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-00041, Senior Judge Nicholas Tsoucalas

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

JOHN J. GALVIN
Galvin & Mlawski
245 Fifth Avenue
Suite 1902
New York, New York 10016
Tel.: (212) 679-1500
Attorneys for Defendant-Appellant,
Harish Shadadpuri

April 16, 2014

Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

UNITED STATES v. TREK LEATHER, INC. AND HARISH SHADADPURI

No. 2011-1527

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) APPELLANT 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:

- none -

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:

JOHN J. GALVIN GALVIN & MLAWSKI

08/22/2011
Date

Signature of counsel

JOHN J. GALVIN
Printed name of counsel

Please Note: All questions must be answered

cc: _____

Reset Fields

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Cases: **Page:**

TABLE OF AUTHORITIES (Cont'd.)

Page:

Statutes and Regulations:

In accordance with the Court's Order of March 5, 2014, vacating its July 30, 2013 decision, reinstating the instant appeal and granting the Petition of plaintiff-appellant, the United States, for Rehearing En Banc, defendant-appellant, Harish Shadadpuri, through his undersigned counsel, hereby submits its new brief in the instant appeal, addressing the following issues as instructed by the Court:

> (A) 19 U.S.C. § 1592(a) imposes liability on any "person" who "enter[s], introduce[s], or attempt[s] to enter or introduce" merchandise into United States commerce by means of fraud, gross negligence, or negligence by the means described in § 1592(a). What is the meaning of "person" within this statutory provision? How do other statutory provisions of Title 19 affect this inquiry?
>
> (B) If corporate officers or shareholders qualify as "persons" under § 1592(a), can they be held personally liable for duties and penalties imposed under § 1592©)(2) and (3) when, while acting within the course and scope of their employment on behalf of the corporation by which they are employed, they provide inaccurate information relating to the entry or introduction of merchandise into the United States by their corporation? If so, under what circumstances?
>
> (C) What is the scope of "gross negligence" and "negligence" in 19 U.S.C. § 1592(a) and what is the relevant duty? How do other statutory provisions in Title 19 affect this inquiry?

BACKGROUND AND SUMMARY

The importer of record of the entries at bar was Trek Leather, Inc. ("Trek"), with the requisite declarations thereon made by Trek's licensed customs brokers as attorney-in-fact. It was conceded that Trek was grossly negligent in failing to properly disclose the existence and/or value of material assists as part of the dutiable value of the apparel imported by Trek. The trial court held that the corporate

defendant "Trek and Mr Shadadpuri committed gross negligence, in violation of 19 U.S.C. § 1592(a) by importing men's suits into the United States by means of material false entry documents with wanton disregard for and indifference to their obligations under the statute." 781 F. Supp. 2d 1306, 1313 (emphasis added).

The fundamental issue presented on appeal is whether the Trade Court's decision to impose penalties under § 1592(c)(2) upon Mr. Shadadpuri while acting in his capacity as a corporate officer and shareholder of Trek for the grossly negligent violations of Trek was contrary to law.

Appellant submits that corporate shareholders and officers are only liable for Section 1592 penalties and lost duty: (1) where they have engaged in fraudulent conduct; (2) where they have aided or abetted the corporate importer's fraud; or, (3) where they have been found to be the mere alter ego of the corporation as the result of a formal veil-piercing analysis.

DISCUSSION

A.

1. The Meaning of "*Person*" within 19 U.S.C. § 1592(a)

Section 1592(a) of Chapter 4 to Title XIX of the United States Code [19 U.S.C. § 1592(a)] prohibits any person, by fraud, gross negligence, or negligence from entering, introducing or attempting to entry or introduce merchandise into the commerce of the United States by means of any material misstatement or omission, providing (emphasis added):

> (a) Prohibition
> (1) General rule
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no *person*, by fraud, gross negligence, or negligence—
>
> > (A) may *enter, introduce, or attempt to enter or introduce* any merchandise into the commerce of the United States by means of—
> >
> > > (I) any document or electronically transmitted data or information, written or oral statement, 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).

