

Court No. - 21

Case :- WRIT TAX No. - 760 of 2021

Petitioner :- M/S Maa Geeta Traders

Respondent :- Commissioner Commercial Tax And Another

Counsel for Petitioner :- Pooja Talwar

Counsel for Respondent :- C.S.C.

Hon'ble Naheed Ara Moonis,J.

Hon'ble Saumitra Dayal Singh,J.

1. Heard Ms. Pooja Talwar, learned counsel for the petitioner, Mr. Manu Ghildyal, learned Standing Counsel for the revenue.
2. By means of the present petition, challenge has been raised to the ex-parte adjudication order dated 07.08.2021 passed by Deputy Commissioner, Commercial Tax, Sector-I, Shajahanpur (hereinafter referred to as the 'Deputy Commissioner), purportedly in exercise of powers vested under section 74 (9) of the U.P. Goods and Services Tax Act, 2017 (hereinafter referred to as the "Act"), for the tax period/Financial Year 2018-2019.
3. Solitary ground pressed in the present petition is - lack of inherent jurisdiction with the Deputy Commissioner to issue a notice, conduct proceedings and pass the impugned adjudication order under section 74 of the Act. In the first place, learned counsel for the petitioner submits, the Commissioner, State Tax (hereinafter referred to as the "Commissioner") as defined under section 2 (24) of the Act, is vested with the jurisdiction over the entire State of Uttar Pradesh to exercise all powers and perform all or any function under the Act. The other officers, who may be

subordinate to the “Commissioner” may derive their particular function-jurisdiction to initiate, continue and conclude any proceedings in the nature of adjudication proceedings only under a valid delegation of power made under section 5 (3) of the Act. Since no delegation of power existed in favour of the Deputy Commissioner, the adjudication proceedings initiated and concluded by that authority lacked inherent jurisdiction. Thus, relying upon the provisions of section 2 (91) read with sections 3, 4 and 6 of the Act, it has been submitted, in the absence of any notification issued, authorising the Deputy Commissioner to act as a “proper officer” under the Act, he could never claim any inherent jurisdiction to pass the impugned order. In that regard, heavy reliance has been placed on two decisions of the Supreme Court in *Commissioner of Customs Vs Sayed Ali and another*, reported in 2011 (3) SCC 537 and *M/s Canon India Private Limited vs Commissioner of Customs*, reported in AIR 2021 SC 1699.

4. Responding to the above, learned Standing Counsel for the revenue submitted, section 5(3) of the Act has no application to the present facts inasmuch as the Deputy Commissioner is an officer included in the list of officers described under section 3 of the Act. Also, relying on the clear language of the proviso thereto and referring to the Office Orders dated 01.07.2017 and 19.11.2018, both issued by the Commissioner, in exercise of powers vested in that Authority under section 2(91) of the Act read with section 4(2) of the Act, it has been submitted, the necessary function

assignment contemplated under section 4 of the Act was complete and valid in law, in favour of the Deputy Commissioner. No other officer could act as the “proper officer” to initiate, conduct and/or conclude the adjudication proceedings in the case of the petitioner, for the tax period/Financial Year 2018-19. The decisions cited by learned counsel for the petitioner are wholly distinguishable. In those cases, the issue had arisen in a different statutory and fact context.

5. Having heard learned counsel for the parties and having perused the record, by the impugned order, the inward supply received by the petitioner against ten (10) invoices has been disbelieved. The ITC claim of Rs. 2,92,500/- each, made under the Act and the Central Goods and Service Tax Act, 2017 (hereinafter referred to as the 'Central Act') has been rejected. Accordingly, penalty has been imposed.

