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# THE 'PROPER OFFICER' CONUNDRUM: A CRITICAL ANALYSIS OF CONFERMENT OF ADJUDICATORY POWERS ON INVESTIGATIVE OFFICERS IN LIGHT OF THE RECENT CANON INDIA JUDGMENT

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## ABSTRACT

In March 2021, a three-judge bench of the Supreme Court in *Canon India* held in unequivocal terms that an officer of the DRI is not a "proper officer" to issue Show Cause Notices (SCN) or raise a customs duty demand against importers. It is the officer who had undertaken the original assessment of imports or his successor, who would be the "proper officer" to issue Show Cause Notices and demand customs duty. As an aftermath of the Supreme Court judgement, High Courts and Tribunals have quashed SCN issued by DRI officers on account of an inherent lack of jurisdiction. In an expected turn of events, the Government resorted to amendments in the forthcoming Budget to retrospectively empower the DRI to issue SCN and validate their past actions.

The above flow of events is not new in history of indirect tax jurisprudence and has also occurred after the judgments in *Mangali Impex* and *Sayed Ali* were delivered by the respective honourable courts. In both these cases, powers of the officers of investigative and preventive wings to issue Show Cause Notices (SCNs) to assesses, in an event of short-levy, short payment or non-payment of custom duty were challenged. Since the respective courts found such SCNs lacking the force of law, the Government foresaw that assessments/re-assessments conducted by such officers will be vulnerable to invalidation resulting in loss of revenue to the exchequer and disruption of revenue streams. The Government, thus, amended the Customs Act to empower multiple investigative officers to issue SCNs. The trend of empowering multiple investigative officers to issue SCNs (adjudicatory power) adopted by the Government digresses from the expected compartmentalization of duties between various officers of customs. Further,

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absence of guidelines for exercise of powers among multiple jurisdictional officers contravened Article 14 of the Constitution as it may lead to multiple proceeding for a single assessee leading to hardship and inconvenience. The paper thus investigates and comments on the legal and practical consequences arising out of such approach.

The author aims to accomplish so by mapping out the decades long interplay between the judiciary and the government by tracing judgments nullifying SCNs issued by revenue intelligence officers and the accompanying statutory amendments and validating legislations by the government to bypass those judgments.

The author then analyses the amendments and circulars empowering multiple jurisdictional officers and comments on various consequences such as – incoherence in tax policy, executive officers unable to specialize in their domain due to adjudicatory duties, complicated tax administration due to multiple officer governing an assessee, etc.

And the author then concludes with comments on the impact of recent amendments made by the Finance Act, 2022.

### ABBREVIATIONS

CBEC	Central Board of Excise & Customs
CBIC	Central Board of Indirect Taxes & Customs
CC	Commissioner of Customs
CEGAT	Central Excise & Gold Appellate Tribunal
CESTAT	Central Excise & Service Tax Appellate Tribunal
DRI	Directorate of Revenue Intelligence
DGCEI	Directorate General of Central Excise Intelligence
HC	High Court
SC	Supreme Court
SIIB	Special Intelligence and Investigation Branch
u/s	u/s
UOI	Union of India

## Introduction

The Customs Act, 1962<sup>2</sup> (hereinafter as 'the Act') defines a 'proper officer'<sup>3</sup> as an officer who has been appointed or authorized by the government to perform specific functions under the Act. This includes classes of officers of Customs listed u/s 3 of the Act, who are responsible for implementing customs regulations and enforcing the law.

Section 28 of the Act<sup>4</sup> allows the proper officer to issue a show cause notice to individuals who violate customs regulations or commit offenses. The notice requires the person to explain why penalties should not be imposed, and failure to respond or submit an unsatisfactory explanation may result in penalties being imposed.

From the 1990s, as tax collections increased, the Revenue Intelligence wings were permitted increased strength as tax policy was relaxed enough to allow officers of specialized wings to issue SCN. But the manner in which this function was assigned, i.e. through Notifications and Circulars issued by the Board of Customs was problematic, as they suffered from various legal inconsistencies. Thus the jurisdiction of these officers was susceptible to legal challenge.

