IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No. 42629 of 2014

(Arising out of Order in Appeal No. 88/2014 TTN (CUS) dated 21.8.2014 passed by the Commissioner of Customs and Central Excise (Appeals), Trichy)

Shanti Rayons India Pvt. Ltd. **Appellant**
14, Nagaier Street, Shevapet
Salem – 636 002.

Vs.

Commissioner of Customs **Respondent**
Custom House, New Harbour Estate
Tuticorin – 628 004.

APPEARANCE:

Shri J. Shankarraman, Advocate for the Appellant
Shri Sanjay Kakkar, Authorized Representative for the Respondent

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Hon'ble Shri M. Ajit Kumar, Member (Technical)

FINAL ORDER NO.40590/2025

Date of Hearing: 01.05.2025
Date of Decision: 06.06.2025

This appeal is filed by M/s. Shanti Rayons India Pvt. Ltd. is against Order in Appeal No. 88/2014-TTN (CUS) dated 21.8.2014 passed by the Commissioner of Customs and Central Excise (Appeals), Trichy.

2. Brief facts of the case are that the appellant had imported 18292.2 kgs of "100% Rayon Filament Yarn Bright Raw White on cake 120D/30 Finance Act, 1994 Grade' vide Bill of Entry No. 473227 dated 16.11.2009. They had previously imported another consignment of "Viscose Rayon Filament Yarn" vide Bill of Entry No. 473068 dated 12.11.2009. In both this case, the goods imported were declared

classifying under CTH 5403 3100 of the Customs Tariff Act, 1975. The impugned goods had been imported from M/s. Hitansh Global Viscose P. Ltd. Singapore. In the aforementioned bills of entry, the appellant had claimed exemption from payment of Anti Dumping Duty (herein after '**ADD**'), @ USD 4.77 per kg as stipulated under S. No. 7 of Notification No. 81/2009-Cus dated 13.7.2009 for the said imported goods. Directorate of Revenue Intelligence, Tuticorin (herein after '**DRI**'), allegedly received information that 'the importer' was evading ADD, by declaring a rate less than the bench mark rate of 5.20 USD/Kg fixed for such imports under Sl. No.25 of the notification 81/2009 Cus dated 13.07.2009. Investigation allegedly revealed that the producer-manufacturer of the said imported goods were from China and the exporter-supplier was from Singapore and hence it appeared that the appellant is not eligible for ADD at USD 4.77 per kg and they are liable to pay ADD at USD 5.20 per kg. The Ld. Original Authority rejected the ADD at USD 4.77 per kg and redetermined the ADD at USD 5.20 per kg and demanded differential ADD of Rs.7,17,199/- with interest and imposed penalty under sec. 114A of the Customs Act, 1962. On appeal, the Commissioner (Appeals) vide Order in Appeal No. 04/2013-TTN (CUS) dated 28.1.2013 remanded the matter with a direction to grant adequate personal hearing to the appellant. Accordingly, the adjudicating authority, after following due process of law, has vide Order in Original No. 30/2013 dated 30.9.2013 rejected the ADD payable declared by the importer and redetermined the same. The adjudicating authority has also imposed redemption fine of Rs.50,000/- on the appellant in lieu of confiscation under the provisions of sec. 125 of the Customs Act, 1962. The appellant preferred an appeal before

the Ld. Commissioner (Appeals) who vide the order impugned herein, rejected the appeal. Hence the present appeal before this Tribunal.

3. The learned Advocate Shri J. Shankarraman appeared for the appellant and Ld. Authorized Representative Shri Sanjay Kakkar appeared for the respondent.

3. The Ld. Advocate for the appellant submitted that;

a) The submissions made by the appellant was recorded at para 2 of the impugned order, however none of the issues were addressed by the First Appellate Authority.

b) The demand pertains to the pre-self-assessment regime and assessment was the duty of the proper officer. Any mistake on his part in assessing the goods to duty at sl no 7 of the notification instead of sl no 25 could not be fastened on them.

c) The Lower Appellate Authority who rejected their appeal and upheld the de-novo Order in Original dated 30.09.2013, failed to realise that the appellant cannot be worse off by filing an appeal and that they had in fact paid the entire amount of differential duty prior to issuance of the show cause notice and therefore the question of imposition of any penalty under section 114A more particularly when the show cause notice did not invoke the larger period of limitation under section 28(1) of the Customs Act, 1962 or redemption fine and was also time barred.

d) When the goods had already been cleared the same could not be held liable to confiscation.

e) The show cause notice in the instant case was issued by the DRI in terms of Section 28(1) of the Customs Act, 1962 and as per the Judgment of Hon'ble Supreme Court in the case of **M/s. Canon India**

Private Limited in Civil Appeal No. 1827 of 2018 dated 09.03.2021, the officers of the DRI are incompetent to exercise the powers under section 28 of the Customs Act, 1962.