6. Before proceeding further, it may be relevant to notice certain provisions of the Act. Section 2 of the Act defines various words, terms and phrases used in the Act. Thus, the term “Commissioner” has been defined in section 2 (24) of the Act. It reads:

“(24) “Commissioner” means the Commissioner of State tax appointed under section 3 and includes the Chief Commissioner, Principal Commissioner, Special Commissioner or Additional Commissioner of State tax appointed under section 3;”

7. Similarly, section 2(91) of the Act defines the term “proper officer”. It reads:

“(91) “proper officer” in relation to any function to be

performed under this Act, means the Commissioner or the officer of the State tax who is assigned that function by the Commissioner;”

8. Section 2(104) of the Act defines the term “State tax”. It reads:-

“104. “State tax” means the tax levied under this Act;”

9. Then sections, 3, 4, 5 and 6 of the Act, read as below:

“Section 3. Officer under this Act.-

The Government shall, by notification, appoint the following classes of officers for the purposes of this Act, namely:-

- (a) Principal Commissioner, Chief Commissioner or Commissioner of State tax*
- (b) Special Commissioners of State tax,*
- (c) Additional Commissioners of State tax,*
- (d) Joint Commissioners of State tax,*
- (e) Deputy Commissioners of State tax,*
- (f) Assistant Commissioners of State tax,*
- (g) State tax officers, and*
- (h) any other class of officers as it may deem fit:*

PROVIDED that, the officers appointed under the Uttar Pradesh Value Added Tax Act, 2008 (U.P. Act No. 5 of 2008) shall be deemed to be the officers appointed under the provisions of this Act.”

“Section 4. Appointment of officers.-

(1) The Government may, in addition to the officers as may be notified under section 3, appoint such persons as it may think fit to be the officers under this Act.

(2) The Commissioner shall have jurisdiction over the whole of the State, the Special Commissioner and an Additional Commissioner in respect of all or any of the functions assigned to them, shall have jurisdiction over the whole of the State or where the State Government so directs, over any local area thereof, and all other officers shall, subject to such conditions as may be specified, have jurisdiction over the whole of the State or over such local areas as the Commissioner may, by order, specify.”

Section 5. Powers of officer.-

(1) Subject to such conditions and limitations as the Commissioner may impose, an officer of State tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of State tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of State tax who is subordinate to him.

(3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.

(4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of State tax.

Section 6. Authorisation of officers of central tax as proper officer in certain circumstances.-

(1) Without prejudice to the provisions of this Act, the officers appointed under the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017) are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify.

(2) Subject to the conditions specified in the notification issued under sub-section (1),-

(a) where any proper officer issues an order under this Act, he shall also issue an order under the Central Goods and Services Tax Act 2017 (Act No. 12 of 2017), as authorised by the said Act under intimation to the jurisdictional officer of central tax;

(b) where a proper officer under the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017) has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act, shall not lie before an officer appointed under the Central Goods and Services Tax Act, 2017 (Act No. 12 of 2017).

10. Also, Section 74 of the Act, under which impugned proceedings were drawn and concluded, reads as under:

“Section 74.-Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made there under.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation 1.- For the purposes of section 73 and this section,-

(i) the expression “all proceedings in respect of the said notice” shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.- For the purposes of this Act, the expression suppression shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.”

11. By virtue of section 74 (1) of the Act, a “proper officer” alone, may issue a notice requiring any “person chargeable with tax”, to show cause as to the subject matter of that proceeding. Again, by virtue of section 74 (9) of the Act, it is the “proper officer” alone, who may consider the reply that may be submitted by the concerned “person chargeable with tax” and, determine the amount of tax, interest or penalty due upon such person. Therefore, it necessarily flows from section 74 of the Act, other than a “proper officer” no other authority under the Act may pass such an order.

12. As to the description of a “proper officer”, by virtue of section 2(91) of the Act it has to be either the “Commissioner” himself and/or the officer of the “State tax”, who may have been assigned that function by the Commissioner. Here, there is no dispute between the parties that the Office

Orders dated 01.07.2017 and 19.11.2018 were issued by the “Commissioner” as defined under section 2(91) of the Act. Its effect will be examined a little later.

13. Thus, there would be no dispute between the parties, if the “Commissioner” had himself issued the notice or passed the order giving rise to the present petition. The issues that arise are whether there is any function assignment/sub-delegation made in favour of the Deputy Commissioner, with reference to section 74 of the Act and, whether the assignment made, if any, validly confers jurisdiction on the Deputy Commissioner.

14. Then, different provisions of the Act exist for different purposes. section 3 of the Act defines the “classes of officers”, who may be appointed under the Act. That provision does not create any function assignment or sub-delegation in favour of any class of officers and it does not define the function jurisdiction of any class of officers. However, it does create a fiction of law. Thus, under the proviso thereto it includes, on deemed basis, all officers appointed under the U.P. Value Added Tax Act, 2008, to be officers appointed under the Act. At the same time, no jurisdiction or function assignment has been created or sub-delegated in favour of such officers or class of officers.

