

(2016) 08 MAD CK 0114

In the Madras High Court

Case No : Writ Appeal (MD) No. 705 of 2011, Writ Petition (MD) No. 626 of 2015, M.P. (MD) Nos. 1 of 2011 and 1 of 2014 and M.P. (MD) Nos. 1 & 2 of 2015

Sterlite Industries (I) Ltd.

APPELLANT

Vs

Central Board of Excise and Customs

RESPONDENT

Date of Decision : 01-08-2016

Acts Referred:

Citation : (2016) 340 ELT 477

Hon'ble Judges : S. Manikumar and C.T. Selvam, JJ.

Bench : Division Bench

Advocate : S/Shri P. Paul Pandi, CGSC and B. Vijay Karthikeyan, Counsel, for the Respondent; S/Shri A.R.L. Sunderasan and C. Natarajan, Senior Counsels, Mohammed Shaffiq and Y. Prakash, Advocates, for the Appellant

Final Decision : Disposed Off

Judgement

C.T. Selvam, J. - Since the parties and issues involved are one and the same, the present writ appeal and writ petition are heard together and disposed by this common judgment.

2. The Commissioner of Customs (Tuticorin) vide proceedings C. No. VIII/48/61/2013-SIIB, dated 13-1-2015 alleged misuse of advance licence/advance authorisation scheme by M/s. Sterlite Industries India Ltd. (hereinafter referred to as "the company"), the petitioner in W.P. (MD) No. 626 of 2015 between the period February, 2005 and May, 2010 and consequent evasion of customs duty of Rs. 399,60,57,592/- and issued show cause notice to the following effect :

"52. Now therefore, M/s. Sterlite Industries (India) Ltd., (now named as M/s. Sesa Sterlite Limited) DTA Unit, Tuticorin are, hereby required to show cause to the Commissioner of Customs, Custom House, Tuticorin within 30 days of receipt of this notice as to why :

(a) Benefit of Customs Notifications No. 91/2004-Cus., dated 10-9-2004 and No. 93/2004-Cus., dated 10-9-2004 should not be denied for the import of 77214.024 MT of Copper in Copper Concentrate imported by them for violations of the conditions stipulated in the said Notifications read with the provisions of the Foreign Trade Policy;

(b) the amount of Rs. 399,60,57,592 as calculated in the worksheet given above along with interest for having violated the conditions of the Notifications 91/2004-Cus. and 93/2004-Cus. on the quantity of 77,214.024 MT of Copper in Copper Concentrate used in the manufacture of goods illegally diverted into Domestic market without fulfilling the export obligations should not be demanded as duties of Customs from them in terms of the Bonds executed by them before the Assistant Commissioner/Deputy Commissioner of Customs;

(c) the quantity of 77,214.024 MT of Copper in Copper Concentrate used in the Copper products diverted to domestic market should not be held liable for confiscation under Section 111(o) and 111(d) of the Customs Act, 1962 for violation of the conditions of the Notifications and provisions of the Foreign Trade Policy subject to which they were allowed clearance and as the goods are not available for confiscation, and since exemption under the said Notifications were extended against the bonds executed by them, why redemption fine should not be imposed in terms of the said Bonds under Section 125 of the Customs Act, 1962;

(d) a penalty should not be imposed on them under Section 112(a)(ii) of the Customs Act, 1962.

53. Shri S. Varadharajan, Vice President, M/s. Sterlite Industries (India) Ltd., DTA Unit, Tuticorin, is hereby required to show cause to the Commissioner of Customs, Custom House, Tuticorin within 30 days of receipt of this notice as to why a penalty should not be imposed on him under Section 112(b) of the Customs Act, 1962 for abetting the commission of the above offence by SIIL.

54. M/s. Sterlite Industries (India) Ltd., Unit-I and Shri S. Varadharajan, Vice President, M/s. Sterlite Industries (India) Ltd., Unit-I are directed to produce all the evidences upon which they intend to rely in support of their defence. They may also state in their written reply as to whether they wish to be heard in person before the case is adjudicated.

