2011-1527

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES,

Plaintiff-Appellee,

v.

TREK LEATHER, INC.,

Defendant,

and

HARISH SHADADPURI,

Defendant-Appellant.

Appeal from the United States Court of International Trade in case no. 09-CV-0041, Senior Judge Nicholas Tsoucalas.

REPLY BRIEF OF DEFENDANT-APPELLANT, HARISH SHANDADPURI ADDRESSING ISSUES RAISED IN REHEARING EN BANC

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Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES v. TREK LEATHER AND HARISH SHADADPURI

No. 2011-1527

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of HARISH SHADADPURI certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

HARISH SHADADPURI

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

HARISH SHADADPURI

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

NONE

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

JACK MLAWSKI, GALVIN & MLAWSKI

JUNE 27, 2014
Date

/s/JACK MLAWSKI
Signature of counsel

JACK MLAWSKI
Printed name of counsel

Please Note: All questions must be answered

cc:

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Summary

Plaintiff-Appellee's broad interpretation of the term "person" is contrary to the structure of 19USC1592(a)(1). The term as it appears preceding subparagraphs (A) and (B) refers to different persons depending upon the subparagraph. Therefore, the term has different meanings depending on the subparagraph and, contrary to the erroneous assertion, a person can not be subject to liability under subparagraph (A) regardless of whether a violator was an importer of record. Further, Plaintiff-Appellee's broad interpretation would have an absurd result rendering paragraph (B) superfluous.

Contrary to Plaintiff-Appellee's assertion, as the structure of Sections 1593a and 1592(a)(1) are similar, Section 1593a does not support the view that "person" should be interpreted broadly. If that was correct, then Congress unnecessarily included in subparagraph (A) the terms "to that person or others" in Section 1593a. That is, the terms "to that person or others" in subparagraph (A) can be omitted as the term "person" preceding the subparagraph, as in the case of 1592, must be read broadly and out of context and covers persons regardless of whether the person seeks, etc. payment or credit for themselves or others. That is contrary to Congressional intent.

Finally, Plaintiff-Appellee would not only create personal liability

for gross negligent acts of corporate officers and shareholders, but would create such unintended liability for any employee having a minimal or, non-existent stake in the corporation for non-intentional acts. Under Plaintiff-Appellee's erroneous interpretation any employee, agent, corporate officer or corporate shareholder would be potentially personally liable for non-intentional acts committed during the course of their employment.

I
Plaintiff-Appellee Erroneously Concludes that 19 U.S.C. § 1592(a)(1)(A) Imposes Liability on Any "Person" Without Regard to Whether the Person can "Enter, Introduce, or Attempt to Enter or Introduce" Merchandise into United States Commerce by Means of Fraud, Gross Negligence, or Negligence by the Means Described in § 1592(a)

Plaintiff-Appellee fails to consider that the term "person" in 19USC1592(a)(1) refers to different persons depending upon the subparagraph. The term "person" appears twice in 19USC1592(a)(1). The term when it initially appears preceding subparagraphs (A) and (B) refers to different persons depending upon the subparagraph which is illustrated below in the redacted citation to the section:

> 19 U.S.C. § 1592(a)(1)
> ....no **person**, ...-
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of -
>
> X X X
>
> (B) may aid or abet any other **person** to violate subparagraph (A).

The initial reference to "person" in the context of subparagraph (A), is a person who can enter, introduce, etc. merchandise but in the context of subparagraph (B) the initial reference to "person" applies to those that aid or abet the "person" subject to subparagraph (A). In short, the person subject to subparagraph (A) is a person who can enter merchandise, while the "person" initially appearing in the section when refering to subparagraph (B) is a person who can not, but aids or abets the person who can enter the merchandise subject to the violation.