15. Then, section 4(1) of the Act, empowers the State Government to appoint a person as an officer under the Act, in addition to the class of officers specified under section 3 of the Act. Since, the Deputy

Commissioner is an officer falling under the proviso to section 3 of the Act, section 4(1) of the Act has no relevance to the present controversy. Insofar as section 4(2) of the Act is concerned, it first specifies the territorial limits of the jurisdiction of the “Commissioner”, the “Additional Commissioner” and the “Special Commissioner”. The Commissioner has been vested with territorial jurisdiction over the entire State. Second, the Special Commissioner and the Additional Commissioner, would also have jurisdiction over the whole of the State of Uttar Pradesh so however, they may exercise that jurisdiction with respect to all or any of the functions that may be “assigned”/sub-delegated to them and where State Government so directs such jurisdiction may be exercised over any local area of the State. Crucially, by way of the third part of section 4 (2) of the Act, all other officers i.e. officers subordinate to the rank of Special Commissioner and Additional Commissioner shall have jurisdiction over the whole of the State or over such local area as the Commissioner may by order specify. Thus, so far as the respondent-Deputy Commissioner is concerned, his territorial jurisdiction would arise under the third part of section 4(2) of the Act, by an order of the Commissioner and subject to conditions as may be specified by the Commissioner.

16. In view of the Office Orders dated 01.07.2017 and 19.11.2018, there is no dispute raised in this petition to territorial jurisdiction of the respondent-Deputy Commissioner. The dispute is confined to the function assignment/sub-delegation if any, made in his favour. *Prima-facie*, section

4(2) of the Act does not appear to directly deal with function assignment/sub-delegation or creation of subject matter jurisdiction of the Deputy Commissioner or any other authority. That provision speaks of but does not itself provide for or specify/sub-delegate function jurisdiction in favour of any officer under the Act.

17. Clause 1 of the Office Order dated 01.07.2017 first refers to and provides that jurisdiction specification on the following terms:

"1- उ०प्र० माल एवं सेवा कर अधिनियम 2017 (उ०प्र० अधिनियम संख्या 1 सन् 2017) की विभिन्न धाराओं में उल्लिखित कृत्य के संबंध में उचित अधिकारी (Proper Officer) नामित करने के उद्देश्य से अधिनियम की धारा 2 (91) तथा धारा 4(2) में प्रदत्त शक्तियों का प्रयोग करते हुए मैं, आयुक्त, राज्य कर, उत्तर प्रदेश राज्य के अन्तर्गत राज्य कर खण्डों के अधिक्षेत्र की भौगोलिक सीमाओं को इस परिपत्र के अनुलग्नक "क" के अनुसार, राज्य कर के मण्डलों की भौगोलिक सीमा इस परिपत्र के अनुलग्नक "ख" के अनुसार, राज्य कर के सम्भाग एवं जॉन की भौगोलिक सीमा इस परिपत्र के अनुलग्नक "ग" के अनुसार अवधारित करता हूँ।"

18. Insofar as section 5(3) of the Act is concerned, learned counsel for the petitioner has vehemently urged, unless the Commissioner first sub-delegates his specified powers, no function jurisdiction may arise in favour of the respondent-Deputy Commissioner. Thus, it is her submission, originally, all function jurisdiction vest in the Commissioner. He may sub-delegate the same to other officers by specific orders. In absence of any order issued under section 5(3) of the Act, the Deputy Commissioner never acquired function jurisdiction under Section 74 of the Act.

19. On a plain reading of section 5(3) of the Act, we find, the Commissioner has been granted a general power to sub-delegate all or any of his powers/functions to any other officer who may be subordinate to him. It would include within its plain ambit, the sub-delegation of function jurisdiction or the power to act as the “proper officer”, to adjudicate a dispute under section 74 of the Act.

20. In absence of any other procedure or manner being prescribed under the Act to effectuate or create that sub-delegation or to create that function assignment, and in face of the powers vested in the “Commissioner” under section 4(2) and 5(3) of the Act, we may test the true purport and scope of the Office Orders dated 01.01.2017 and 19.11.2018 to determine if such sub-delegation of power or necessary function assignment had been made, in accordance with law.