### Part I - From Poona Roller to Sayed Ali - approaching the doorstep of the apex court

The origin of challenge is found in *CC, Bombay v. Poona Roller*<sup>5</sup>, wherein the CEGAT Mumbai determined that although the Assistant Director, DRI was appointed as Assistant CC under a Notification, it did not specifically vest the authority to levy and collect tax. As a SCN u/s 28 of the Customs Act may only be issued by a "proper officer," the Assistant Director, DRI lacked the authority to issue SCN u/s 28(1) of the Act in the absence of CBEC or the CC assigning him powers of levy and collection.

The CBEC interestingly came up with a 'patchwork' circular<sup>6</sup> dated 14.05.1992 (the "Circular") that SCN u/s 28 would continue to be issued by the CC in order to maintain the status quo. Acknowledging the Circular, the CEGAT Mumbai found CC to be the "proper officers" for

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<sup>2</sup> Customs Act, 1962, No. 52, Acts of Parliament, 1962 (India).

<sup>3</sup> Customs Act, 1962, § 2(34), No. 52, Acts of Parliament, 1962 (India).

<sup>4</sup> Customs Act, 1962, § 28, No. 52, Acts of Parliament, 1962 (India).

<sup>5</sup> *Commissioner of Customs, Bombay v. Poona Roller*, (1997) 89 ELT 604.

<sup>6</sup> *Id.*, ¶16.

issuing SCN u/s 28 of the Act. Following this ruling, similar rulings were given in *Dhirendra Seth*<sup>7</sup>, *Ramesh Nabhnani*<sup>8</sup> and *Shankar Rao*<sup>9</sup>.

The validity of the Circular was challenged on the ground that the Circular did not deal with assigning functions u/s 2(34) of the Customs Act, as it did not mention Section 2(34) or any other provision it was sourced from. Following the judgment in *Poona Roller*, the CEGAT, New Delhi, held in *Bakeman's Home Products*<sup>10</sup> that this would not invalidate the Circular if it is issued by exercise of statutory power since the CBEC was empowered to assign certain functions to customs officials.

But this idea sounds strange as it would render the statutory provisions providing the power to assign functions meaningless. Further, this ruling can be misused to authorize certain actions for which the statutory provisions themselves do not provide powers for.

The CEGAT, Mumbai infused lucidity in the matter by clarifying that although a Commissioner of Excise be appointed as CC, i.e. an 'Officer of Customs' u/s 3 of the Act, this per se would not imply that the Commissioner is a 'Proper officer' u/s 28(1) of the Act. Thus *Manohar Brothers*<sup>11</sup> ruling became the first decision bringing clear delineation between the functions of an 'Officer of Customs' and a 'Proper officer' under the Customs Act.

In *Mahesh India*<sup>12</sup>, CEGAT Mumbai, following Poona Rollers, held that the DRI officer despite being appointed an 'Officer of Customs'; he would not be a 'Proper officer' to issue show cause notice u/s 28 of the Act.

In *Konia Trading Co.*<sup>13</sup>, the CESTAT, New Delhi held that officers of the DRI appointed as customs officers shall have the same power as Customs officers who are "proper officer" in relation to matters where Customs officers are notified as "Proper officer." This decision diverged from the general understanding that Investigative Officers (of DRI, SIIB, etc.) are not proper officers as envisaged u/s 28 until being specifically assigned such powers.

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<sup>7</sup> Dhirendra Seth v. Commissioner of Customs (Kandla), (2000) 122 ELT 625.

<sup>8</sup> Commissioner of Customs v. Ramesh Nabhnani, (2001) 138 ELT 232.

<sup>9</sup> Commissioner of Customs v. Shankar Rao, (2002) 149 ELT 387.

<sup>10</sup> Bakeman's Home Products Pvt. Ltd. v. Collector of Customs (Bombay), (1997) 95 ELT 278.

<sup>11</sup> Manohar Brothers v. Collector of Customs (Bombay), (1998) 98 ELT 821.

<sup>12</sup> Commissioner of Customs (Mumbai) v. Mahesh India, (2003) 151 ELT 605.

<sup>13</sup> Konia Trading Co. v. Commissioner of Customs, 2006 SCC OnLine CESTAT 1919.