Section 1.40(16) of the Model Business Corporation Act of the Committee of Corporate Laws of the American Bar Association (2011), defines "*person*" to include "*an individual and an entity.*"[1]

The word "person" generally carries a broad connotation and, as used in § 1592(a), should be read broadly as encompassing individuals as well as corporate entities. Nevertheless, the term "person" cannot be divorced from the remainder of

---

[1] The term "*entity*" is defined in § 1.40(9) of the Model Act to include "a domestic and foreign business corporation; domestic and foreign nonprofit corporation; estate; trust; domestic and foreign unincorporated entity; and state, United States and foreign Government." As stated in the Official Comments thereto, the term '*entity*" in § 1.40(9) appears in the definition of "*person*" in § 1.40(16) and is included "to cover all types of artificial persons."

the language therein nor be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in context and "with a view to their place in the overall statutory scheme." Roberts v. Sea-Land Servs., ___ U.S. ___, 132 S. Ct. 1350, 1357 (2012), (quoting *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989); *United States v. Morton*, 467 U.S. 822, 828 (1984) ("[w]e do not, however, construe statutory phrases in isolation; we read statutes as a whole."). As observed by Chief Justice Marshall in U.S. v. Palmer, 16 U.S. 610, 631 (1818, emphasis ours), general words of unlimited extent such as "any person or persons" "must not only be limited to cases within the jurisdiction of the state, *but also to those objects to which the legislature intended to apply them.*"

2. How Other Statutory Provisions of Title 19 Affect the Meaning of "*Person*" within § 1592(a)

Turning to the structure of the Tariff Act, 19 U.S.C. § 1481 sets forth the requirements and timing for making entry of imported merchandise into the United States which must be met by *"one of the parties qualifying as importer of record under section 1484(2)(B).*" 19 U.S.C. § 1481(c).

19 U.S.C. § 1484(2)(B) defines "importer of record" as limited to either the owner or purchaser of the merchandise, or a licensed customs broker designated by the owner, purchaser or consignee of the merchandise. *See* also 19 C.F.R. § 101.1 definition of "*Importer.*"

Finally, § 1485(a) requires that "[e]very *importer of record* making an entry under the provisions of section 1484" must declare under oath that all the statements in the entry documents are true and correct.

Section 1592 does not punish all fraudulent or negligent dealings with Customs, but only those acts which occur in connection with the "entry" of merchandise into the United States and only when they are of such character as to affect Customs' decision-making when assessing duties in connection with such entry. See United States v. Thorson Chem. Corp., 795 F.Supp. 1190, 1197–98 (Ct. Int'l Trade 1992).[2]

The only "duties" regarding the filing of documents in connection with the entry of merchandise set forth in the Tariff Act which could give rise to a negligence claim are those spelled out in §§ 1484 and 1485. Section 1592(c)(2) and (c)(3) are thus inextricably tied to §§ 1484 and 1485.

The Government recognized this interaction between §§ 1484 and 1485 and the penalties which can be assessed under § 1592 when issuing its August 13, 2008

---

[2] In this context, entry is defined as filing information to enable Customs to determine whether the subject merchandise may be released from custody and enable Customs to assess duties on the merchandise, collect accurate statistics, and determine whether any other applicable requirements are met. 19 U.S.C. § 1484(a); see also 19 C.F.R. § 141.0a (defining "entry" as the documentation required to be filed with Customs or the act of filing such documentation.).

Amended Penalty Notice (Supp. App. at A178) and when filing its summary judgment motion at the Court of International Trade. See United States v. Trek Leather, Inc. and Harish Shadadpuri, No. 1:09–CV00041–NT, Doc. 30 at 11 (Supp. App. at A484). In its motion, under the section heading "[f]or [v]iolation [o]f 19 U.S.C. § 1592(a)," the Government first sets out §§ 1484 and 1485, and related Customs regulations, to demonstrate the procedures and requirements importers must follow—i.e. their "*duties*" under the Act—and documents that must be filed at the time of entry. Id. Only after setting forth these requirements does the Government provide the details of § 1592 and the relevant levels of culpability and penalties which attach when an "entry" is fraudulent or negligently false. Id. at 11–12.

Similarly, in promulgating the 1984 amendments to its regulations relating to penalties and penalty procedures, one of the public commenter's suggested that the language "violate the laws of the United States" in the proposed definitions of gross negligence and fraud be expanded to read "violate the laws of the United States related to the entry or introduction or attempted entry or introduction of merchandise into the commerce of the United States." T.D. 84-18, 18 Cust. Bull. 58, 60-61 (1984). In response, Customs stated (Id. at 61):

> Customs believes that the suggested expansion of this language is inappropriate since a false statement or omission may relate to an offender's obligations under laws of the United States other than the

> laws related exclusively to entry or introduction of merchandise, e.g., laws prohibiting possession or use of certain articles in the United States, such as controlled substances, automobiles which fail to meet safety or emission standards, etc.