21. Clearly, the respondent-Deputy Commissioner is an officer of the “State tax” in view of the language of the proviso to section 3 of the Act. Even otherwise, there is no dispute to that, in the present petition. From a plain reading of section 2(91) of the Act the sub-delegation of function assignment is to be made by the Commissioner. Here, clearly, the “Commissioner” had himself issued the Office Orders dated 01.07.2017 and 19.11.2018. Paragraph 2 of the office order dated 01.07.2017 reads as below:-

“2— उ०प्र० माल एवं सेवा कर अधिनियम 2017 (उ०प्र० अधिनियम संख्या 1 सन् 2017) की धारा 2 (91) में प्रदत्त शक्तियों का प्रयोग करते हुए मैं, आयुक्त, राज्य कर, उत्तर प्रदेश, उक्त अधिनियम की विभिन्न

धाराओं के स्तम्भ में नीचे अंकित तालिका के स्तम्भ 2 में अंकित अधिकारियों को उनके सम्मुख स्तम्भ 3 में अंकित अधिनियम की धाराओं के प्रयोजन हेतु उचित अधिकारी (Proper Officer) नामित करता हूँ:-

क्र० सं०	अधिकारी का पदनाम	उ०प्र० माल एवं सेवा कर अधिनियम 2017 (उ०प्र० अधिनियम संख्या 1 सन् 2017)
1	1. खण्ड में तैनात राज्य कर के उप आयुक्त 2. खण्ड में तैनात राज्य कर के सहायक आयुक्त 3. खण्ड में तैनात राज्य कर अधिकारी	10, 35, 54, 61, 62, 63, 64, 65, 66, 67(11), 68, 70, 73, 74, 75, 76, 78, 79, 81, 123, 126, 127, 129, 130, 142
2	1. खण्ड में तैनात राज्य कर के उप आयुक्त 2. खण्ड में तैनात राज्य कर के सहायक आयुक्त	25, 27, 28, 30, 60
3	जेन में तैनात संयुक्त आयुक्त कारपोरेट सर्किल	28, 29, 30, 60, 35, 54, 61, 62, 63, 64, 65, 66, 67(11), 68, 70, 71, 73, 74, 75, 76, 78, 79, 81, 123, 129, 127, 129, 130, 142
4	1. वि०अनु०शा० इकाई में तैनात राज्य कर के उप आयुक्त 2. वि०अनु०शा० इकाई में तैनात राज्य कर के सहायक आयुक्त 3. वि०अनु०शा० इकाई में तैनात राज्य कर अधिकारी	68, 70, 126, 127, 129, 130
5	1. जोन में तैनात राज्य कर के संयुक्त आयुक्त (टैक्स आडिट) 2. जोन में तैनात राज्य कर के उप आयुक्त (टैक्स आडिट) 3. जोन में तैनात राज्य कर के सहायक आयुक्त (टैक्स आडिट)	65, 66
6	1. सम्भाग में तैनात राज्य कर के संयुक्त आयुक्त (कार्यपालक) 2. सम्भाग में तैनात राज्य कर के संयुक्त आयुक्त (वि०अनु०शा०)	67, 68, 70, 71, 72
7	1. सचलदल में तैनात राज्य कर के उप आयुक्त 2. सचलदल में तैनात राज्य कर के सहायक आयुक्त 3. सचलदल में तैनात राज्य कर अधिकारी	67(11), 68, 70, 126, 127, 129, 130

22. Doubts, if any, as to overlapping jurisdictions (amongst the sub-delegates) came to an end upon issuance of the subsequent Office

Order dated 19.11.2018. Therein, the pecuniary jurisdiction was dissected and distributed, exclusively, amongst the officers of the rank of Commissioner Tax Officer, Assistant Commissioner and Deputy Commissioner. The relevant part of that Office Order reads as below:-

