal Director General, Central Excise Intelligence or Principal Director General, Service Tax.	Principal Chief Commissioner
2.	Director General, Audit,	Chief Commissioner
3.	Principal Additional Director General, Central Excise Intelligence, Principal Additional Director General, Audit	Principal Commissioner
4.	Additional Director General, Central Excise	Commissioner.

	<i>Intelligence, Additional Director General, Service Tax or Additional Director General, Audit.</i>	
5.	<i>Additional Director, Central Excise Intelligence, Additional Director, Service Tax or Additional Director, Audit.</i>	<i>Additional Commissioner.</i>
6.	<i>Joint Director, Central Excise Intelligence, Joint Director, Service Tax or Joint Director, Audit</i>	<i>Joint Commissioner</i>
7.	<i>Deputy Director or Assistant Director, Central Excise Intelligence, Deputy Director or Assistant Director, Service Tax or Deputy Director of Assistant Director, Audit</i>	<i>Deputy Commissioner or Assistant Commissioner.</i>
8.	<i>Senior Intelligence Officer, Central Excise Intelligence, Superintendent, Service Tax or Superintendent, Audit.</i>	<i>Superintendent</i>
9.	<i>Intelligence Officer, Central Excise Intelligence, Inspector, Service Tax or Inspector, Audit</i>	<i>Inspector</i>

2. This notification shall come into force on 15th October, 2014. (Notification No.22/2014-S.T., dated 16-09-2014).”

12. The show cause notice dated 13.12.2016, which is called in question is issued by the Principal Additional Director General of the Directorate General of Central Excise. The primary contention of the petitioner is that the show cause notice issued by the Senior Intelligence Officer of Belagavi Unit and the one that is issued on 13.12.2015 are all acts without jurisdiction as the strength on which notice dated 13.12.2015, is

issued is notification dated 15.10.2014. The Service Tax Rules 1994 are promulgated in exercise of powers under sub-sections (1) and (2) of Section 94 of the Finance Act. The Rules framed in terms of the Act depict appointment of officer. Rule 3 reads as follows:

*“3. **Appointment of officers.** – The Central Board of Excise and Customs may appoint such Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Act within such local limits as it may assign to them as also specify the taxable service in relation to which any such Central Excise Officers shall exercise his powers.”*

In terms of the afore-extracted Rule 3, the Central Board of Excise and Customs is empowered to appoint such Central Excise Officers as it deems fit to act within the local limits as it may assign to them as also specify taxable service in relation to any such officer exercising such power. In terms of Rule 3, the jurisdiction of the Principal Commissioner of Central Excise and Chief

Commissioner of Service Tax are depicted by issuance of a notification.

13. The jurisdiction of the Chief Commissioner of Central Excise, Bangalore has come to the Principal Commissioner of Tax-1, Bangalore and Chief Commissioner of Tax-II, Bangalore. Likewise, territorial jurisdiction of Principal Commissioners of Service Tax is conferred on the Principal Commissioner of Service Tax-I depicting several zones in Bangalore and Principal Commissioner of Service Tax-II depicting several zones in Bangalore. This notification comes into effect from 15-10-2014. After the 2nd respondent issuing summons and recording statements, the matter is referred to the Principal Additional Director General, Central Excise Intelligence of Service Tax. This is in terms of Notification issued on 15.10.2014 pursuant to which, the Principal Additional General, Central Excise Intelligence, Principal Additional Director General,

Service Tax or Principal Additional Director General, Audit shall exercise the power of the Principal Commissioner.

14. Therefore, the five officers who are indicated are empowered to exercise the powers of the Principal Commissioner. Likewise, Senior Intelligence Officer, Central Excise Intelligence, Superintendent, Service Tax or Superintendent Audit could exercise the power of the Superintendent. The justification of the revenue is in terms of the said notification, the summons that were issued by the Intelligence Officer is now transferred to Principal Commissioner who has also issued a detailed show cause notice which is impugned in the writ petition to answer the notice.

15. I decline to accept the submissions, the jurisdiction to enquire into the affairs of the petitioner is conferred on the Principal Commissioner exercisable by

5 different officers as indicated in the Notification. It is one of whom, before him, the petitioner is now sought to show cause. Therefore, the question that it is without jurisdiction is a figment of imagination of the petitioner. The Notification being issued is contrary to Rule 3 which depicts that officers who are indicated in the notification once issued in terms of the Act.

16. It is germane to notice Section 2(b) of the Central Excise Act of 1944 and it reads as follows:

*2. **Definitions.**- In this Act, unless there is nothing repugnant in the subject or context,-*

... ..