“Once he is appointed as CC, he will have jurisdiction to exercise all the functions which are to be exercised by the Collector of Customs.” The statement displays the erroneous logic on which the decision of CESTAT New Delhi was based; because if it is treated as a precedent then it will lead to multiple jurisdictional officers for the same function causing inefficiency and inconvenience. This will be explained in the next part.

The Bombay HC, in its decision in *Electron Textile Exports*<sup>14</sup>, deepened the rift caused by the ruling made in *Konia Trading*. Relying on the same, Bombay High Court in the appeal brought against *Mahesh India*<sup>15</sup>, partially overruled the decision of CEGAT Mumbai insofar as the investigating officers of Customs have the power to issue SCN u/s 28 is concerned. The judgment delivered in *Konia Trading* was relied upon in numerous judgments and thus induced a volte-face change allowing investigating officers to issue SCN for the purposes of Section 28.

Nevertheless, in *Commissioner of Customs v. Sayed Ali* (hereinafter as ‘Sayed Ali’)<sup>16</sup>, the Hon'ble Supreme Court of India went ahead with the reasoning that ***not all "officers of customs" are necessarily "proper officers"*** and that ***only the officers of customs being assigned the specific duties*** of assessment and reassessment of customs duty ***in the jurisdictional area where the import in question has been affected***, by either the ***Board or the CC***, in accordance with Section 2(34) of the Act, are ‘proper officers’ competent to issue SCN u/s 28 of the Act.

It is pertinent to note that the Hon'ble Supreme Court held that the Board or the CC is competent to appoint a 'proper officer' u/s 2(34) of the Customs Act. However, this finding would subsequently be negated by the Hon'ble Supreme Court in *Canon India*.

It might seem that the judgment in *Sayed Ali* settled the dust on all issues associated with empowering DRI officers, but events post *Sayed Ali* unearthed several important issues regarding exercise of powers and jurisdiction which had to be dealt with. The next part lucidly explains the same.

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<sup>14</sup> Commissioner of Customs (Import) v. Electron Textile Exports Pvt. Ltd., CUSTOM APPEAL NO. 51 OF 2010, HIGH COURT OF BOMBAY.

<sup>15</sup> Commissioner of Customs (Import), Mumbai v. Mahesh India, (2009) 243 ELT 339.

<sup>16</sup> Commissioner of Customs v. Sayed Ali, 2011 (265) ELT 17 (SC).

## Part II – From Sayed Ali to Canon India – The next phase of confusion

In Sayed Ali, the legality of SCN issued by Commissioner of Customs (Preventive) was challenged on the ground that he was assigned such function and did not have the required jurisdiction to issue the relevant SCN. The practice of empowering multiple officers to SCN was found to be problematic in two ways.

Firstly, it becomes evident after a conjoint perusal of the contents of sections 2(34) and 28 of the Act that only the officer assigned with the function of assessment/reassessment of duty in the jurisdiction where the import concerned is affected. Secondly, it may give rise to a situation where there are multiple jurisdictional officers over one assessee causing “utter confusion and chaos”.

The Sayed Ali judgment was indeed landmark in its impact as it imperiled the recovery of tax dues in numerous cases where SCNs were issued by non-jurisdictional officers. It thus compelled the government to retroactively revise the Act through the Finance Act of 2011 vide which Section 28 was modified thereby effectively reversing the Sayed Ali decision by retrospectively designating a number of DRI officials as proper officers.

Moreover, the CBIC vide *Notification No. 44/2011-Customs*<sup>17</sup> on July 6, 2011, authorized non-jurisdictional officers (including DRI personnel) to perform the duties of "the proper officer for the purposes of Section 28 of the Act. The Parliament enacted *Customs (Amendment and Validation) Act, 2011*<sup>18</sup> in order to validate the SCNs issued by the DRI officers before July 6, 2011. All these amendments were made to cure the legal errors and authorize CC (Preventive) and other officers of the Customs Department other than the jurisdictional CC with respect to a particular assessee.