55. Reliance for the issue of this notice is based on the documents mentioned in Annexure to this show cause notice. Copies of the essential relied upon documents are enclosed and the same may be treated as integral part of the show cause notice.

56. if no cause is shown within 30 days of receipt of this notice or having shown cause they fail to appear before the adjudicating authority when the case is posted for hearing, the case shall be decided ex parte on merits.

57. This notice is issued without prejudice to any order of the Hon"ble High Court

in WA No. 704/2011 and 705/2011 and any related petitions. This SCN shall not be adjudicated unless and until directions are obtained from the Hon"ble High Court and will be kept pending until such time.

58. This notice issued without prejudice to any other action that may be or has already been initiated against any other Act or Rules made thereunder or under any other laws for the time being in force and enforceable in India."

Quash thereof is sought in W.P. (MD) No. 626 of 2015.

3. The company imports Copper Concentrate and converts the same into Copper Anodes at its factory at Tuticorin. The Copper Anodes are dispatched to another unit of the Company at Chinchpada and Silvassa on job work basis for conversion into Copper Cathodes, rods, etc. Permission under Rule 4(6) of the Cenvat Credit Rules, 2004, entitles the company to Cenvat credit. One of the conditions for availment thereof was that job work challans was to be received by the parent unit from the job work unit within 180 days and should be produced before the jurisdictional Range Office once in a fortnight. Alleging failure on the part of the company, the Assistant Commissioner of Central Excise, Tuticorin/fourth respondent passed an ex parte order dated 8-6-2010 demanding reversal of Cenvat credit of Rs. 315,91,42,459/-. The fourth respondent, addressed a letter dated 9-6-2010 to the Assistant Commissioner of Central Excise, Division III, Silvassa, on the basis of the order dated 8-6-2010 and called for reports from various divisions under his jurisdiction on action taken against the company and directed submission of report to the Chief Commissioner, Central Excise, Coimbatore/second respondent. The Superintendent of Central Excise, Tuticorin/sixth respondent issued summons in C. No. IV/06/02/2010-DPU, dated 26-7-2010 calling for appearance of the company officials. Having challenged the communication dated 8-6-2010 and 9-6-2010 in W.P. (MD) Nos. 8123 and 8135 of 2010 [2011 (274) E.L.T. 53 (Mad.) = 2012 (27) S.T.R. 423 (Mad.)], the Company moved W.P. (MD) No. 9744 of 2010 seeking issuance of a writ of mandamus directing the first respondent to appoint "proper officers" of customs to investigate and examine issues, if any, not arising or connected to orders passed by the fourth respondent dated 8-6-2010 and 9-6-2010 inasmuch as respondents 3 to 6 lack jurisdiction to enquire into the alleged offences under the Customs Act, 1962 and the Foreign Trade Regulation Act, 1994 read with the EXIM policy and in any way have disqualified themselves to enquire any further into the matter in view of the personal bias and malice in fact and law which stands reflected in the arbitrary and high-handed manner in which the present proceedings have been conducted so far in wilful disobedience of the order of this Court. The summons dated 26-7-2010 was challenged in W.P. (MD) No. 9745 of 2010. Under common orders in W.P. (MD) Nos. 9744 and 9745 of 2010, dated 29-4-2011, a learned single Judge of this Court dismissed both writ petitions. W.A. (MD) No. 705 of 2011 is preferred against the finding in W.P. (MD) No. 9744 of 2010 while W.A. No. 704 of 2011 was preferred against the finding in W.P. (MD) No. 9745 of 2010. Both Mr. C. Natarajan, learned senior counsel for

petitioner and Mr. A.R.L. Sundaresan, learned senior counsel for appellant, stated that W.A. (MD) No. 704 of 2011 has become infructuous.