In the instant appeal, the only asserted false statements and/or omissions respecting Trek's legal obligations relate exclusively to those laws addressing the entry or introduction of the subject apparel.

B.
Corporate Officers and/or Shareholders May be Personally Liable for Duties and Penalties Under § 1592(c)(2) and (3) where they have Committed Fraud, or Aided or Abetted the Corporate Importer of Record's Fraud, or where they have been Found to be the Mere Alter Ego of the Corporation after a Formal "Veil-Piercing" Analysis

1. Fraud
Corporate Officer's and Shareholder's Liability

In the context of § 1592(a)(1)(A), it is indisputable that any individual or entity who enters, introduces, or attempts to enter or introduce merchandise by means of fraudulent misstatements or omissions is liable thereunder. In the context of § 1592(a)(1)(B), liability is equally indisputable for any individual or entity that "*aids or abets*" an importer of record's fraud in the entry or introduction of merchandise.

In the case at bar, the corporate importer of record's misstatements and/or omissions were found to be occasioned by gross negligence, with the trial court dismissing the Government's fraud claim. Although the dismissal was timely

appealed, it was subsequently abandoned.[3]

In United States v. Hitachi America, Ltd., 21 CIT 373, 379, 964 F. Supp. 344 (1997), *aff'd.-in-part, vacated-in-part, rev'd.-in-part and remanded,* 172 F. 3d 1319, 1338 (Fed. Cir. 1999), this Court stated (emphasis ours):

> As the Court of International Trade pointed out, the Customs laws asserted by the government, 19 U.S.C. §§ 1484, 1485, apply by their terms **only to importers of record.** See Hitachi Am., 964 F. Supp. at 356. Because HAL [Hitachi America, Ltd.] is **the importer of record**, Hitachi Japan may **not** be held directly liable for a violation of those provisions and can *only* be liable under 19 U.S.C. § 1592(a)(1)(B) for aiding or abetting. See id.

After correctly observing that liability for aiding or abetting fraud "requires, inter alia, proof of knowledge of unlawfulness, also articulated as intent to violate the law," 172 F. 3d at 1337, the Court stated (Id., emphasis added):

> [a]lthough a literal reading of 19 U.S.C. § 1952(a) might at first blush suggest the possibility that a party can be found liable for negligently aiding or abetting negligence, any such interpretation would conflict with the generic requirement to show knowledge or intent to establish aiding or abetting liability and, in any event, is itself wholly without support and inconsistent with fundamental legal logic. We therefore reverse the Court of International Trade on this legal issue. But we need not remand for a determination of whether Hitachi Japan knowingly aided or abetted HAL's violations, because it is clear on this record that it no more had such intent than did HAL.

---

[3] The Government filed a cross-appeal respecting the dismissal of its fraud claim on August 26, 2011 [Appeal No. 2011-1545]. On July 16, 2012, the Court granted the Government's motion to voluntarily dismiss said appeal.

Citing to this Court's decisions in Hitachi, *supra*, the CIT in United States v. Action Products Int'l., Inc., 25 CIT 139 (2001), observed (25 CIT at 144-5, emphasis ours):

> The Federal Circuit [in Hitachi] reasoned that a negligent offender could not legally aid and abet because the term "negligence" implies action without intent. *Id.*
>
> > Although a literal reading of 19 U.S.C. § 1592(a) might at first blush suggest the possibility that a party can be found liable for negligently aiding or abetting, any such interpretation would conflict with the generic requirement to show knowledge or intent to establish aiding or abetting liability and * * * is itself wholly without support and inconsistent with fundamental logic.*Id.*
>
> This Court is bound by the Federal Circuit's holding. Thus, Defendant cannot be held liable for negligent aiding and abetting. Moreover, while *Hitachi* addresses only negligence, it appears clear that the [CAFC's] holding requires that any claim of aiding and abetting be based on actual knowledge or intent. *See id.* at 1337-38. Consequently, gross negligence, which is grounded on reckless disregard or inattention to consequences rather than actual knowledge or intent, cannot be a basis for liability under the statute. Thus, Defendant [foreign manufacturer] cannot be held liable for grossly negligent aiding or abetting.