However, as the author demonstrates subsequently, only the first component of the reasoning provided by the SC in *Sayed Ali* was addressed. There appears to have been no legislative reform to address the second aspect raised by the SC, namely the possibility of "a scenario of utter chaos and confusion" using which it barred non-jurisdictional officers

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<sup>17</sup> Ministry of Finance (Department of Revenue), Notification No. 44/2011-cus (NT), dated 06.07.2011, available on

[https://upload.indiacode.nic.in/showfile?actid=AC\\_CEN\\_2\\_2\\_00042\\_196252\\_1534829466423&type=circular&filename=Circular%20No.44-11docx.pdf](https://upload.indiacode.nic.in/showfile?actid=AC_CEN_2_2_00042_196252_1534829466423&type=circular&filename=Circular%20No.44-11docx.pdf) (last visited Jan. 20, 2023)

<sup>18</sup> The Customs (Amendment and Validation) Act, 2011.

from issuing SCNs. In *Mangali Impex v. UOI*<sup>19</sup>, it was this aspect raised before Delhi HC in order to argue that despite the aforesaid amendments, SCNs issued by non-jurisdictional officers were still invalid.

### ***Mangali Impex v. Union of India***

In the discussed background, post the 2011 amendments, petitions were raised before several HCs challenging the validity of SCNs issued by non-jurisdictional officers. In *Sunil Gupta v. UOI*<sup>20</sup>, the Bombay HC upheld the legality of the 2011 amendments holding that the amendments were sufficient enough to address the issues leaving no flank open to challenge the jurisdiction of DRI officers to issue SCNs. The Delhi HC, in sheer dissonance, concluded in its judgment in *Mangali Impex* that irrespective of 2011 amendments the SCN issued by the DRI officers were not valid.

A brief reference to the contentions raised by the assessee will allow us to understand why such a conclusion was adopted. The main argument was that because the "complete disarray and confusion" error was not corrected, the 2011 amendment did not fully address the issues raised by the SC in *Sayed Ali*. The assessee argued that the 2011 amendment "reinforced the apprehension stated in the *Sayed Ali* case by delegating powers of the proper officer to several groups of customs officers without any territorial or pecuniary restrictions on their jurisdiction.

The assessee simultaneously asserted that increasing the number of jurisdictional officers over a certain assessee was a violation of the constitutional requirement. The 2011 amendment was thus contested as being in violation of Article 14 of the Indian Constitution as it increased the number of jurisdictional officers arbitrarily and without any directions regarding exercise of such power among multiple officers. Further the assessee sought a declaration that "*once a particular officer exercises authority, it would preclude the jurisdiction of all the other officers*" as an alternative.

### ***The Decision of the Delhi HC***

The HC found merit in the contention that the 2011 amendment is excessively wide in its ambit inasmuch as it confers jurisdiction on a plurality of officers on the same subject matter capable

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<sup>19</sup> *Mangali Impex v. Union of India*, 2016 SCC OnLine Del 2597.

<sup>20</sup> *Sunil Gupta v. Union of India*, 2014 SCC OnLine Bom 1742.

of causing harassment, confusion, contradictory and inconsistent conclusions." According to Delhi HC, the amendment allows the possibility of exercise of unrestricted power over an assessee at the hands of multiple officers and is thus arbitrary and violative of Article 14 of the Constitution.

Further, Delhi HC referred decisions of various High Courts to reaffirm that "if plurality of officers are invested with the powers of assessing the same dealer, it will result in great hardship and inconvenience to the dealers in travelling to the offices of different officers and producing accounts before different officers and will greatly handicap the dealers in making their representations and it will also lead to conflicting and contradictory orders of assessment"<sup>21</sup>; that "it could result in chaos, confusion, and conflicting orders, and could even result in multiple legal proceedings involving the same issue, which would be burdensome and inconvenient for dealers".<sup>22</sup>

The Delhi HC also found substance in the notion that if one officer of Customs exercises jurisdiction over a subject matter, the jurisdiction of other level-placed authorities over the same subject matter should impliedly lapse. Recognizing the necessity that the exercise of powers not overlap for the proper administration of justice, the HC invoked doctrine of comity of jurisdiction. The HC thus concluded that the DRI officers have no power to issue SCNs.

The decision was subjected to an appeal before the SC which is currently ceased of the matter in SLP (C) No. 20453/2016<sup>23</sup> and stayed vide the order of the SC. Although the judgment in *Mangali Impex* is bereft of legal force, it still compels us to ponder over susceptibility of plurality of jurisdiction officer to legal challenge. It is because the current administrative structure of all three principal indirect tax legislations. i.e., Customs, Excise and GST, allows issuance of SCN by officers other than the jurisdictional officers as well.