- “1. डिप्टी कमिश्नर (उपायुक्त)– 50 लाख से अधिक करयोग्य विक्रयधन वाले निर्माता इकाई तथा 1 करोड. से अधिक करयोग्य बिक्री करने वाली ट्रेडिंग ईकाइयाँ।
2. असिस्टेंट कमिश्नर (सहायक आयुक्त)– 15 लाख से 50 लाख तक करयोग्य विक्रयधन वाली निर्माता ईकाइयाँ तथा 25 लाख से 1 करोड. तक करयोग्य बिक्री करने वाली ट्रेडिंग ईकाइयाँ।
3. वाणिज्य कर अधिकारी (राज्य कर अधिकारी)– 15 लाख तक करयोग्य वियधन निर्माता ईकाइयाँ तथा 25 लाख तक करयोग्य बिक्री करने वाली ट्रेडिंग ईकाइयाँ।”

23. The function-jurisdiction that have been sub-delegated and thus assigned to the officers falling in the class of officers-Deputy Commissioner, Assistant Commissioner and the Commerical Tax Officer are clearly mentioned in Column-3 of the chart below paragraph 2 of the Office Order dated 01.07.2017 (quoted above). Thereby, the function-jurisdiction of adjudication under Section 74 has been assigned to the officers of the above mentioned three classes (specified under Section 3). The pecuniary jurisdiction of each of the three class of officers namely, Commercial Tax Officer, Assistant Commissioner and Deputy Commissioner has been delineated by the subsequent Office Order dated 19.11.2018. Thus, there is no overlapping jurisdiction. Both, pecuniary and territorial jurisdiction are clearly demarcated and visible.

24. Then section 5(3) is the source of the power to sub-delegate the function-jurisdiction vested in the Commissioner, to be exercised in favour of any officer subordinate to him. Neither there exists any procedure or stipulation prescribed by law with respect to the mode or the manner in which that power to sub-delegate may be exercised nor the Commissioner was required to obtain any approval of the State Government in that regard nor there exists any requirement in law prescribing issuance of a notification etc. to evidence a valid sub-delegation made under section 5(3) of the Act.

25. Therefore, the fact, composite Office Orders 01.07.2017 and 19.11.2018 were issued by the Commissioner, makes no difference to the validity of the power exercised. Non-recital of section 5(3) of the Act in either of those orders is inconsequential and even extraneous to the valid exercise of power made by the Commissioner. The power was admittedly existing and it is seen to have been exercised. It is not shown to have been exercised in contravention of any statutory provision or principle of law. Hence, the validity of the power exercised would remain by established firm and undoubted.

26. Section 5(3) of the Act provides the source of power to be exercised by the Commissioner for the purpose of section 4 read with section 2(91) of the Act. As noted above, the power under section 5(3) of the Act is a general power of sub-delegation vested in the Commissioner, by the legislature. Once that power is shown to exist and the same is seen to have

been exercised, no fetters may be searched and attached to the exercise of that power and no challenge may arise thereto, de hors the statutory scheme, to defeat that exercise of power.

27. It is not the requirement of law that the source of power must necessarily be recited in the order passed in exercise of that power to validate the power exercised. It is enough that the source of power existed and it was exercised in the manner prescribed by law. Its recital in the order passed in exercise of that power would not lend or add to the legitimacy of the power exercised. It is not a spell that may cause a magical effect only upon its incantation in a ritualistically correct manner.

28. As to the further submission advanced by learned counsel for the petitioner on the strength of section 6 of the Act, we find, the same is misconceived. It has no applicability to the present facts. That provision would apply only to officers appointed under the Central Act. Those officers may act as “proper officer” under the Act subject to conditions as the State Government may notify in that regard, and not otherwise.

29. Thus, the statutory scheme appears to be - the legislature has first recognised the Commissioner as the “proper officer” for all functions under the Act. It also recognises the classes of officers who may be appointed officers under the Act. Further, officers of the UP VAT Act have been recognised as officers under the Act, on deemed basis. As to the officers of the Central Government, the State Government has been delegated the power (under section 4(1) of the Act) to appoint them officers under the

Act. Second as to the functions to be performed by various officers under the Act, the Commissioner may sub-delegate absolutely, any functions to an officer of "State tax" [as defined under section 2(104) of the Act]. On the contrary, an officer of the Central Government may not be sub-delegated such powers generally. He may be sub-delegated that power and he may act as a "proper officer" subject to the conditions as the State Government may by notification (under section 6 of the Act), specify, in that regard.