The decision in Action Products was never appealed. While maintaining the law's uniformity is the responsibility of appellate rather than trial judges, it is nevertheless submitted that the CIT's well-reasoned analysis based upon this Court's decision in Hitachi should be applied in holding that a party cannot be held liable for grossly negligent aiding or abetting.

Ten years after issuing its decision in Hitachi, this Court reiterated its holding in United States v. Inn Foods Inc., 515 F.Supp. 2d 1347, 1356 (CIT, 2007), *appeal dismissed*, 275 Fed. Appx. 956, 2008 WL906155, *vacated*, 277 Fed. Appx. 985, 2008 WL 1946750, *affirmed*, 560 F. 3d 1338, 1346 (2009), stating (emphasis ours):

> Where Congress intends a provision of the Tariff Act to apply only to the importer, it says so explicitly. See, *e.g.*, 19 U.S.C. §1484 (referring specifically to the "importer of record"); id. § 1485 (same); id. § 1505 (same); see also Hitachi, 172 F. 3d at 1336 (**non-importer defendant could be liable under § 1592(a)(1)(B) as an aider and abettor, but not under §§ 1484-85 directly because those sections "apply by their terms only to importers of record**").

In that case, the Court affirmed the trial court's holding that the corporate defendant had fraudulently violated § 1592(a)(1)(A) as respects the entry of its own merchandise and had violated § 1592(a)(1)(B) by aiding and abetting the fraudulent entry of its corporate affiliate's merchandise.[4] The Court further upheld the trial court's decision holding that any party guilty of fraud, **or** aiding and abetting fraud, is liable for lost duties under section 1592(d), stating (560 F. 3d at 1346):

---

[4] Because this Court affirmed the trial court's finding that Inn Foods had fraudulently aided and abetted the entry of its affiliate's merchandise, it was unnecessary to address the issue of whether the CIT was required to engage in a formal veil-piercing analysis when finding that Inn Foods was also the alter ego of its affiliate.

> . . . the language and structure of § 1592 indicates that subsection (d) [requiring the restoration of lawful duties] is not limited to only importers and their sureties, but is intended to apply to further the mandatory recovery of unpaid duty from any party *liable under subsection (a)*.

Continuing, the Court observed (560 F. 3d at 1347):

> The clear purpose of the statute [§ 1592(d)] as well supports a broad reading. It seems inherently improbable that the statute was intended to allow a party (such as Inn Foods) that deprives the government of revenue by aiding and abetting another's fraudulent entry of merchandise to be subject to penalties, yet bear no responsibility under § 1592(d) to make the United States whole by paying the duty lost as a result of that fraud.

The clear teaching of Hitachi and Inn Foods is that those who have committed fraud, or aided or abetted fraud, are, respectively, liable for penalties under 19 U.S.C. § 1592(a)(1)(A) or § 1592(a)(1)(B) as well as lost duty under § 1592(d).

In the instant appeal, the corporate importer of record's misstatements and/or omissions were occasioned by gross negligence. Accordingly, under this Court's holdings in both Hitachi and Inn Foods as well as the CIT's reasoning in United States v. Action Products Int'l., Inc., 25 CIT 139 (2001), appellant asserts that, as a matter of law and fundamental legal logic, he could not have aided or abetted Trek's gross negligence.

2. Negligence and/or Gross Negligence

(a). Corporate Officer's Liability for Gross Negligence

Under the facts of this case, it is undisputed that Trek is the importer of record because it is the owner of the merchandise which was entered into the United States and as to which Customs assessed duties. The Government does not contend that Mr. Shadadpuri was an "importer of record or customs broker." Nor does it assert that Mr. Shadadpuri had any independent duty under §§ 1484 and 1485 with respect to Trek's entries. It concedes that Trek is a corporation and that, even as its sole shareholder, Mr. Shadadpuri is not chargeable with its acts generally. The Government cannot reasonably contend otherwise given long-standing principles of limited liability for shareholders and corporate officers when acting on behalf of a corporation. See Anderson v. Abbott, 321 U.S. 349, 361–62 (1944) ("[n]ormally the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose."); Burnet v. Clark, 287 U.S. 410, 415 (1932) ("[a] corporation and its stockholders are generally to be treated as separate entities.").