### ***Canon India v. Commissioner of Customs (2021)***

Canon India Pvt. Ltd. and four other assessee submitted a Bill of Entry (BOE) and technical write-up for importing cameras based on which the Deputy CC, Customs Appraisal, Delhi Air

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<sup>21</sup> Sri Balaji Rice Company v. Commercial Tax Officer, No. I, Nellore, 1983 SCC OnLine AP 309.

<sup>22</sup> Sivaramakrishnan v. State of Kerala, ILR 1995 (1) Ker 92.

<sup>23</sup> Union Of India v. Mangali Impex Ltd. on 20 March, 2018 available at <https://indiankanoon.org/doc/127304588/>



Cargo cleared the goods with an exemption from Customs duty according to the relevant notification.

Canon India thereafter received a SCN from the Additional Director General, DRI, issued according to Section 28(4) of the Act. Regarding the nature of imported products, the DRI accused Canon India of deliberate concealment and misrepresentation and sought the payment of Custom duty alleged to be payable by Canon.

On the basis that the imported commodities were not exempted from duty under the relevant notification, the CESTAT upheld the consequential confiscation of goods, assessment of penalty and interest. As a result, Canon India and others appealed to the SC. The question of law was whether the ADG, DRI had the authority under law to issue SCN u/s 28(4) of the Act, when CC, Appraisal Group had cleared the goods for import.

The Central Government vide *Notification No. 17/2002-Cus (NT)* dated 07.03.2002<sup>24</sup> issued under Sec 4(1) appointed ADG, DRI as CC. Subsequently, the Board vide *Notification 40/2012-cus (NT)*<sup>25</sup> issued under Sec 2(34) appointed 'Deputy or Assistant CC as 'proper officer' for exercise of functions under Sec 28. And by virtue of section 5(2), powers conferred to subordinate officers can also be exercised by senior officer, i.e. CC in this case, thereby allowing the CC to issue SCN u/s 28 as 'proper officer'.

The SC rejected the contention that the DRI officer was proper officer u/s 28 as empowered under *Notification 40/2012-Cus* as –

- (i) the same was issued u/s 2(34) of the Act by CBIC. This section is part of the definition clause of the Customs Act and does not confer any powers on any authority to entrust any functions to officers. Only Section 6 provides such powers.
- (ii) Further only Central Government is empowered to extend powers u/s 6 of Customs Act.

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<sup>24</sup> Ministry of Finance (Department of Revenue), Notification No. 17/2002-cus (NT), dated 07.03.2002, available at [https://upload.indiacode.nic.in/showfile?actid=AC\\_CEN\\_2\\_2\\_00042\\_196252\\_1534829466423&type=notification&filename=17-02.pdf](https://upload.indiacode.nic.in/showfile?actid=AC_CEN_2_2_00042_196252_1534829466423&type=notification&filename=17-02.pdf) (last visited Jan. 20, 2023)

<sup>25</sup> Ministry of Finance (Department of Revenue), Notification 40/2012-cus (NT), dated 02.05.2012, available at [http://www.ieport.com/2012/customs\\_not\\_nt/notification-40.htm](http://www.ieport.com/2012/customs_not_nt/notification-40.htm) (last visited Jan. 20, 2023)

- (iii) that Section 28 uses the term 'the proper officer' and not 'any proper officer'. Thus, basis the use of article 'the' the intention of the law is to give authority of reassessment to the same officer (who assessed the BOE in the first place) and not any officer.

The judgment in *Canon India* posed repercussions on other functions of Proper Officer as well as on intelligence wings of GST (DGGI), Central Excise (DGCEI), and Audit (DGA). Taxpayers challenged the jurisdiction of the DGGI and DGCEI under GST and excise law respectively, citing *Canon India*, and the matter was brought before the Constitutional Courts shortly after the stated verdict was issued.

Notably, the government submitted a review petition in the SC soon after the pronouncement of verdict, foreseeing that it may adversely impact hundreds of cases with considerable amounts of customs revenue at stake. The SC reaffirmed this judgment in the *Agarwal Metals*<sup>26</sup> case in August 2021. High Courts and Tribunals were likewise abiding by the Apex Court's judgment to overturn duty demands.