4. The Ld. Authorized Representative for the respondent submitted that the Hon'ble Supreme Court in **COMMISSIONER OF CUSTOMS Vs M/S CANON INDIA PVT. LTD.,** [REVIEW PETITION NO. 400 OF 2021 IN CIVIL APPEAL NO. 1827 OF 2018, Dated: 07.11. 2024 / 2024 (11) TMI 391 - SUPREME COURT (LB)], has decided the controversy regarding the jurisdiction of DRI to issue SCN's under Section 28 in favour of DRI. Further ever under the pre-self-assessment regime the importer was expected to give a true declaration of facts in the Bill of Entry and hence the charge of suppression of facts will sustain. Non mention or an error in mentioning the correct section in the SCN cannot lead to the charges being dropped. He further reiterated the points given in the impugned order and prayed that the appeal may be rejected.

5. Having heard the rival contentions, perusing the record and after going through the relevant case law relied upon by the parties, the issues raised by the rival parties are examined below.

5.1 I take up the issue regarding jurisdiction of the DRI to issue SCN first, since a SCN issued without proper jurisdiction would be a nullity and the issue on merits would not survive. I find that the Hon'ble Supreme Court in its judgment on the **review petition** in the case of **COMMISSIONER OF CUSTOMS Vs M/S CANON INDIA PVT. LTD.** (supra), held that the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and

other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Hence the plea raised by the appellant stating that the officers of the DRI are incompetent to exercise the powers under section 28 of the Customs Act, 1962, fails.

6. One of the points raised by the appellant was that though their submissions were recorded at para 2 of the impugned order, however none of the issues were addressed by the First Appellate Authority. Para 2 of the impugned order is reproduced below, for easy reference;

> *"The appellants have submitted that the show cause notice was issued on 18.07.2011 in respect of the Bills of Entry No.473227 dated 16.11.2009 and 473068 dated 12.11.2009 and it was hit by the bar of limitation, as the same was not issued within six months from the date of filing of the Bill of Entry or the date of payment of duty; that the show cause notice did not invoke the larger period of limitation under proviso to Section 28(1) of the Customs Act, 1962 nor alleged any suppression or mis-representation of the facts; that for wrong availment of benefit of Notfn. No.81/2009-Cus dated 13.07.2009 at Sl.No.7, the appellant's goods were assessed to duty under Sl.No.25 of the Notification ibid; that the "Assessment" under the Customs Act, 1962 is governed by Section 17 of the Act ibid and in terms of the said section, prior to its amendment by Notification of the Finance Act, 2011 the Proper Officer is responsible, who had assessed the said impugned Bills of Entry, had extended the benefit of the Notification No. 81/2009-Cus dated 13.07.2009 at Sl.No.7; that when the goods are not available for confiscation, the goods can neither be confiscated nor can the goods be held liable to confiscation; that if the benefit of the Notfn. was inadvertently extended to the appellants by the proper officer of Customs, the same would amount to a mistake on the part of the proper officer of Customs in assessing the Bill of Entry and for such mistake in assessment by the proper officer, no differential duty was demandable from the appellants; that in the present issue the show cause notice was issued on 18.07.2011 demanding the differential ADD under Section 28(1) without invoking the proviso for the larger period of limitation, is not correct, thereby traversing beyond the scope of the show cause notice and on this score alone, the impugned order deserves to be set aside in its entirety, with consequential relief to the appellants."*

The said issues have been listed at para 3 and are taken up for consideration below. In this I am guided by the judgment of the Hon'ble Supreme Court in **Bachhaj Nahar Vs Nilima Mandal & Ors** [AIR

2009 SUPREME COURT 1103 / 2008 (15) SCALE 158], relevant portion of which is reproduced below;

> "8. . .
>
> (i) No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.
>
> (ii) A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.
>
> (iii) A factual issue cannot be raised or considered for the first time in a second appeal."

7. Firstly, I find that the appellant has accepted and not challenged the conclusion in the impugned order that the rate of ADD is correctly payable under Sl. No.25 of the notification 81/2009 Cus dated 13.07.2009. They are however of the view that the demand pertains to the pre-self-assessment regime and assessment was the duty of the proper officer. Any mistake on his part in assessing the goods to duty at Sl. No. 7 of the notification instead of Sl. No. 25 could not be fastened on them.