4. Heard Mr. C. Natarajan, learned senior counsel for petitioner, Mr. A.R.L. Sundaresan, learned senior counsel for appellant, Mr. B. Vijay Karthikeyan, learned counsel for Customs and Mr. P. Paul Pandi, learned Central Government Standing Counsel for Central Government.

5. Mr. A.R.L. Sundaresan, learned senior counsel for appellant, took us through the provisions of the Customs Act towards drawing the distinction between "Customs Officers" and "Proper Officers" under the Customs Act, 1962. It was his contention that the Respondents 3 to 6 lack jurisdiction to enquire into allegations of offences under the Customs Act, 1962 and Foreign Trade Regulation Act, 1994, r/w the EXIM policy, as they were not proper officers. In circumstance where persons holding the office of the Respondents 3 to 6 had undergone a change, learned senior counsel fairly did not press the contention of personal bias and malice. He took us through the order under challenge to explain that the distinction between Customs Officer and Proper Officer had been missed. Referring to the preamble to the show cause notice, learned senior counsel submitted that the Commissioner of Customs, Tuticorin, on the one hand had claimed that he had filed a miscellaneous petition seeking vacation of status quo ordered by the Division Bench while on the other he had proceeded to issue the show cause notice. Learned senior counsel submitted that without obtaining appropriate orders in the writ appeal, the Commissioner of Customs, Tuticorin, ought not to have issued show cause notice when it had not been found necessary to do so for a period of 3? years. Learned senior counsel submitted that the Commissioner of Customs, Tuticorin, had undertaken to keep the show cause notice pending and not to adjudicate the same till Court directions were obtained and raised the question of the need for such directions if, in the first place, the Commissioner of Customs, Tuticorin, was right in issuing the show cause notice. Learned senior counsel submitted that the show cause notice in Paragraph No. 50 informed that the company attempted to redeem its advance licenses by DGFT suppressing the fact regarding violation of Foreign Trade Policy and the same was indicative of the malice of the Commissioner of Customs, Tuticorin, against the company. Learned senior counsel further submitted that in requiring the DGFT to keep the issue of redemption under abeyance pending vacation of stay and issuance of show cause notice under C. No. VIII/48/55/2014-SIIB, dated 14-8-2014 was totally without jurisdiction.

6. Mr. C. Natarajan, learned senior counsel for petitioner, submitted that though the Commissioner of Customs, Tuticorin, was empowered to issue the show cause notice in C. No. VIII/48/61/2013-SIIB, dated 13-1-2015, he had done so not on his own accord but at the instance of Commissioner of Central Excise, Tirunelveli. The draft show cause notice had been prepared by one who is not a Proper Officer. Learned senior counsel referred to copies of communication obtained under the Right to Information Act. Learned senior counsel also referred

to the following in the communication in C. No. VIII/10/47/2011-ADJN, dated 29-4-2011 of the Commissioner of Customs, Tuticorin, addressed to the Commissioner of Central Excise, Tirunelveli :

"Please refer to your letter C. No. IV/16/06/2010-Adjn., dated 17-2-2011. The letter including of Draft Show Cause Notice which has been studied in detail in the Commissionerate.

?.. So long as the export obligation is fulfilled within the stipulated period, the requirements of the Notification stands satisfied for actual user like M/s. Sterlite. As per Para 9.5 of the Foreign Trade Policy, "Actual user (Industrial) means a person who utilizes imported goods for manufacturing his own industrial units or manufactures for his own use in another unit including jobbing unit. This means that as per the policy the scheme is to allow duty free import of inputs which are physically incorporated in export product but is no one-to-one correlation between imports and exports. The Tribunals in a series of decisions have taken a view that there is no bar in sale of finished goods in the domestic market before export obligation within the stipulated time. In the present case, all raw materials and finished goods have been accounted for between export and domestic sales. There is no goods of any clandestine removal either the raw material or finished goods. In view of the above point, the merits of the case may be re-looked.