### **Finance Act, 2022 – Another ‘patchwork’ legislation or a lesson learnt from the past?**

In an expected sequence of events, several retrospective and prospective amendments were brought in, through the Finance Act of 2022<sup>27</sup>, to do away with the flaws pointed out in the judgment of SC in *Canon India*.

As per the amended definition of the term "proper officer" in Section 2(34) of the Act, the Board, the Principal CC or CC may expressly assign duties to a customs officer under the newly added sub-sections (1A) and (1B) to Section 5 of the Act. Sub-sections (1A) and (1B) to Section 5 propose giving the Board or the Chief CC or CC, the authority to delegate duties to Custom officers as 'proper officers' within their assigned jurisdiction.

The ambit of Section 3 is expanded by inclusion of officers of DRI and Audit and Preventive Wing of Customs into "classes of officers of Customs" so as to eliminate any doubt. In contrast to the previous Notifications having no legal force being issued under the definition clause, the

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<sup>26</sup> Commissioner of Customs v. M/s Agarwal Metals and Alloys, 2021 SCC OnLine SC 1164.

<sup>27</sup> Finance Act, 2022, No. 6, Acts of Parliament, 2022 (India).

amended Section will be an absolute reference of designation of aforementioned classes of officers as 'officers of customs'.

In addition, Clause 97 of the Finance Act is a validation clause that retrospectively upholds any actions or duties carried out by DRI or Customs officers prior to the passage of the Finance Bill 2022, irrespective of rulings from courts, tribunals, or authorities. Additionally, it has been made clear that any proceedings resulting from actions taken in accordance with the clause that are still pending as of the date the Finance Act takes effect shall be resolved in accordance with the changed provisions. The outcome of pending SCNs, petitions and appeals wherein the jurisdiction of DRI officer is contested will be significantly impacted by this retrospective amendment.

The most interesting provision is Clause 93 which adds section 110AA in the Act. It brings a paradigm shift in the exercise of adjudicatory powers among various classes of Customs officers.

It prescribes that in pursuance of any proceeding, *“if an officer of customs has reasons to believe that there has been any non-levy, short-levy, non-payment or short-payment of any duty or interest; or any drawback has been erroneously allowed or duty has been erroneously refunded, then such officer has to prepare a report after conducting the required inquiry, investigation or audit and transfer it to **the proper officer having jurisdiction, as assigned u/s 5 in respect of assessment of duty or approval of refund/drawback, who thereupon, will exercise the power u/s 28.**”*

Under the new provision, any audit-related or investigation-related demands must be transferred along with a written report to the jurisdictional Customs Officer. Only the jurisdictional Customs Officer has the power to issue a show cause notice and make a decision regarding the matter. This applies to officers of audit and other investigative agencies such as DRI and Preventive formations.

The amendments are indeed a lesson learnt from the past as they pluck out all legal errors revealed in *Canon India*, *Mangali Impex* and *Sayed Ali*. The extensive amendments could assist the government in not only restoring damage caused by the above judgments but will also shield it from the judgment in *appeal to Mangali Impex*. Further, the process of issuing SCNs is now finally streamlined as there is a proper compartmentalization of functions. The

amendments thus eliminate the possibility of ‘utter chaos and confusion’ by removing of plurality of jurisdictional officers over the same function.

### The ‘Circular’ Trend

The practice has been existed for more than 25 years and was continually challenged before various courts and tribunals, in cases like *Poona Roller*, *Sayed Ali*, *Mangali Impex*, and most recently in *Canon India*, as explained previously. This multitude of litigations, as explained above, could have been avoided by the government, if the process of assessment and adjudication of assesses had been kept streamlined. But instead of supplying manpower to the class of officers issuing SCNs, the Board assigned this function to officers specializing in investigative functions.

The practice had two problematic aspects i) plurality of jurisdictional officers over a single function, and ii) conferring adjudicatory powers to officers of other specialized wings.