7.1 I find that the appellant (CEO of the company), in his statement has admitted that the impugned goods were manufactured by M/s Yibin Hiest Fibre Ltd, China and exported to them by M/s Hitansh Global Viscose (P) Ltd, Singapore. That they had purchased 2 containers from Hitansh Global Viscose Private Limited, Singapore under Bill of Entry No.473227 dated 16.11.2009 & 473068 dated 12.11.2009 since the party had extended credit facility. That in respect of the said two consignments M/s Hitansh Global Viscose Private Limited, Singapore had arranged the delivery of goods from Yibin Hiest Fibre Limited Corporation, China. Hence the producer of the goods was not the

exporter of the goods to the appellant, and the goods were hence not covered by Sl. No. 7 of notification 81/2009 Cus dated 13.07.2009.

7.2 This being so the position whether in the 'pre' or 'post' self-assessment regime is the same. Suppression may manifest itself in misrepresentation and if done, the proper officer will be in no position to correctly assess the goods. An importer declaring a lower ADD rate in the Bill of Entry without stating the correct producer / exporter of the goods, which is essential for determining the rate of ADD as per the notification would amount to suppression. The Hon'ble Gujarat High Court in **Trafigura India Private Limited vs Union Of India** [2023-TIOL-737-HC-AHM-CUS], held as under;

> "17. The extended period of five years under sub- section (4) of Section 28 could indeed be invoked by the authorities since the petitioners were found guilty of suppression of facts regarding RVC [Regional or Domestic Value Content] content in the Origin Certificate. The suppression is not always concealment of facts. The suppression can take form of suggesting wrong facts and to obtain some advantage, which may not be available upon the disclosure of correct and genuine facts. Suppression may manifest itself in misrepresentation also. In the present case, the misrepresentation became suppression, as the exemption benefit or preferential duty benefit was obtained by putting forth wrong facts, which did not constitute eligibility to earn the exemption from the Basic Customs Duty. By suggesting wrong details and by subscribing untruth, essential conditions regarding RVC was not fulfilled. It partook suppression in eye of law and within the meaning of sub-section (4) of Section 28."
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> (Emphasis supplied)

Hence, I find that it was due to an admitted suppression of facts by the appellant, that the proper officer arrived at a wrong assessment and hence this plea of the appellant is rejected. The judgment of the Hon'ble High Court of Punjab and Haryana cited by the appellant in **Commissioner of Customs, Amritsar Vs Jyoti Industries** [2007 (209) ELT 180 (P&H), relates to an issue where it concurred with the Tribunal's, conclusion that in the case where there is a mistake on the

part of Customs Officer in proper assessment of the goods, the respondents cannot be held liable for any suppression of facts as they have neither colluded or suppressed the facts. The issue is hence distinguished on facts.

8. The appellant has further stated that the Lower Appellate Authority who rejected their appeal and upheld the de-novo Order in Original dated 30.09.2013, failed to realise that the appellant cannot be worse off by filing an appeal.

8.1 I find that no penal action was taken against the appellant/ goods by the Ld. Commissioner (Appeals), in appeal proceedings. He only asked the Original Authority to examine the issue afresh in de novo proceedings since violation of natural justice was pleaded and upheld. Hence the appellant was not worse off at the appellate stage.

8.2 Further 'de novo' is a Latin term that means "anew," "from the beginning," or "afresh." When an Authority hears and decides a case "de novo," it is deciding the issues without reference to any legal conclusion or assumption made by the previous court to hear the case. The Apex Court while examining the scheme of de novo trial in the case of **AJAY KUMAR GHOSHAL ETC. VS STATE OF BIHAR** [AIR 2017 SC 804, 2017 (12) SCC 699], held:

> 12. 'De novo' trial means a "new trial" ordered by an appellate court in exceptional cases when the original trial failed to make a determination in a manner dictated by law. **The trial is conducted afresh by the court as if there had not been a trial in first instance.** Undoubtedly, the appellate court has power to direct the lower court to hold 'de novo' trial.
>
> (emphasis added)

A similar position obtains in quasi-judicial proceedings of denovo adjudication also. This being so there does not appear to be any legal

infirmity in the action of the Original Authority in imposing a redemption fine during de novo proceedings.

9. The appellant has further stated that the show cause notice did not invoke the larger period of limitation, as section 28(1) of the Customs Act, 1962 only was mentioned in the SCN and the demand was hence time barred.