(b) "Central Excise Officer" means the Principal Chief Commissioner of Central Excise, Chief Commissioner of Central Excise, Principal Commissioner of Central Excise or Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Deputy Commissioner of Central Excise Assistant Commissioner of Central Excise any other officer of the Central Excise Department, or any person (including an officer of the State

Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act.”

In terms of the afore-extracted definition in the Act, a Central Excise Officer would mean the Principal Chief Commissioner of Central Excise, Principal Commissioner of Central Excise, Additional Commissioner of Central Excise and other officers as defined under the Act. If the definition of Central Excise Officer under the Act is read in tandem with the impugned notification, it becomes unmistakably clear that a Principal Commissioner of Central Excise is also a Central Excise Officer and the power of the Principal Commissioner can be exercised by the aforesaid 5 officers one of whom is the Principal Additional Director General, Central Excise Intelligence.

17. Therefore, the contention that depiction of authorities under the impugned notification is contrary

to the Act is unacceptable as a conjoint reading of Section 2(b), Rule 3 and Notification dated 15.10.2014, all would lead to an unmistakable conclusion that the Officer before whom the petitioner is now directed to appear is an Officer who has jurisdiction to enquire into what is alleged against the petitioner as the office of the Principal Additional Director General, Directorate General of Central Excise Intelligence is the one who has issued the show cause notice dated 13.12.2016. What the Senior Intelligence Officer has done is issuing notice/summons to the petitioner and recording his statement and the entire matter is transferred to the proper officer, as aforesaid. It is he who has now issued show cause notice for initiation and continuation of actual proceedings. What the Senior Intelligence Officer has done is only transmission of the said document to the proper officer.

18. It is to be noticed that the show cause notice is not issued by the Senior Intelligence Officer. What is impugned is summons and what is recorded after summons is the statement. There is no show cause notice or a decision taken by the Senior Intelligence Officer. The job performed by the Senior Intelligence Officer is only transmission of such records that he has built up. It is another thing that the Senior Intelligence Officer at Belagavi was holding a camp at Bangalore.

19. In taxing parlance, an Assessing Officer before whom a particular assessee goes, Authority cannot transfer the proceedings even to the next assessing officer as it becomes without jurisdiction. It is not a case of the kind at hand as the second respondent has not exercised the jurisdiction of the competent authority. Though the summons emanate from the office of the Deputy Director of Directorate General of Central Intelligence, the file is transferred to the competent

authority. The show cause notice is issued by the proper officer. Therefore, I decline to accept that the show cause notice issued is without jurisdiction.

20. If the answer to the jurisdiction is in the negative, the maintainability of the writ petition would also be in the negative as it is only under certain circumstances a show cause notice would become maintainable, primary of which is an act without jurisdiction. If the answer to the contention of the notice being without jurisdiction is in the negative, the writ petition would have to be dismissed directing the petitioner to reply and participate in the proceedings.

21. The judgments that the petitioner placed reliance upon are all cases where the action of issuance of show cause notice was on the fact of it being without jurisdiction. The latest of the judgment that was relied on by the learned counsel appearing for the petitioner to

contend that the entire issue stands covered by the said judgment is also unacceptable. In the case of **CANNON INDIA PRIVATE LIMITED v. COMMISSIONER OF CUSTOMS**¹, the Apex Court while considering who is the proper officer delineates as follows:

"9. The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. v. Coffee Board, Bangalore² has held:—

¹ 2021 SCC Online SC 200

“14. ...Secondly, and more importantly, the user of the definite article ‘the’ before the word ‘agreement’ is, in our view, very significant. Parliament has not said ‘an agreement’ or ‘any agreement’ for or in relation to such export and in the context the expression ‘the agreement’ would refer to that agreement which is implicit in the sale occasioning the export.”

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 re-assessment 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.

15. 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)].

23. *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 Ali⁵ 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 advertng 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 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."

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."

24. 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.

(Emphasis supplied)

This judgment again, as stated hereinabove, is inapplicable as the case was concerning confiscation of goods. In that context, the Apex Court holds that it was not instituted by the proper officer. Paragraphs afore extracted would clearly divulge as to what was the issue before the Apex Court. Therefore, the said judgment also would not lend any support to the contention of the learned counsel appearing for the petitioner. The show cause notice is within the jurisdiction and not without, as contended. Therefore, the petitioner has to answer to the show cause notice and further proceedings to take place in accordance with law.

22. For the aforesaid reasons, I do not find any merit to entertain the writ petition and is accordingly dismissed.

**Sd/-
JUDGE**

bkp
CT:MJ