### Plurality

Regarding the **first aspect**, plurality itself is not judicially prohibited. Plurality through concurrent jurisdiction was envisaged in §125A of the Income Tax Act, 1961. Several HCs<sup>28</sup> have explained the exercise of powers in concurrent jurisdiction, wherein among multiple jurisdictional officers, if one of such jurisdictions is invoked, the matter will only be handled by that officer without resulting denudation of powers of other jurisdictional officers.

Notably, concurrent jurisdiction was established in the context of income taxes through statutory enactment, whereas in Customs the plurality of jurisdictional officers (which is not concurrent jurisdiction) was a result of subordinate legislation (Notifications, Circulars, etc.). This mere difference significantly threatens the validity of plurality in the latter scenario as there are no guidelines as to how the exercise power will take place. Further, the relevant provision has been omitted<sup>29</sup> from the income tax legislation long before, which might be

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<sup>28</sup> Delhi HC in *Valvoline Cummins Ltd. v. Deputy Commissioner of Income Tax*, 2008 SCC OnLine Del 634; Calcutta HC in *Berger Pvt. India Ltd. v. Asst. CIT*, 2000 SCC OnLine Cal 661.

<sup>29</sup> Omitted by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1-4-1988.

indicative of how problematic it is for tax policy to handle plurality of jurisdictional officers over one function.

Moreover, one can reasonably claim that even now there are no clear rules on when a specific officer should use their authority and how this exercise of power might limit the jurisdiction of other officers. As a result, the absence of such guidelines creates a situation where these officers operate without direction, potentially leading to multiple officers taking different approaches to the same issue.

### ***Conferring adjudication to officers of specialized wings***

Although the paper specifically focuses on actions of Board of Customs, reference to particular circulars will be made to show the attitude of the executive (erstwhile Central Board of Excise and Customs) towards the administrative policies of other indirect tax administrations.

The revenue intelligence department became stronger and more dedicated to stopping tax evasion, which resulted in increased tax collections. Thus the policy was eventually adjusted to meet the increased demand for authority and officers of intelligence and enforcement wings were allowed issue SCNs and conduct assessments. However, policy-wise they were still consciously kept away from perform adjudication functions till 2011.

After the Sayed Ali (supra) decision in 2011, Notification No. 44/2011 Cus. N.T. dated 06.07.2011 granted DRI officers the authority to act as proper officers for section 17 and 28 of the Act. But the administrative instructions in the Circular No. 44/2011 Cus. dated 23.09.2011 kept adjudication away from the DRI's hands despite them being empowered as 'proper officer'.

But soon, in 2014, Circular No. 14/2014 Cus. dated 11.12.2014<sup>30</sup> declared that new posts in the rank of CC were created in DRI and DGCEI for adjudication of cases, allowing specified officers of DRI and DGCEI to attend to work relating to adjudication of cases where show cause notices of short levy/non-levy of customs duty have been issued under section 28 of the Act.

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<sup>30</sup> Ministry of Finance (Department of Revenue), Circular No. 14/2014 Customs dated 11.12.2014, available at [https://pdicai.org/docs/Circular%20No.%20%20%2014\\_2014%20-Customs\\_16122014121115427.pdf](https://pdicai.org/docs/Circular%20No.%20%20%2014_2014%20-Customs_16122014121115427.pdf) (last visited Jan. 20, 2023)

Additional circulars were released (including Circular No. 18/2015-Cus., dated 09.06.2015<sup>31</sup> and Circular No. 30/2015-Cus., dated 04.12.2015<sup>32</sup>) that clarified the details of the modified administrative work distribution. To put it briefly, the long-standing tax policy was discarded to allow officers responsible for the Revenue Intelligence Wings to perform adjudication duties.

The tax administration seemed to have gone into frenzy by enabling even officers from the audit department to take on administrative duties in order to clear the backlog of outstanding cases before onset of GST. It would therefore not be unusual to see any tax administration officer, regardless of whether they are affiliated with the jurisdictional executive Commissionerate or not, be given the authority to perform assessment and adjudication responsibilities, subject only to financial restrictions. This is outlined in Circular No. 1053/02/2017-CX, dated 10-3-2017<sup>33</sup>.