9.1 I find that the quoting of 'section 28(1)' instead of 'proviso to section 28(1)', is an inadvertent error in the Show Cause Notice. A reading of the SCN as a whole clearly brings out the mens rea involved in attempting to evade duty. The statement of Shri B. Kirthi Kumar, CEO of Shanti Rayons India (P) Ltd on 27.11.2009, indicates that the appellant was aware that anti-dumping duty, at a higher rate was applicable for the goods produced by M/s Yibin Hiest Fibre Limited Corporation, China, and exported to them by a Singapore firm. Section 58 of the **Indian Evidence Act, 1872** as it stood at the relevant time, states that a fact does not need to be proved in any proceeding if the parties or their agents admit it, or if it is admitted by writing under their hands before the hearing, or if it is deemed to have been admitted by their pleadings under any rule of pleading in force at the time. The principle behind this section is that a court only decides disputed facts, so facts that are not in dispute need not be proved.

9.2 The appellant has not pleaded that the statement was retracted. Even in the case of retraction, it is for the person who claims retraction to prove that the statement was made under force, duress, coercion etc. [See K.P Abudul Majeed Vs. Commissioner of Customs [2014 (309) ELT 671 (Ker)]; Surjeet Singh Chhabra Vs. UOI [1997 (89) ELT 646 (SC)]; K.I. Pavuny Vs. Assistant Collector (HQ), Cochin [(1997) 3 SCC

721] Further as observed by the Hon'ble Apex Court in **Avadh Kishore Das Vs Ram Gopal and Ors.** [AIR (1979) SC 861], Section 31 of the Indian Evidence Act, 1872 establishes that evidentiary admissions, while not conclusive proof, create an estoppel and shift the burden of proof. Unless shown incorrect, they serve as effective proof of the facts admitted.

9.3 As regards suppression, the Hon'ble Gujarat High Court in **Trafigura India** (supra), held that suppression can take the form of suggesting wrong facts to obtain some advantage, which may not be available upon the disclosure of correct and genuine facts. Hence suppression may manifest itself in misrepresentation also.

9.4 Further the mere mentioning of a wrong provision of law would not vitiate the show cause notice as the assessing officer was otherwise competent to issue the same. This principle has been laid down by the Hon'ble Supreme Court in the case of **JK Steel Vs Union of India** [1978 (2) E.L.T. (J355)], and also in the case of **Sanjana Vs Elphinestone Spinning & Weaving Mills** [1978 (2) E.L.T. (J399)]. The appellant being aware of the statement by the CEO of the company given during an investigation carried out by DRI, knew that the ground of suppression was involved and that the goods had also been seized and released on a bond. They also paid the differential anti-dumping duty involved before the issue of SCN and have not challenged the conclusion in the impugned order that the rate of ADD is correctly payable under Sl. No.25 of the notification 81/2009 Cus dated 13.07.2009. Section 114A invoked in the SCN also pertains to a case of willful mis-statement or suppression of facts etc. and supports the view that the non-citing of 'proviso to' before 'section 28(1)', was an

inadvertent error. Hence no prejudice was caused to the appellant and the mere fact that the sub section was not expressly mentioned in the SCN would not vitiate the notice.

10. The appellant has stated that when the goods had already been cleared the same could not be held liable to confiscation.

10.1 I find that this is a case where the goods were released to the appellant on the execution of a bond. I find that the Hon'ble Apex Court in **M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi** [2000 (115) ELT 278 (SC)], took the view that redemption fine can be imposed even in the absence of the goods as the goods were released to the appellant on an application made by it and on the appellant executing a bond. Since the goods were released on a bond the position is as if the goods were available. Hence there is no legal infirmity in the confiscation and redemption fine imposed by the Original Authority.

11. Before parting with the matter, I would like to state, with some anguish, that the Appeal Memorandum contained language which shows a lack of respect / disrespect, for the First Appellate Authority and also contained unsolicited advice to the Tribunal on the mode of disposal of the dispute. While an erroneous statement may inadvertently creep into a pleading, it cannot happen repeatedly. The expression of disrespect or advice has no place in an appeal memorandum or pleading. Some portions of the Appeal Memorandum are reproduced below as an illustration;

> "The appellants **with a great sense of responsibility** submit that it appears that the Lower Appellate Authority **does not have even the rudimentary knowledge of Customs Law and the adjudication process and it is because of such lack of knowledge** that Lower Appellate Authority has passed the order under challenge and **on this**