The issue posed is whether Mr. Shadadpuri, under the circumstances here, can be personally chargeable with gross negligence for the actions he took in his capacity as a corporate officer and/or shareholder on behalf of the corporation.

As the owner of the imported merchandise at bar, Trek is chargeable with Mr. Shadadpuri's actions because he is a corporate officer (i.e., he is an "agent" of the corporation in the common law sense of that term). However, under basic principles of corporate law, his actions in the capacity of a corporate officer were those of the corporate entity. O'Neal and Thompson's Close Corporations and LLCs: Law and Practice, § 8.22 (Rev. 3d ed.); Id. (3d ed.) (stating that when an officer of a corporation acts, his action is that of the entity).

Moreover, 19 U.S.C. § 1484(2)(B) makes clear that the only party *authorized* to make entry as an "*agent*" of the owner or purchaser of imported merchandise is a licensed customs broker designated by the owner, purchaser or consignee of that merchandise.[5] Since Mr. Shadadpuri was neither the owner or purchaser of the imported merchandise nor a licensed customs broker, he was legally barred from acting as an importer of record and making entry in the capacity of Trek's agent.

---

[5] 19 C.F.R. § 101.1 defines "*Importer*" as follows (emphasis added):
"Importer" means the person primarily liable for the payment of any duties on the merchandise, or an *authorized* agent acting on his behalf. The importer may be:
(1) The consignee, or
(2) The importer of record, or
(3) The actual owner of the merchandise, if an actual owner's declaration and superseding bond has been filed in accordance with § 141.20 of this chapter, or
(4) The transferee of the merchandise, if the right to withdraw merchandise in a bonded warehouse has been transferred in accordance with subpart C of part 144 of this chapter. [Emphasis added.]

In Hitachi, this Court found that because §§ 1484 and 1485 apply by their terms only to importers of record, the corporate parent of an importer could not be directly liable for negligent violations thereof, even where it had played "an active role" in the importer's entry of merchandise. Hitachi, 172 F.3d at 1337–38. Further, the Court held that the corporate parent could not be liable for aiding and abetting the importer's violations of §§ 1484 and 1485 because one cannot, as a matter of legal theory, "aid and abet" the negligence of another. Id.

Absent a showing that pierces Trek's corporate veil, Mr. Shadadpuri is as much a third party to Trek's activities as an "importer of record" as was the corporate parent in Hitachi and, thus, cannot be directly chargeable with penalties under § 1592(c)(2) or (3) for Trek's gross negligence. As Mr. Shadadpuri concedes, a corporate officer and/or shareholder could be chargeable with a penalty under § 1592(a) for their own direct acts of fraud [§ 1592(a)(1)(A)], or for aiding and abetting corporate fraud [§ 1592(a)(1)(B)], had the Government chosen to prove that Trek and/or Mr. Shadadpuri had engaged in such fraud, but the Government abandoned that claim.

When Congress intends to impose personal liability on corporate officers for conduct taken in their capacity as such, it says so expressly. See, e.g., 18 U.S.C. § 1350 (fraud provisions of Sarbanes–Oxley Act). There is nothing in the applicable statutory scheme supporting the conclusion that Congress intended to impose liability

on corporate officers accused of negligently filling out entry papers required of their corporation by §§ 1484 and 1485 and to thereby put the officer's personal assets at risk based on conduct that falls short of affirmative acts of fraud, or the aiding and abetting of fraud.

The Government nevertheless continues to assert that Mr. Shadadpuri is a "person" within the meaning of § 1592(a)(1)(A) who, through gross negligence, entered or introduced merchandise into the commerce of the United States by means of documents which were material and false and/or by material omissions. The same argument was posited and rejected by Judge Restani in Aegis Sec. Ins. Co. v. Fleming, Slip Op. 08-142 (Ct. Int'l. Trade Dec. 23, 2008). That case involved whether Mr. Fleming, the sole shareholder and employee of the corporate importer accused of subverting an antidumping duty order on Chinese pencils, could be held personally liable under Section 1592(a). In rejecting the surety-third party plaintiff's argument, Judge Restani ruled (footnote omitted, emphasis ours) (Slip Op. 08-142 at 13):

> Under the facts of the case, however, absent piercing of the corporate veil [under applicable Florida State law], Fleming may not be liable under this theory because he was not the one who directly entered or introduced merchandise into commerce. Rather, the corporation was the importer of record, which utilized customs brokers to file entry documents on its behalf. Nonetheless, Fleming may still be liable for violation of § 1592(a) if he aided and abetted the corporation to

> [fraudulently] violate the statute. See United States v. Action Products Int'l. Inc., 25 C.I.T. 139, 144 (2001) (stating that one cannot be held liable for negligent aiding or abetting because "a claim of aiding and abetting requires knowledge or intent on the part of the offender") (quoting United States v. Hitachi Am., Ltd., 172 F. 3d 1319, 1338 (Fed. Cir. 1999).