30. Insofar as the present respondent-Deputy Commissioner is an officer under section 3 of the Act, section 6 of the Act has no application. Only with respect to officers appointed under the Central Act, the exercise of jurisdiction would be circumscribed by a notification that would have to be first issued by the State Government, before such jurisdiction may be created in their favour. Upon clear language of the provisions of the Act, the officers appointed under the Act would continue to be governed by the provisions of sections 3 and 4 read with section 2(91) of the Act and the general orders issued by the "Commissioner" in that regard, issued with reference to the power exercised under section 5 of the Act.

31. Hence, the decision relied upon by learned counsel for the petitioner are found to be wholly distinguishable. In **Commissioner of Customs Vs. Syed Ali and Others (Supra)**, two conflicting orders of the Tribunal existed. In the first set, the Customs, Excise and Gold (Control) Appellate Tribunal had reasoned, the Commissioner of Customs (Preventive),

Mumbai was not a “proper officer” under Section 2(34) of the Customs Act, 1962. In the second set, a contrary view had been expressed by the Central Excise and Service Tax Appellate Tribunal. Both sets of orders of the Tribunal came to be examined by the Supreme Court in that decision. Dealing with the same and after taking notice of the provision of section 28 of the Customs Act, 1962 (hereinafter referred to as the Customs Act); the definition of “proper officer” given under section 2(34) of the Customs Act and, after taking note of the fact that the Collector of Customs, (Preventive) had not been assigned any function under section 28 of the Act it was held, the adjudication order passed by the Collector Customs (Preventive) lacked inherent jurisdiction.

32. Relevant to our discussion, in paragraph nos. 20, 21 and 24 of the report, it was held as under:-

“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.

21. Moreover, if the Revenue’s contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a “proper officer” in terms of Section 28 of the Act is

accepted, it would lead to a situation of utter chaos and confusion, as much as all officers of Customs in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be “proper officer”. In our view, therefore, it is only the officers of Customs, who are assigned the function of assessment, which of course, would include reassessment, working under jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

24. Nothing has been brought on record to show that the Collector of Customs (Preventive), who had issued the show cause notices was assigned the functions under Section 28 of the Act as “proper officer” either by the Board or the Collector/Commissioner of Customs. We are convinced that Notifications Nos. 250-Cus. and 251 Cus., both dated 27.8.1983, issued by the Central Government in exercise of the powers conferred by sub-section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive), etc. to be the Collector of Customs for Bombay, Thane and Kolaba Districts in the State of Maharashtra did not ipso facto confer jurisdiction on him to exercise power entrusted to the “proper officers’ for the purpose of Section 28 of the Act.”

(emphasis supplied)

33. Then in **Canon India (Supra)**, a question arose whether the Additional Director General, Revenue Intelligence had the authority to issue a Show Cause Notice under section 28(4) of the Customs Act, 1962. After taking note of the provisions of section 28(4) read with section 2(34) and section 6 of the Customs Act, 1962, the Supreme Court reasoned, the Additional Director General, Revenue Intelligence was not a “proper

officer”. In reaching that conclusion, the Supreme Court observed in paragraph nos. 13, 15, 16, 18, 19, 20 and 21 of the report as under:-

“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.

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.

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)] Government of India Ministry of Finance (Department of Revenue) Notification No.40/2012-Customs (N.T.) New Delhi, dated the 2nd May, 2012 S.O. (E). – In exercise of the powers conferred by 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: -

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

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No.3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-Section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows:-

“2. Definitions – In this Act, unless the context otherwise requires, -

... (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.

(emphasis supplied)

34. Thus, at the surface it appears, the Supreme Court had principally reasoned, unless there existed a specific exercise of power made by the competent authority to assign the function of adjudication, no function jurisdiction could have been assigned/sub-delegated in favour of the Commissioner of Customs (Preventive) or the Additional Director General, Directorate of Revenue Intelligence. At the same time, it cannot be accepted as the true reasoning of the aforesaid decisions. In fact, in

those decisions issue had arisen whether the Commissioner of Customs (Preventive)/Additional Director General, Directorate of Revenue Intelligence were officers falling within the class of Officers of Customs defined under section 3 of the Customs Act and whether there was any notification issued under section 6 of the Customs Act assigning any function to those officers.