> score alone the order under challenge deserves to be set aside in its entirety, with consequential relief to the appellants."
> "The appellants therefore submit that the order of the Lower Appellate Authority is perverse and unbecoming of the Appellate Authority and on this score also the order under challenge deserves to be set aside in its entirety with consequential relief to the appellants."
> "The appellants submit that placing reliance on the said order of the Tribunal is a perverse understanding of the ratio of the said order. The appellants submit that the Lower Appellate Authority does not appear to have passed the impugned order as an Appellate Authority but as an ignoramus to the provisions of law and such an order cannot be permitted to be sustained by this Hon'ble Tribunal."
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> (emphasis added)

What is even more disturbing is that the averments are contained in an appeal filed by the appellant under legal advice and statedly with a 'great sense of responsibility'. Responsibility in such matters to my mind should involve propriety and greater restraint. While the appellants averments appear to suggest their own infallibility, I find that Justice Robert H Jackson of the United States Supreme Court, in **Brown Vs Allen** [344 U.S. 443 (1953)] has acknowledged the fallibility of even the Supreme Court while stating, "We are not final because we are infallible, but we are infallible only because we are final." The appellant may do well to ruminate on the Latin phrase *Nemo judex in causa sua* (or Nemo judex in sua causa) which literally means, "no-one is a judge in his own cause".

11.1 The Hon'ble Punjab and Haryana High Court in **COURT ON ITS OWN MOTION Vs AJIT SINGH AND OTHERS** [Criminal Original Contempt Petition No. 15 of 1984, Dated: 12.08.1985] had examined an issue wherein allegations about the integrity, of a Judge in a transfer application was made by the litigant. The Court held;

> 21. A lawyer cannot disclaim any liability if it ensues from the pleadings or the application which he himself has drafted for his client or was a privy to their drafting or had presented these in case these

had been brought to him in a drafted condition. . . . A lawyer guided by the principles of legal ethics, education, training in law and professional experience is expected to know what a transfer application has to contain. . . . Before a lawyer drafts a transfer application, he is to address himself a few questions like; Should he sign the transfer application at all? Are there scandalous allegations which are contumacious? Why should he associate himself with them? Why not advise the party to omit such allegations and confine himself to facts which bear proof? If it is a case of his own prestige and duty, is that clear in law and in fact ? Is it a borderline case where no opinions may be possible? Is it not better to avoid even such situations unless professional duty is imperative? Is he serving the interests of the administration of justice by his act or is it merely to satisfy his own ego, bias or personal satisfaction? Is the public benefited by his stand? Unless a lawyer gets a clear answer from his conscience satisfying these questions, which are illustrative and not exhaustive, he should not proceed further in pursuit of those allegations which either he or his client intends to make against a Judge. The ingenious mind of a lawyer ponder over more possibilities of this type in a broad sphere to come to the conclusion whether he should take up or proceed with such a case, in which he is asked to appear by his client. Unhappiness of a lawyer with a Judge or lack of cordiality in relations between him and a judicial officer should not be permitted to have an upper hand to influence the mind of a legal attorney in such cases. The Advocates are the officers of the Court. It is one of their functions to maintain the dignity of the court and law, of which they are an integral part. A lawyer has to maintain a respectful attitude towards the court, not for the sake of temporary in cumbent of the judicial office, but for the maintenance of its freedom. He not only himself is to maintain a courteous and respectful attitude towards the Judge of the court, but has to insist for a similar conduct on the part of his client. Remuneration alone does not matter nor the cordiality of the relations with the Judge. It is no duty of a counsel to his client to take interest in the pleadings applications, etc, which contain scandalous allegations against a presiding officer of a court or having an effect of lowering his authority as a Judge without reasonably satisfying himself about the prima facie existence of adequate grounds therefor; on the contrary, his duty is to advise his client from refraining from making allegations of such nature in pleadings or applications.

*****. *****. *****

25. . . . . The litigant and the lawyer are to take care not to over-step the limits of courtesy, propriety and decency. They cannot malign or ridicule the judicial officers in their judicial capacity. . .”

(emphasis added)

I think the issues flagged by the Hon’ble Court are relevant for pleadings made before quasi-judicial authorities as well and fervently

hope that better sense would prevail in future, guided by the observations made in the above-mentioned judgment. An appellant can reasonably expect an appeal to be disposed of in his favour on the strength of the weighty legal arguments taken in the pleadings and not by the 'weight' of the disrespect shown to the authorities deciding the dispute.

12. As per the discussion on the grounds raised by the appellant and discussed above, I find that the lower authority has taken a view which is reasonable, legal and proper and I hence uphold the impugned order and reject the appeal. The appeal is disposed of accordingly.

(Pronounced in open court on 06.06.2025)

(**M. AJIT KUMAR**)
Member (Technical)

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