See also Inn Foods, Inc, *supra,* wherein the Trade Court correctly held at 515 F. Supp. at 1356, that the corporate importer of record, Seaveg, was the alter ego of its sister subsidiary Inn Foods and the fact that Seaveg and Inn Foods were incorporated as two separate entities did not shield Inn Foods from Customs duties and penalties owed on actions it took partly under the name of Seaveg.[6]

Pursuant to § 1484(2)(B), Mr. Shadadpuri did not and, indeed, could not legally act as an importer of record and enter Trek's merchandise into the commerce of the United States. Rather, as in Fleming, the corporation was the importer of

---

[6] The Trade Court found that both Inn Foods and its sister subsidiary were (i) owned and controlled by the same people; (ii) had the same phone number and operated from the same building; (iii) utilized the same employees and officers, and utilized them in the same roles; (iv) paid invoices, regardless of which of the two was the importer of record, from Inn Foods' accounts; (v) had intermingled accounting ledgers; (vi) would combine their names in certain of their contracts and (vii) appeared to be the same entity for all intents and purposes to both its own employees and to Customs. Seaveg, a shell corporation, was admittedly created solely to assist Inn Foods, an operating company and its sister subsidiary, to better conduct its business by providing Inn Foods the use of a different company name to facilitate sales without raising the ire of certain customers. *See* Trial Tr. vol. 3, 371, Feb. 23, 2007. Id.

record which utilized customs brokers to file and sign entry documents on its behalf. As in Fleming, Mr. Shadadpuri could only be liable for a grossly negligent violation of § 1592(a) if, after a formal veil-piercing analysis, he was found to be Trek's alter ego.

(b). Corporate Shareholder's Liability for Gross Negligence

If, as stated by this Court in Hitachi, aiding or abetting an importer's negligence is "*inconsistent with fundamental legal logic*," then aiding or abetting an importer's gross negligence is equally inconsistent with fundamental legal logic. Indeed, such was the CIT's reasoning and conclusion in Action Products.

The same fundamental legal logic that Mr. Shadadpuri could not have aided or abetted Trek's grossly negligent violation of 1592(a) as a corporate officer applies equally as well in his capacity as a shareholder of Trek. Indeed, "[a] corporation and its stockholders are generally to be treated as separate entities." Burnet v. Clark, 287 U.S. 410, 415 (1932). To hold otherwise would require ascribing to Congress the unstated purpose of repealing the common law principle of corporate-shareholder immunity.

Acceptance of the Government's argument would require holding that any and all shareholders of privately held or publically traded corporations are jointly and severally liable for the company's negligent violation of 1592(a) beyond the amount

of their stock investment. Thus, had General Motors Corporation negligently violated § 1592(a) in 2010, the United States - a 61% shareholder of its common and preferred stock - together with each individual shareholder would be liable for any penalties imposed on the company.

Absent fraud, only those *"parties qualifying as "importer of record""* under 19 U.S.C. § 1484(2)(B) may be subject to liability under § 1592(a). However, a party other than the importer of record may nonetheless be jointly and severally liable for a corporate importer's negligent (or grossly negligent) violation of § 1592(a)(1) where, after a formal veil-piercing analysis, that party is found to be the alter ego of the corporate importer. In the instant action, the Government never asserted such a claim nor undertook such an analysis.

In conclusion, it is respectfully submitted that - absent fraud - liability for negligent and/or grossly negligent violations of § 1592(a)(1) is limited to those *"parties qualifying as an 'importer of record' under paragraph (2)(B)"* of 19 U.S.C. § 1484 (i.e., the owner, purchaser or, when appropriately designed, a licensed customs broker), and individuals found to be mere alter egos of the corporate importer.

