

# M/s. Canon India Pvt. Ltd. Vs. Commissioner of Customs

Civil Appeal No. 1827 of 2018  
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## Full judgment text

M/s. Canon India Pvt. Ltd. Vs. Commissioner of Customs

[Civil Appeal No. 1827 of 2018]

[Civil Appeal No. 1875 of 2018]

[Civil Appeal No. 1832 of 2018]

[Civil Appeal No. 3213 of 2018]

S.A. Bobde, CJI.

1. This batch of statutory appeals (being Civil Appeal Nos. 1827/2018, 1875/2018, 1832/2018 and 3213/2018) under Section 130E of the Customs Act, 1962 arises from a common final order of the Central Excise and Service Tax Appellate Tribunal ('CESTAT') dated 19th December 2017 ('impugned order').

2. Vide the impugned order an exemption of basic customs duty accorded to the Digital Still Image Video Cameras ('DSIC') imported by the Nikon India Pvt. Ltd, Canon India Pvt. Ltd., Sony India Pvt. Ltd. and Samsung India Electronics Pvt. Ltd (hereinafter referred to as 'appellants' or 'importers'), in terms of exemption Notification No. 20/2005 dated 01.03.2005 (as amended by Notification No. 15/2012 dated 17.03.2012) came to be denied and the consequential confiscation of goods, demand of interest and imposition of penalty as provided for under various sections of the Customs Act, 1962, was upheld by the CESTAT.

3. Since the appeals involve common questions, these are being decided together and for sake of convenience we shall be referring to the events which took place in the case of Nikon.

4. The main issue is whether after clearance of the cameras on the basis that they were exempted from levy of basic Customs duty under Notification No.15/2012, the proceedings initiated by the Directorate of Revenue Intelligence for recovery of duty not paid under Section 28(4) of the Customs Act, 1962 are valid in law.

### Exemption Notification

5. Exemption to Digital Still Image Video Cameras was issued on 1.3.2005 vide Notification No.25/2005 (and amended vide Notification No.15/2012 on 17.3.2012).

### Arrival and decision to clear the goods on payment of nil duty

6. The consignment of cameras arrived at Delhi on 15.3.2012. The importer submitted a Bill of Entry to the Customs Authorities on 20.3.2012. Along with the Bill of Entry, the importer submitted a covering letter and literature containing specifications of the cameras.

After verification of the Bill of Entry by the Inspector and the Superintendent, the importer requested the Deputy Commissioner of Customs for a first check on 21.3.2012. The Customs Authorities checked the goods on 24.3.2012. They compared the goods with the description given in the literature and took a decision to clear the goods on 24.3.2012, as being exempt from duty in terms of the Notification No.15/2012 which was issued on 17.3.2012.

### Recovery of Duties

7. On 19.8.2014, a show cause notice was issued under Section 28 (4) of the Customs Act, 1962 alleging that the Customs Authorities had been induced to clear the cameras by wilful mis-statement and suppression of facts about the cameras. In particular; that the cameras were capable of recording more than a single video sequence of less than 30 minutes. In other words, after one sequence of less than 30 minutes was recorded, the camera had sufficient memory (extendable) to record more such sequences.

8. It is significant to note that while the decision to clear the goods for import because they were exempted from customs duties under Notification No.15/2012, was taken by Deputy Commissioner, Appraisal Group, Delhi Air Cargo, the show cause notice was issued by the Additional Director General, Directorate of Revenue Intelligence.

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. and Another vs. Coffee Board, Bangalore<sup>2</sup> has held:-

" 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."

In Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd.<sup>3</sup> has held:-

" 9. 'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a particular thing or a person."

10. 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'.

11. Parliament has employed the article "the" not accidentally 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.

12. 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 re-open 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.

13. 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.

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)].

15. It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28(4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside.

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 (NT) 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 II, Section 3, Sub-section (ii)]

S.O. (E). - 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 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:

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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, - (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 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.

22. In the above context, it would be useful to refer to the decision of this Court in the case of Commissioner of Customs vs. Sayed Ali and Another<sup>5</sup> 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 advertent 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 shortlevied 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."

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.

Limitation

24. It is strictly not necessary to decide the question on limitation but we intend to do so since parties have elaborately relied on disclosures made before the Customs officer on that issue. The show cause notice was issued on 19.8.2014. Under Section 28(4), such a show cause notice must be issued within five years from the relevant date which means the date on which the goods were assessed and cleared, in case the duty was not paid or short paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts. It is, therefore, necessary for us to examine whether there is suppression of facts.

25. The case was presented for scrutiny of the Customs officers on 20.3.2012 along with the Bill of Entry and literature consisting of specifications of the cameras.

26. The Bill of Entry made a statement that these are Digital Still Image Video Camera packed for retail sale (COOLPIX S4300, S2600 etc.). This was supported by literature which clearly stated that "the single maximum 18 recording time for a single movie is 29 minutes, even when there is sufficient free space on the memory card for longer recording". This meant that even if the camera could record more than 29 minutes when it had sufficient free space (which depends on the capacity of the card providing extended memory) the maximum time for which it could record a single sequence was 29 minutes.

27. In other words, the camera could record more than one single sequence but not 30 minutes and more in a single sequence. It is obvious that the Deputy Commissioner took the view that the camera complied with the requirement of exemption i.e. it could only record up to less than 30 minutes in a single sequence. At this juncture, it is not relevant to see whether the Deputy Commissioner was right or not in taking this decision to clear the goods as exempted goods. What is important is to see whether the importers made any wilful mis-statement or suppression of facts and induced the delivery of goods.

28. It is pertinent to note that the importer had asked for a first check and had shown the cameras and the cameras were offered on 20.3.2012 along with Bill of Entry and literature detailing specifications of models. The camera could have been operated to see the length of time of the single sequence and whether recording of the single sequence exhausts the total memory of the camera (including extended memory) and whether the cameras were eligible for exemption.

It is difficult in such circumstances to infer that there was any wilful misstatement of facts. In these circumstances, it must, therefore, follow that the extended period of limitation of five years was not available to any authority to re-open under Section 28(4).

29. In this view of the matter, we consider it unnecessary to answer the issue whether the cameras that were cleared on the basis that they were exempted from customs duty under Exemption Notification No.15/2012 were in fact eligible for the exemption or not. The goods must be taken to have been validly cleared by the Customs officer.

30. We might note that cameras with similar specifications have been treated as exempted under the Explanatory Note to the Combined Nomenclature of the European communities. It is important to add that the same cameras have been considered to be eligible for exemption before 17.03.2012 and after 30.04.2015 under the exemption Notifications issued under the Customs Act read with Chapter 84 & 85 (First Schedule) of Customs Tariff Act, 1975.

31. In the result, these appeals are allowed. The common order dated 19.12.2017 passed by the CESTAT, New Delhi in Customs Appeal Nos. 50098, 50099, 50100 and 50280/2017 is set aside. Consequently, the impugned demand notices issued against all the three appellants herein are also set aside.

32. Parties to bear their own costs.

1 Section 28 (4) Where any duty has not been [levied or not paid or has been shortlevied or short-paid] or erroneously refunded, or interest payable has not been paid, partpaid 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 not paid] 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.

2 (1980) 3 SCC 358

3 (2001) 3 SCC 609

4 Section 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;

5 (2011) 3 SCC 537

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