M/s. Sterlite Industries India Ltd., have purchased copper concentrate in bulk either on payment of duty or under exemption. It is not possible to identify the quantity of copper concentrate as being physically identifiable with the goods cleared duty free. In the instant case copper concentrate are stored in bulk in bonded warehouse. In the absence of identifying particulars of the commodity on itself or on its package or container it would be impossible to identify any particular quantity stored or issued for the manufacture of a batch of finished products as one imported duty free or imported on payment of duty or indigenously manufactured."

7. Learned senior counsel contended that though the Commissioner of Customs, Tuticorin, initially had reservations against issue of show cause notice, he had succumbed to the dictates of the Commissioner of Central Excise, Tirunelveli, who was not a Proper Officer under the Customs Act. Learned senior counsel referred to the maxim - Qui Per Alium Facit Per Seipsum Facere Videtur - He who does an act through another is deemed in law to do it himself, to submit that the Commissioner of Central Excise, Tirunelveli, has used the hands of the Commissioner of Customs, Tuticorin, to carry out his intention and as such the show cause notice must be seen as one issued by him. Learned senior counsel contended that issue of show cause notice was quasi-judicial in nature and the power to do so must be exercised in a neutral and untainted manner. Learned senior counsel submitted that a reading of the show cause notice informed overt hostility towards the company and indicated lack of neutrality on the part of Commissioner of Customs, Tuticorin, who issued the show cause notice,

abdicated his responsibility. Learned senior counsel referred to the following observations in *Orient Paper Mills Ltd. v. Union of India* [1969 (1) SCR 245 : 1978 (2) E.L.T. (J345) (S.C.)]:

"8. If the power exercised by the Collector was a quasi-judicial power - as we hold it to be - that power cannot be controlled by the directions issued by the Board. No authority however high placed can control the decision of a judicial or a quasi-judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the Appellate Authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the Appellate Authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act they must act independently and impartially. They cannot be said to act independently if their judgment is controlled by the directions given by others. Then it is a misnomer to call their orders as their judgments; they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party. The only provision under which the Board can issue directions is Rule 233 of the Rules framed under the Act. That rule says that the Board and the Collectors may issue written instructions providing for any supplemental matters arising out of these Rules. Under this rule the only instruction that the Board can issue is that relating to administrative matters; otherwise that rule will have to be considered as ultra vires Section 35 of the Act."

Learned senior counsel also relied on the decision of the Apex Court in *Mahadaya Premchandra v. Commercial Tax Officer, Calcutta and Another* [1959 SCR 551], a case wherein, on facts it was found, that the Commercial Tax Officer who issued the show cause notice had not acted independently but had followed the instructions of the Assistant Commissioner.

8. Informing undue haste in issuance of show cause notice, learned senior counsel referred to the decision of the Apex Court in *Orient Paper Mills Ltd. v. Union of India* [1970 (3) SCC 76 : 1978 (2) E.L.T. J382 (S.C.)] to submit that it would be open to this Court to direct a fresh assessment. The decision in *Grindlays Bank Ltd. v. Income-tax Officer, Calcutta and Others* [(1980) 122 ITR 55 (SC)] was relied upon to impress that considerations of limitation would not stand in the way of doing so. Relying on the decision in *Jay Engineering Works Ltd. v. Commissioner of Customs, Chennai* [2003 (162) E.L.T. 680 (Tri.-Bang.)], learned senior counsel submitted that the Company had fulfilled its export obligation and therefore, there could be no restriction on its disposal of imported materials.

9. The show cause notice has been issued pending the present writ appeal. It contains a preamble which seeks to justify the issue thereof and informs thus :

"Thus, there is no restraint on the Department from issuing this SCN. The earlier

orders passed by the Hon'ble Court were only up to 28-9-2011 and no restraining order has been passed today either. Hence, this SCN is being issued without prejudice to any order of the Hon'ble High Court in the aforesaid Writ Appeals and any other related Petitions. This SCN shall be kept pending and shall not be adjudicated unless and until directions are obtained from the High Court enabling such adjudication."