In Hitachi, this Court properly rejected the Government's argument that §§ 1592(c)(2) and (c)(3) should be read broadly to encompass entities or individuals who, though not importers of record, are actively involved with the funding and control of the entry of merchandise by that importer of record. Hitachi, 172 F.3d at 1336–38. The position the Government takes here, though phrased differently, is to the same effect and, if accepted, would overrule the result in Hitachi and Inn Foods.

It is submitted that neither the Court's discussion nor holding in Hitachi was limited to exporters. Rather, the Court's focus was on the fact that, as a corporate parent, Hitachi Japan was not the importer of record and had no duties as such, despite findings by the Court of International Trade that it was actively involved with and even directed the activity. As there, appellant herein asks the Court to continue to both respect the corporate form and recognize that a claim of negligence against Mr. Shadadpuri must be predicated upon a legal duty imposed on him which he broached.

The Government had three separate avenues to hold Shadadpuri personally liable for penalties under § 1592 in connection with the duties owed by Trek. It could have attempted to prove that Mr. Shadadpuri personally committed direct acts of fraud and is liable for that conduct under § 1592(a)(1)(A); and/or attempted to prove that Trek committed fraud and that Mr. Shadadpuri aided and abetted that fraud and

is liable for that conduct under § 1592(a)(1)(B); and/or it could have attempted to pierce Trek's corporate veil and charged Mr. Shadadpuri with Trek's admitted negligence as Trek's alter ego. While all of these routes were available, the Government steadfastly eschewed them all.

Instead, the Government seeks adoption of a broad legal principle that would expose all shareholders and corporate officers to personal liability for negligent acts undertaken on behalf of their corporation. Absent an explicit statutory basis for doing so, the Court should decline to believe Congress intended to supplant the common law so completely.

Section 1592(a) makes clear that corporate officers may be held liable for false statements made by a corporation if the officer knowingly participated in the deception or failed to correct the false statements upon learning of them. All the Government need do is prove that the corporate officer engaged in direct acts of fraud [§ 1592(a)(1)(A)], or that the corporate importer of record committed fraud through that officer and that the officer "knowingly participated in that deception" or covered it up, i.e., "aided or abetted" it [§ 1592(a)(1)(B)].

Alternatively, the Government could attempt to prove via a formal veil-piercing analysis that the officer and/or shareholder is the mere alter ego of the corporation.

What the Government should not be permitted to do, however, is shortcut its burden of proof in a way that ignores both the statutory scheme of the Tariff Act and an importer of record's corporate form.

C.

The Scope of "Gross Negligence" and "Negligence" in 19 U.S.C. § 1592(a) and Relevant Duty. How Other Statutory Provisions in Title 19 May Affect this Inquiry

1. Scope and Duty

Appendix B to Part 171 of the Customs regulations entitled "Revised Penalty Guideline, 19 U.S.C. 1592, " defines the terms "negligence" and "gross negligence" as follows (emphasis ours):

> (C) Degrees of Culpability Under Section 592
>
> * * * * * * * * * *
>
> (1) *Negligence.* A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of *reasonable care* and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.

> (2) *Gross Negligence.* A violation is deemed to be grossly negligent if it results from an act or acts (of commission or omission) done *with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute.*

2. How Other Statutory Provisions in Title 19 May Affect this Inquiry

As part of the shared responsibility between Customs and the trade community, an importer is obligated to exercise "reasonable care." Specifically, as amended by the Customs Modernization and Informed Compliance Act ("Mod Act"), passed as part of the North American Free Trade Agreements Implementation Act, Pub. L. 103-182 § 637, Sect. 621, 107 Stat. 2057 (1993), section 1484(a)(1) requires that "*one of the parties qualifying as 'importer of record' under paragraph (2)(B)* [§1484(2)(B)] ... *shall, using reasonable care*" make and complete the entry of imported merchandise. (Emphasis ours.)

The drafting Committee of the Mod Act stated that an importer should consider utilizing one or more of the following aids to establish evidence of proper compliance: seeking guidance from Customs through the pre-importation or formal ruling program; consulting with a customs broker, a customs consultant, or a public accountant or an attorney; or using in-house employees such as counsel, a customs administrator, or if valuation is an issue, a corporate controller, who has experience

and knowledge of customs laws, regulations and procedures. H. Rep. No. 103-361 at 120, 1993 U.S.C.C.A.N. 2670 (1993). The Committee also noted how the reasonable care standard should be interpreted by Customs; with the failure to follow a binding ruling evincing a lack of reasonable care while an honest, good faith professional disagreement as to correct classification would not [unless such disagreement has no reasonable basis (e.g. snow skis are entered as water skis)]. H.R. Rep. No. 103-361 at 120.