Plaintiff-Appellant fails to distiguish the two subparagraphs and the meaning of the term "person" as applied to the two subparagraphs. Instead, it reviews the term "person" out of context and in a vacuum and posits that a "person" can be an individual, corporation or other entity without regard to the context of subparagraphs (A) and (B) when it concludes and summarizes its position in this appeal, Br. at 9:

> In sum, there is no doubt that Congress recognized that various parties could commit violations of section 1592 and intended that all violators be subject to 19 U.S.C. § 1592(a)(1)(**A**) for all levels of culpability, regardless of whether a violator was an importer of record.(Emphasis added)

Thus, it is erroneously asserted that any person can be liable under subparagraph (**A**) even those persons that can not enter the merchandise. In other words, a

person is subject to subparagraph (A) whether or not it is the importer of record capable of making entry. [1]

Plaintiff-Appellant's assertions violate the canon of statutory construction as it causes absurd results which must be avoided. *Pitsker v. Office of Personnel Management*, 234 F. 3d 1378 (Fed. Cir. 2000). If, as asserted, a person under subparagraph (A) is liable without regard to the ability to enter merchandise, than one who aids or abets is likewise liable under subparagraph (A). By Plaintiff-Appellant's reasoning, an aider or abetter regardless as to whether it is the importer of record is within the ambit of a "person" under subparagraph (A). Clearly, Congress in enacting subparagraph (B) did not place the same requirements on liabilty and distiguished the "person" in subparagraph (B) from that in the preceeding subparagraph (A). Yet, the erroneous assertion, interpretes "person" out of context, and conflates the two subparagraphs. That creates the absurd result of rendering subparagraph (B) superfluous.

II
Plaintiff-Appellee Erroneously Relies on 19 U.S.C. § 1593a to Support the Assertion that "Person" Shall Be Interpreted Broadly. The Provision Clearly Indicates the Opposite

Plaintiff-Appellee posits that 19 U.S.C. § 1593a supports its position that the

[1] Plaintiff -Appellant does not claim that Defendant-Appelant is an Importer of Record.

term "person" should be interpreted broadly. "Section 1593a is especially telling because it parallels section 1592 with respect to duty drawback claims." Br. at 10. "Sections 1592 and 1593a are simply different sides of the same coin. In both, violators are penalized and revenue may be recovered due to misrepresentations regarding the amount of duty owed on import transactions. Most 1592 cases involve misrepresentations to CBP about the amount of revenue owed before importation, and section 1593a involves misrepresentations to CBP about the amount of revenue owed after importation. Accordingly, as section 1593a envisions liability for a wide variety of individuals and entities stemming from drawback claims, section 1592 should possess the same scope when addressing underpayments to the Government." Br. at 12.

We agree with Plaintiff-Appellee that the two sections should possess the same scope and we submit that a review of 1593a establishes Congress' intent with respect to both provisions.

19 U.S.C. § 1593a(a)(1)(A) and (B) provide (Emphasis added):

> (a) Prohibition
> (1) General rule
> No person, by fraud, or negligence --
>
> **(A)** may seek, induce or affect, or attempt to seek, induce, or affect, the payment or credit <u>to that person or others</u> of any drawback claim by means of -- (i) any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or (ii) any omission which is material; or
>
> **(B)** may aid or abet any other person to violate subparagraph (A)

The clear meaning of subparagraph (A) above is to create liability covering those that falsely seek, etc. payment or credit to the violator ("that person") "or" to "others".

Plaintiff-Appellee asserts because the term person should be interpreted broadly with respect to subparagraph (A) of Section 1592, any person is liable regardless of the person's capability of making entry. If as additionally asserted by Plaintiff-Appellee this same reasoning is to be applied to Section 1593a, then Congress unnecessarily included the terms "to that person or others" in the statute. That is, the terms "to that person or others" in subparagraph (A) can be omitted as the term "person" preceding the subparagraph, as in the case of 1592, must be read broadly and out of context and covers persons regardless of whether the person seeks, etc. payment or credit for themselves or others. Consequently, under this erroneous interpretation the terms "to that person or others" are unnecessary as the term "person" preceding the subparagraph covers anyone regardless as to whether the payment or credit is claimed for such person or for others and runs afoul of statutory construction as "[i]t is elemental that Congress does not add unnecessary words to statutes." *US v. Plaza Health Laboratories, Inc.*, 3 F. 3d 643, 646 (Ct of App., 2nd Cir. 1993) Accordingly, the clear meaning of 1593a establishes that the term "person" can not be interpreted broadly as asserted by Plaintiff-Appellee

because that would be contrary to Congress' intent.