10. Learned senior counsel contended that in the decision in *Siemens Ltd. v. State of Maharashtra and Others* [2006 (12) SCC 33 : 2007 (207) E.L.T. 168 (S.C.) : 2007 (5) S.T.R. 3 (S.C.)], the Apex Court had held that a show cause notice issued with premeditation may be challenged by way of writ petition since directing the authority to hear the matter afresh would not yield any fruitful purpose. Reliance was also placed on the judgment of this Court in *Rajam Industries P. Limited v. DCTO, Sriperumbudur Assessment Circle and Another* [2010 (34) VST 303 (Mad.)].

11. Mr. P. Paul Pandi, learned Central Government Standing Counsel, submitted that under communication in C. No. IV/16/05/2010, dated 8-6-2010, the Assistant Commissioner of Central Excise, Tuticorin, had directed the Company to reverse the amount to Rs. 315,91,42,459/-. Towards explaining the alleged nature of wrong doing, learned Central Government Standing Counsel referred to the following :

"The Cenvat credit that accrues on account of the duty paid Copper Concentrates is more than sufficient to discharge the duty liability on the final products viz. Copper Cathodes/rods arising out of the same. Hence, excess Cenvat credits are bound to accumulate in the Cenvat account of M/s. Sterlite Industries India Limited, Tuticorin. These excess Cenvat credits would have been lying idle and could not have been encashed on any account.

Given this situation, M/s. Sterlite Industries Ltd., Tuticorin cleared the final products, made out of non-duty paid advance licence inputs, into the DTA markets to mis-utilise the excess Cenvat credit which would have otherwise remain unutilised. They pumped their final copper products (meant only for export), manufactured out of the copper concentrate imported without payment of duty on Advance License Scheme, into the local market. While doing so, they utilised the Cenvat credit that had accumulated as excess, for payment of duty on those domestic clearances and thus encashed the duty amount charged to their buyers using excess Cenvat accumulations and conveniently avoiding PLA payments. In this process, there are two serious offences involved.

1. What was legally bound for export was wilfully cleared into the DTA as if the same had been made out of the duty paid inputs. This is a serious violation of the Advance License Scheme.

2. The accumulated Cenvat credits, which would have otherwise lied idle and gone unutilised, were illegally encashed by conveniently avoiding PLA payments."

12. Learned Central Government Standing Counsel submitted that the Superintendent of Central Excise has issued summons as a Customs Officer. Learned counsel submitted that the learned single Judge rightly had accepted the contention that under Notification No. 31/97-Cus. (N.T.), dated 7-7-1997, the Superintendent of Central Excise working in any place in India were appointed as Officers of Customs and as such notification was not superseded by another subsequent notification, the sixth respondent was an authorised officer competent to issue show cause notice. Such finding had not been challenged. The notice of the Assistant Commissioner of Central Excise, Tuticorin, dated 8-6-2010 referred to a matter exclusively of the concern of the Central Excise Department.

13. Mr. B. Vijay Karthikeyan, learned counsel for Customs, referred to amendment to Section 28 of the Customs Act. Section 28 of the Customs Act, as amended, reads as follows :

"2. In section 28 of the Customs Act, 1962, after sub-section (10), the following sub-section shall be inserted, namely :-

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

14. Learned counsel submitted that such amendment came about pursuant to judgment of the Apex Court in Commissioner of Customs v. Sayed Ali and Another, Civil Appeal Nos. 4294 and 4295 of 2002 [2011 (265) E.L.T. 17 (S.C.)]. Therein, the Apex Court had held that only a Customs Officer who had been specifically assigned the duties of assessment and re-assessment in the jurisdiction area would be a "proper officer" competent to issue a notice for demand of duty. Several were the cases where show cause notices had been issued by Customs Officers who had not specifically been assigned the function of assessment and reassessment of customs duty. As the invalidity thereof would result in huge loss of revenue to the exchequer, Government issued notification on 6-7-2011 specifically declaring certain officers as "proper officers" for the said purpose. Following up thereon, the amendment referred to had been brought about.