The exercise of reasonable care is a complete defense to a penalty case for negligence under 19 U.S.C. §1592. See, e.g. Black & White Vegetable Co. v. United States, 125 F. Supp. 2d 531 (CIT 2000). In that case, the Trade Court found that the determination of what constitutes "reasonable care" in a given context is made by reference to the care exercised by a reasonably prudent person similarly situated.

In Heng Ngai Jewelry, Inc. v. United States, 318 F.Supp. 2d 1291 (2004), the importer challenged Customs' use of computed value rather than transaction value. The Government claimed that the related party status affected the price, and that the importer failed to use reasonable care to provide Customs with the detailed information it needed to verify that the transaction value was not affected by the relationship of the parties. On cross-motions for summary judgment, the Court held that it could not grant summary judgment to the Government because, given that the

plaintiff did respond to CBP's requests and provide what *it considered* to be adequate information, the possibility that it exercised reasonable care could not be eliminated. The inference to be drawn from this decision is that, even if the information was not in fact adequate, where an importer in good faith considered it to be adequate, the reasonable care standard has been met.

Finally, in United States v. Optrex America, Inc., Slip Op. No. 06-73 at pp. 17-18, 2006 Ct. Int'l Trade Lexis 71,WL 1330333, the importer argued that it had exercised reasonable care by consulting with customs professionals, cooperating with Customs, and by creating a classification decision tree in a good faith attempt to correctly classify their product. Optrex argued that there was a good faith professional disagreement with Customs on the proper classification as reflected in its decision tree.

The Court noted that consultation with customs professionals is one indicia of compliance, but here there was evidence that Optrex did not always follow the legal advice given. Secondly, the Court said that Optrex's claim of cooperation was weakened by the behavior of Optrex (testimony that Optrex had not read any rulings, consulted with Customs or asked for Customs' advice regarding classification). Thirdly, on the issue of a good faith professional disagreement reflected in the decision tree, the Court noted that Optrex' position was weakened because there was no evidence presented that Optrex had actually followed the decision tree, and it was problematic that the decision tree was formulated after the subject entries were made.

Although the Court denied summary judgment to Optrex in the penalty case, the inference drawn from the decision is that where an importer establishes that it consulted with professionals and made a good faith analysis of how to classify it will have passed the reasonable care test, regardless of whether or not its decision was correct.

CONCLUSION

Since Trek did not fraudulently violate § 1592(a), Mr. Shadadpuri could not have aided or abetted Trek's gross negligence as a matter of "fundamental legal logic." Moreover, he cannot be liable under the penalty provision of § 1592(a) nor liable for the restoration of lost duty under § 1592(d) since he was not found to be the mere alter ego of Trek as the result of a formal veil-piercing analysis. The trial court's decision to the contrary was reversible error and, accordingly, should be reversed.

Respectfully submitted,

/s/ John J. Galvin

John J. Galvin
GALVIN & MLAWSI
Attorneys for Appellant,
Harish Shadadpuri
245 Fifth Avenue Suite 1902
New York, New York 10016
Tel.: (212) 679-1500
Email: jjgalvin@hotmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP Rule 32(a)(7), undersigned counsel for Defendant-Appellant, Harish Shadadpuri, hereby certifies that the attached Brief contains 6,288 words, excluding those parts of the Brief exempted by the Rule. The Brief complies with the typeface and type style requirements of FRAP Rule 32(a)(5) and was prepared using Times New Roman 14 point font, proportionately spaced typeface.

_____

John J. Galvin

Dated: April 16, 2014,
New York, New York.

CERTIFICATE OF SERVICE

I, JOHN J. GALVIN, hereby certify that two (2) true copies of appellant's attached Brief were served this 16th day of April, 2014, upon counsel for plaintiff-appellee, the United States, via Federal Express, next business day delivery, addressed as follows:

Stephen C. Tosini, Esq.
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Suite 7020
Washington, D.C. 20005

By: _____
John J. Galvin

Dated: July 16, 2014,
New York, New York.