35. Section 3 of the Customs Act reads as under:

“3. Classes of officers of customs.- There shall be the following classes of officers of customs, namely:-

(a) Principal Chief Commissioners of Customs;

(b) Chief Commissioners of Customs;

(c) Principal Commissioners of Customs;

(d) Commissioner of Customs;

(e) Commissioners of Customs (Appeals);

(f) Joint Commissioners of Customs;

(g) Deputy Commissioners of Customs;

(h) Assistant Commissioners of Customs;

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

36. Though any officer other than the person of the Customs could be appointed as a Custom Officer by virtue of section 4 of the Customs Act, such an officer could not hold any function jurisdiction in his favour unless a specific entrustment/sub-delegation were first made in his favour by issuance of a notification under section 6 of that Act. Therefore, the Commissioner of Customs (Preventive) and the Additional Director General, Directorate of Revenue Intelligence though became Customs

Officers by virtue of Notification dated 02.05.2012 read with earlier Notification dated 07.03.2002 yet, in the absence of any further notification issued under section 6, (it was reasoned), they could not act as a “proper officer” to adjudicate a dispute under section 28 of the Customs Act, 1962.

37. Similarly, in the context of the Act, any officer of the Central Government who may become an officer under Act by virtue of his appointment thus made, under section 4(1) of the Act, would remain dependent on a further notification that may be issued under section 6 of the Act, regarding function assignment/sub-delegation made in his favour, by the State Government, before he may act as a “proper officer”, under Act. However, that requirement and condition of law would not attach to an officer of the “State tax”. As noted above, undisputedly, the respondent-Deputy Commissioner is an officer of the State Tax whose function assignment has been made in terms of section 2(91) read with sections 4(2) and 5(3) of the Act, by virtue of Office Order dated 01.07.2017 read with further Office Order dated 19.11.2018.

38. Thus, similar to the two methods of function assignment/delegation prescribed under the Customs Act, under the Act as well, there exist two different methods to create function assignment/delegation in favour of officers of “State tax” and officers of “Central tax” (i.e. officers appointed under Central Act). As noted above, function assignment/jurisdiction in favour of officers of the “State tax” may be created by the

“Commissioner” by issuing an order/communication in exercise of his powers of sub-delegation vested under section 5(3) of the Act. However, function assignment/jurisdiction in favour of the officers of the Central Act, may be created and such officers may act as “proper officer” subject to conditions as may be notified by the State Government which alone has the power to cause the sub-delegation in favour of those officers. Under section 5 of the Customs Act, the Board may authorise any officer of Customs to exercise the powers under that Act. Yet, any other officer of the State or the Central Government or a local authority may be entrusted any power, (under that enactment), either of the Board or any officer of the Customs, as may be notified by the Central Government and, not otherwise.

39. The Commissioner of Customs (Preventive), Mumbai [in the case of **Commissioner of Customs Vs. Syed Ali & others (Supra)**] and the Additional Director, Directorate of Revenue Intelligence [in the case of **Canon India (Supra)**] were not officers of Customs (under section 5 of the Customs Act), in the first place. Hence, though appointed (clearly with reference to section 4 of the Act, no function came to be entrusted to them under the Customs Act, in absence of any sub-delegation made in their favour by a further notification under section 6 of that Act. That analogy and reasoning would arise and apply (in the context of the Act), to officers of the “Central tax”, only. It would not apply to functioning of officers of the “State tax” who may draw their function-jurisdiction from simple sub-

delegation under an administrative order issued by the “Commissioner” with reference to his powers to sub-delegate granted under section 5 of the Act, without any gazette notification of such order.

40. Thus no defect exists in the exercise of power made by the Deputy Commissioner. The challenge raised in the present petition thus fails. Accordingly, the writ petition is ***dismissed***. No order as to costs.

41. It is left open to the petitioner to test the merits of the impugned order dated 07.08.2021 before the statutory forum of appeal, if that cause exists. Such appeal, if any, may be filed within a period of four weeks from today. If filed within time granted, the same may be heard and decided on its own merits without any objection to its limitation.

Order Date :- 15.11.2021

Sazia/Saurabh