15. It is the contention of learned counsel that in the light of the said amendment the cause of action for W.P. (MD) No. 9744 of 2010 seeking a direction to the first respondent to appoint "proper officers" of customs to investigate and examine issues, does not survive. Meeting the contention of the show cause notice issued by the Commissioner of Customs, Tuticorin, being the handiwork of another, learned counsel submitted that the draft show cause notice did not bear a date or signature. The Customs authorities may choose to ignore

the same. It is only where action is taken under Section 28 of the Customs Act, 1962, that such action must be that of the Proper Officer. The impugned show cause notice had been issued under due authority. Relevant considerations of manufacture, export, import, etc. had been gone into and quantification had been done. From the fact that the show cause notice informs that "a position appeared to emerge" it could be seen that the Commissioner of Customs, Tuticorin, in issuing the show cause notice had not done so in a pre-determined manner. Learned counsel contends that the decision in *Siemens Limited v. State of Maharashtra* [2006 (12) SCC 33] did not apply. Learned counsel relied on the decision in *Mahadayaal Premchandra v. Commercial Tax Officer, Calcutta and Another* [1959 SCR 551] to submit that a show cause notice cannot be read as an assessment order. In response to communication of the Commissioner of Customs, Tuticorin, in C. No. VIII/48/55/2014-SIIB, dated 9-1-2015, the Commissioner of Central Excise, Tirunelveli, had offered clarifications under reply dated 12-1-2015 and it was only thereafter that the show cause notice had been issued. In the decision in *Sunil Gupta v. Union of India* [2015 (315) E.L.T. 167 (Bom.)], the High Court of Bombay, had held thus :

"23. We have found that Section 28(11) was inserted by Act 14 of 2011 w.e.f. 16th September, 2011. That alters the basis of the judgments, which have been delivered by any Court of law, Tribunal or other authority. Once this section says that all persons appointed as officers of Customs under Section 4(1) before 6th July, 2011 shall be deemed to have been and always to be the proper officers for the purpose of this section, then, the Notifications, which are referred by us above at page 369 and 373 of the paper book are specifically saved and validated. They have been given a retrospective effect. These Notifications were holding the field and were not quashed or set aside. In the teeth of such Notifications, the legislature stepped in to clarify the position that if the functions of the Customs Act, 1962, then, all such Notifications, have been validly issued and enforced. They enable the Parliament to clarify that the officers mentioned therein shall be deemed to be the proper officers for the purposes of Section 17 and 28 of the Act. Precisely, that has been done in the instant case.

24. If that has been done, then, no assistance can be derived from the judgment of the Hon'ble Supreme Court in the case of *Sayed Ali* (supra). There, for want of jurisdiction or competence in the Collector of Customs (Preventive), the show cause notice was quashed by the Tribunal and that order was upheld by the Supreme Court. Before us, the issue is not whether any Collector of Customs (Preventive) could be said to be on par with the officers mentioned in the earlier Notification dated 26th April, 1990. The assignment of functions to these officers, who were earlier carrying on preventive work came w.e.f. 6th July, 2011. That Notification was not, at the relevant time, given retrospective effect. It is in such circumstances that the Hon'ble Supreme Court held that in terms of the Notifications, which were issued and holding the field, not designating the Collector of Customs (Preventive) as a proper officer for the purpose of Section 28 as it then stood, he was not competent to issue show cause notice (see para

24 of Sayed Ali's judgement). This position has now undergone a change and from 6th July, 2011, admittedly, they have been assigned these functions and of the Custom officers. They are therefore competent and the Notification in that behalf at page 373 of the paper book has been given a retrospective effect. It is not the argument of Mr. Singh that the law cannot be amended retrospectively. It is also not his argument that the validating Act does not validate anything which may be or is invalid. In the circumstances and the Parliament being competent to make such a law, we find no force in the arguments canvassed before us. Once the above view is taken, then, no reference is required to be made to the other judgments cited by both Mr. Singh and Mr. Jetly."