Plaintiff-Appellee's also attempts to compare 1592 and the False Claims Act, 31U.S.C.§3279. Br. at 12-14. That Act is not part of title 19, has a completely different structure from 1592 and uses different terms. Rather than using the terms gross negligence and negligence as in 1592, the False Claims Act uses the term "knowingly". If, as claimed, Congress intended in 1592 for the term "gross negligence" to have the same meaning as the term "knowingly" as used and specifically defined in the False Claims Act, it would have used the same terms. It did not. Plaintiff-Appellee is comparing apples and oranges and its reliance on the False Claims Act is misplaced.

III

Plaintiff-Appellee's Broad Interpretation Would Subject Anyone Who Innocently But Negligently Provides Inaccurate Information To Potential Liability

In response to the question whether corporate officers and shareholders qualify as "persons", Plaintiff-Appelant provides a resounding "Yes". Br. at 15. In support of its argument that "persons" subject to § 1592(a)(1)(A) liability are not confined to Importers of Record, the Government cites to the decisions in *United States v. Priority Products*, Inc. 615 F. Supp. 591 (Ct. Int'l. Trade 1985), aff'd., 793 F. 2d 296 (Fed. Cir. 1986) and *United States v. Matthews*, 533 F. Supp. 2d 1307 (Ct. Int'l. Trade 2007). Unlike the present case, in both *Matthews* and *Priority*

Products the corporate importer of record had committed fraudulent violations of § 1592(a). However, in holding that the corporate officers in both cases were jointly and severally liable thereunder, neither court engaged in any discussion of section 1592(a)(1)(B) aiding or abetting liability.

Similarly, the Government's reliance on *United States v. Appendagez, Inc*., 560 F. Supp. 50 (Ct. Int'l. Trade 1983) and *United States v. Golden Ship Trading*, 22 CIT 950 (1998), is equally misplaced. Indeed, in both cases there was neither citation to nor reference of § 1592(a)(1)(B) let alone any discussion of aiding and abetting liability thereunder.

What is not discussed is the "elephant in the room". While this action involves allegations of gross negligence, and the issue to be addressed concerns individuals such as shareholders and corporate officers that may have a considerable stake in the corporation, the statute provides for liability for mere negligent acts and, if Plaintiff-Appelant's assertions are correct, would apply to any employee that innocently, but negligently prepared, or supervised persons, who prepared inaccurate information amounting to more than clerical errors or mistakes of fact. Thus, a part time employee that innocently, but negligently prepared inaccurate information relating to entry or introduction of merchandise, the person directly supervising that person, the manager of that employee, and so up the chain of management, would under Plaintiff-Appelant's interpretation be

personally liable under 1592. We submit this would be grossly unfair to the employee. Congress did not intend that an employee having a minimal or, non-existent stake in the corporation be potentially liable to the Government for non-intentional acts. In short, under Plaintiff-Appelant's erroneous interpretation any employee, agent, corporate officer or corporate shareholder would be potentially personally liable for non-intentional acts committed during the course of their employment.

CONCLUSION

Since an employee acting in the course of his employment could not have violated 19 U.S.C. § 1592(a)(1) by negligent or grossly negligent aiding or abetting the corporate importer's gross negligence, and there being no determination that Mr. Shadadpuri was a mere alter ego of the corporate importer as the result of a formal veil piercing analysis, Mr. Shadadpuri can not be personally liable under §§ 1592(a) and (d) for his non-intentional acts during the course of his employment. The trial court's decision to the contrary was

reversible error and, accordingly, should be reversed.

Respectftilly submitted,

/s/ JackMlawski

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CERTIFICATE OF COMPLIANCE W1TH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule Appellate Procedure 32(a)(7)(B).

The brief contains 1959 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies wiih the typeface requirements of Federal Rule Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule Appellate Procedure 32(a)(6).

The brief has been prepared in a proportionaly spaced typeface using Microsoft Word in Times New Roman 14 point font size.

/s/ Jack Mlawski
JackMlawski
Counsel for Defendant-Appellant

July 1, 2014

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2014, the attached was filed electronically and served by operation on all parties by operation of the Court's electronic filing system.

/s/ Jack Mlawski