The tax administration may defend allowing officers from audit, investigation, etc. to perform assessments and adjudications by stating that they are part of the same pool and regularly rotated. However, this argument fails to consider why specialized wings for audit and investigation exist and adding assessment and adjudication duties can prevent officers from specializing and focusing on their primary tasks. Administering fiscal legislation involves important and complex tasks like assessment and adjudication, which require adherence to various administrative instructions, legal mandates, and court decisions. These tasks cannot be seen as just an additional responsibility and need special attention and focus to ensure their proper execution

The original tax policy restricted assessment and adjudication functions to executive Commissionerates' officers. This policy was based on sound tax policy, and deviating from it for administrative convenience is not advisable. Though adding more officers for assessment and adjudication may clear pending cases in the short term, it could be dangerous if these

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<sup>31</sup> Ministry of Finance (Department of Revenue), Circular No. 18/2015-Customs dated 09.06.2015, available at <https://taxguru.in/custom-duty/appointment-common-adjudicating-authority-guidelines-principal-dg-dri.html> (last visited Jan. 20, 2023)

<sup>32</sup> Ministry of Finance (Department of Revenue), Circular No. 30/2015-Customs dated 04.12.2015, available at <https://taxguru.in/custom-duty/reg-investigation-cases-assigned-additional-director-general-adjudication-dri.html> (last visited Jan. 20, 2023)

<sup>33</sup> Ministry of Finance (Department of Revenue), Circular No. 1053/02/2017-CX, dated 10-3-2017, available at <https://files.caclub.in/wp-content/uploads/cbec-master-circular-1053-2017-cx-dt-10-mar-2017-scen-adjudication-recovery.pdf> (last visited Jan. 20, 2023)

officers are driven by revenue targets, which could compromise their impartiality and fairness in carrying out quasi-judicial functions.

Thus, coming to the **second aspect**, the practice of assigning adjudicatory functions, such as issuing SCNs, to officers of other specialized wings (DRI, Preventive, Audit) can be a matter of concern. While these officers are trained in customs and excise laws, their primary role is to investigate cases of smuggling and tax evasion. As adjudicators, they may lack the requisite expertise and experience needed to make fair and legally sound decisions.

This practice may also lead to a conflict of interest, as DRI officers may be inclined to issue notices or pass orders that favor their investigation or prosecution. This could compromise the fairness of the adjudicatory process and undermine the rule of law

### ***From the assessee's perspective***

There is another way to look at the complexities involved in this debate. One perspective is whether the tax administration solely focuses on collecting tax payments or if they also provide services to taxpayers. Considering the costs borne by taxpayers when dealing with the tax administration, multiple jurisdictional officers are inconvenient for taxpayers, and a single communication line reduces the hassle of interacting with several authorities. Further, consistent interaction with jurisdictional officers ensures compliance with tax requirements and offers certainty to taxpayers about their tax positions.

Multiple officers and authorities can be a disadvantage for taxpayers because it can lead to inconsistent conclusions being reached by different officers regarding the same taxpayer. This can leave the taxpayer unable to determine the correct legal position to follow. Additionally, when officers are spread across the country, it can be logistically difficult, time-consuming, and expensive for the taxpayer to afford legal assistance or carry out their statutory obligations.

### **Conclusion**

The above discussion shows that there are costs, both external and internal, associated with having multiple officers under the indirect tax legislation in the country. Further, judicial precedents do not support this practice. The decades of experience of administering income tax laws showed that having one jurisdictional officer for one taxpayer is both administratively and legally convenient. Therefore, there is no reason to continue the practice of having multiple

jurisdictional officers in the indirect tax landscape. The legislature was compelled to reconsider the impact of plurality of jurisdictional officers in indirect tax administration post the delivering of verdict in *Canon India (supra)*.

The Finance Act of 2022 completely cleared the mess unearthed in the major apex court judgments by removing the divergent practice and reinstating the separation between investigation and adjudication by mandating the issuance of SCN only by the jurisdictional Customs officer based on reports of investigation. This will allow impartiality and exercise of independent discretion. The amendments brought forth harmonized the provisions pertaining to 'proper officer', 'officer of customs' and powers to assign functions of a proper officer, which unlike circulars, were properly codified into the Act thereby ensuring no inconsistencies among them.

Although the amendments would help to strengthen the integrity of the customs administration and promote public trust in the system, it is visible that the overhaul was late and came with a cost.