Learned Special Government Pleader submitted that there was no legal bar to the Customs Department issuing a show cause notice in respect of violation committed under the Customs Act and on the basis of the investigation conducted by officials of Central Excise. In the course of a different exercise, the excise authorities have stumbled upon violations committed under Customs Act and brought the same to the notice of the Customs Authorities. Though an order of status quo passed by this Court had been extended only upto 28-9-2011 both Customs and Central Excise Departments had moved petitions to vacate stay and taken steps to have the same listed by letters dated 17-9-2011 and 7-9-2014 addressed to the Registrar and cited that huge Government revenue is at stake. The same was done only by way of abundant caution and informing the position in the preamble show cause notice could not be complained against. The excise authorities having access to the manufacturing units of the company, had, on the basis of verification of records maintained therein as also the submissions of the Companies, employees, had learnt that goods manufactured duty free and which were bound for export, wilfully were cleared into the local market as if the same had suffered duty on import. Such major violation having taken place out of duty free imports under advance licence availed of through Customs Department at the Tuticorin Court, a draft show cause notice had been prepared and forwarded to the authority, who had issued the show cause notice. As per the Notification No. 31/97-Cus. (N.T.), dated 7-7-1997 all Central Excise Officers are Customs Officers and hence, it is wrong to contend that the Central Excise Officers have no jurisdiction to investigate customs violations and issue show cause notice. This Court has also upheld such position in W.P. Nos. 9744 and 9745 of 2010. Since the show cause has been issued only after conduct of an enquiry by Central Excise authorities, there is no need for independent investigation or calling for any information or records from the company as the same amounts to repetition of enquiry process. Further, the enquiry having been conducted on physical stock taking of duty free goods as on 31-5-2010, it is not possible to recreate the situation which prevailed on 31-5-2010 in the subsequent enquiry. There is no settled law which bars issue of show cause notice on the basis of enquiry or investigation conducted by the Central Excise authorities. In the writ appeal, the company itself has contended that issues on customs violations are within the exclusive domain of Commissioner of Customs (Port), Tuticorin and

hence, the company should not have any grievance when the show cause notice has been issued by the customs authorities with a rider that it will not be acted upon till directions are obtained from the High Court. The communication of the Commissioner of Customs, Tuticorin, dated 14-8-2014, was not issued suo motu but was only a reply to the letter of the Additional Director General of Foreign Trade, Mumbai and since no orders have been passed on the basis of such communication, the company should not have any grievance. It is well settled law that a show cause notice cannot be challenged unless the same was issued without any jurisdiction. On a perusal of the writ petition and writ appeal, it is clear that as on the date of issuance of show cause notice, there was no stay against doing so. As the order of status quo passed in W.A. Nos. 704 & 705 of 2011 was in force only till 28-9-2011, there was no bar restraining the Commissioner of Customs from issuing show cause notice on misuse of advance license scheme. The writ petition filed challenging the show cause notice should not be entertained since the show cause notice issued in this case does not give rise to any cause of action. It is erroneous to contend that the issue dealt in the communication dated 8-6-2010 and 9-6-2010 were one and the same. In communication dated 8-6-2010, the issue regarding avilment of Cenvat credit in violation of Cenvat Credit Rules has been covered whereas in communication dated 9-6-2010, besides the issue of avilment of Cenvat credit, it also dealt with misuse of advance license scheme in procurement of duty free copper concentrate. While disposing of W.P. No. 8135 of 2010, this Court clearly has held that there shall be stay of the communication dated 9-6-2010 insofar as it relates to non-compliance of Cenvat Credit Rules only. No stay was granted regarding misuse of advance license scheme.

16. This Court has considered the rival submissions and perused the materials on record.

17. We straightaway would observe that the distinction between a "proper officer" and "customs officer" has been missed in the order of learned Single Judge. Even so, we do not find reason to interfere. The entire matter is to be considered in the light of amendment to Section 28 of the Customs Act, 1962 and introduction of sub-section (11) thereto. Superintendents of Central Excise working in any place in India were appointed as officers of Customs under Notification No. 31/97-Cus. (N.T.), dated 7-7-1997. Once sub-section (11) of Section 28 of the Customs Act, 1962, informs us that officers of Customs would be deemed to have always had the power of assessment u/s. 17 of the Customs Act, 1962 and shall be deemed to have been and always had been the proper officers for the purposes of "this section" viz., Section 28 which confers powers to issue show cause notice regarding duty not levied or short levied or erroneously refunded or regarding interest payable, part paid or erroneously refunded, the prayer in W.P. No. 9774 of 2010 seeking issue of writ of mandamus directing the first respondent to appoint proper officer and to investigate, falls to the ground. Consequently, W.A. (MD) No. 705 of 2011 is to be dismissed.

18. As has been rightly pointed out, we do not find any impediment to the Customs Authorities issuing show cause notice on the basis of materials gathered/ input received from Excise Authorities. In fact, Customs Notification No. 31/97-Cus. (N.T.), dated 7-7-1997 and the amendment of Section 28 of Customs Act, 1962 by introduction of sub-section (11) is only indicative of the legislative intent that various wings of Revenue act closely and cohesively towards avoiding loss thereof. Central Excise Officers deemed to be Customs Officers had gathered material which forms the basis of the show cause notice. Such Excise officials/ Customs officers are deemed to be proper officers for the purposes of Sections 17 and 28 of the Customs Act, 1962. Thus, when viewed through the prism of Section 28(11) of the Customs Act, 1962, it can be seen that what petitioners are complaining about is what really is in the nature of intra-departmental communications, a course not open to them. As rightly pointed out by Mr. B. Vijay Karthikeyan, learned counsel for Customs, the communications of the Customs (Tirunelveli) dated 14-8-2014, of which much was sought to be made of by learned senior counsel, was not issued suo motu but was only a reply to the letter of Additional Director General of Foreign Trade, Mumbai. Queries had been raised by the Commissioner of Customs, Tuticorin, in his communication dated 9-1-2015. Upon having had clarification from the Commissioner of Central Excise, Tirunelveli, under his reply dated 12-1-2015, the show cause notice had been issued. There is nothing to indicate that the Commissioner of Customs (Tuticorin) had not been satisfied with the clarification offered. Again, as rightly pointed out, the show cause notice informing that "a position deemed to emerge" was indicative that the same had not been issued in a predetermined manner. We have perused the order in W.P. (MD) No. 8135 of 2010 and found that learned counsel for Customs is right in informing that there was no impediment to the issue of show cause notice regarding misuse of the advance license scheme and the pendency of the writ appeal would not stand in the way. In the light of Section 28(11) of the Customs Act, 1962, a discussion on whether Central Excise Officers are empowered to investigate customs violations becomes unnecessary. The decision of the Apex Court in *Grindlays Bank Ltd. v. Income-tax Officer, Calcutta and Others* [(1980) 122 ITR 55 (SC)], carves out an exception to the general rule that a show cause notice cannot be challenged by way of writ proceedings. We have herein above informed why we do not consider the show cause notice premeditated. It is for the company to respond to the show cause notice and satisfy the authority concerned that the allegations against them are unfounded. The contention of the company having met its export obligations with the consequence that it was free to dispose of imported materials is also to be raised only before the authority concerned.

We find no merit either in the W.P. (MD) No. 626 of 2015 or W.A. (MD) No. 705 of 2011. Accordingly, both the writ petition and writ appeal are dismissed. No costs. The company shall now respond to the show cause notice dated 13-1-2015 within a period of two weeks from the date of receipt of this order. Commissioner of Customs, Tuticorin, is directed to conduct proceedings as expeditiously as

possible. Consequently, connected miscellaneous petitions are closed.