CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH-COURT NO. 1

CUSTOMS APPEAL NO. 52239 OF 2021

[Arising out of Order-in-Original No. 11/2021-22/SJ/Pr. Commissioner dated 28.09.2021 passed by the Principal Commissioner of Customs, New Delhi]

M/s Midas Fertchem Impex Pvt Ltd. **Appellant**
C-14A, Ground Floor, Panchsheel Vihar,
Malviya Nagar, New Delhi-100 017

Versus

Principal Commissioner of Customs, **Respondent**
Air Cargo Complex (Import)
New Customs House, Near IGI Airport
New Delhi 110037

WITH

CUSTOMS APPEAL NO. 52240 OF 2021

[Arising out of Order-in-Original No. 11/2021-22/SJ/Pr. Commissioner dated 28.09.2021 passed by the Principal Commissioner of Customs, New Delhi]

Ms. Rashmi Jain, Director **Appellant**
M/s Midas Fertchem Impex Pvt Ltd.
C-14A, Ground Floor, Panchsheel Vihar
Malviya Nagar, New Delhi-1100 017

Versus

Principal Commissioner of Customs, **Respondent**
Air Cargo Complex (Import)
New Customs House, Near IGI Airport
New Delhi 110037

WITH

CUSTOMS APPEAL NO. 52241 OF 2021

[Arising out of Order-in-Original No. 11/2021-22/SJ/Pr. Commissioner dated 28.09.2021 passed by the Principal Commissioner of Customs, New Delhi]

Shri Manish Jain, Director **Appellant**
M/s Midas Fertchem Impex Pvt Ltd.
C-14A, Ground Floor, Panchsheel Vihar,
Malviya Nagar, New Delhi-100 017

Versus

Principal Commissioner of Customs, **Respondent**

Air Cargo Complex (Import)
New Customs House, Near IGI Airport
New Delhi 110037

WITH

CUSTOMS APPEAL NO. 52242 OF 2021

[Arising out of Order-in-Original No. 12/2021-22/SJ/Pr. Commissioner dated 27.09.2021 passed by the Principal Commissioner of Customs, New Delhi]

M/s Midas Import Corporation, **Appellant**
Through the Proprietor Shri Manish Jain,
C-14A, Ground Floor, Panchsheel Vihar,
Malviya Nagar, New Delhi-100 017

Versus

Principal Commissioner of Customs, **Respondent**
Air Cargo Complex (Import)
New Customs House, Near IGI Airport
New Delhi 110037

AND

CUSTOMS APPEAL NO. 52243 OF 2021

[Arising out of Order-in-Original No. 12/2021-22/SJ/Pr. Commissioner dated 27.09.2021 passed by the Principal Commissioner of Customs, New Delhi]

Ms. Rashmi Jain, Authorised Signatory **Appellant**
M/s Midas Import Corporation,
C-14A, Ground Floor, Panchsheel Vihar,
Malviya Nagar, New Delhi-100 017

Versus

Principal Commissioner of Customs, **Respondent**
Air Cargo Complex (Import)
New Customs House, Near IGI Airport
New Delhi 110037

Appearance:.
Present for the Appellant :Shri Amit Jain, Advocate
Present for the Respondent: Shri Nagendra Yadav, Authorised Representative

COARM:
HON'BLE MR. JUSTICE DILIP GUPTA ,PRESIDENT
HON'BLE MR. P V SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NOs. 50027-50031/2023

Date of Hearing: 07.11.2022
Date of Decision: 13.01.2023

P V SUBBA RAO:

1. These appeals arise out of two impugned orders and are on the same issue of classification of the goods described as "0.1 percent natural brassinolide fertiliser" and classified under Customs Tariff Heading[1] 3101 00 99, 3105 10 00 and 3105 90 90 by the appellants and which is classifiable under CTH 3808 93 40 according to the Department. These appeals cover 28 consignments imported between 13.12.2012 to 16.05.2015 by M/s Midas Fertchem Impex Pvt Ltd. and 60 consignments imported by M/s Midas Import Corporation between 04.12.2010 to 27.01.2015. Smt. Rashmi Jain and Shri Manish Jain are the Directors of M/s Midas Fetchem Impex Pvt Ltd. and are assailing the penalty of Rs. 4 Lakhs on each imposed under section 112 (a) of the Customs Act, 1962. Smt Rashmi Jain, is also the authorized signatory Midas Import Corporation and she is assailing the penalty of Rs. 6 lakhs imposed on her under section 112(a) of Customs Act, 1962. The details of these appeals and impugned orders and the show cause notices are as below:

Issue	Classification of "0.1 % Natural Brassinolide Fertilizer", whether under CTI 3101 00 99 or under CTI 3105 10 00 or under CTI 3105 90 90 (as claimed by the Appellants) or under CTI 3808 93 40 (as claimed by the Department)	
Particulars	**Midas Fertchem Impex Pvt. Ltd.**	**Midas Import Corporation**
Show Cause Notice No. and Date	16/Commissioner/ACC/Import/ 2015 dated 16.11.2015	15/Commissioner/ACC/Import/ 2015 dated 16.11.2015
Period of Dispute	13.12.2012 to 16.05.2015	04.12.2010 to 27.01.2015
Quantity imported, name of supplier(s)	28 consignments (Total 13,000 Kgs.)from M/s Greenmax	60 consignments (Total 20,410 Kgs.)

[1] **CTH**

and mode of packing	Bioscience & Organics Co., Ltd, China, **packed in bulk in 25 Kgs. drums**	i) 51 consignments (18,985 Kgs.) from M/s Greenmax Bioscience & Organics Co., Ltd, China, **packed in bulk in 25 Kgs. drums**; & ii) 9 consignments (1,425 Kgs.) from M/s Chengdu Newsun Biochemistry Co. Ltd., China, **packed in 25 Kgs. drums, each drum containing 25 packages of 1 Kg. each**
Order-in-Original No. and date	11/2021-22/SJ/Pr. Commissioner dated 28.09.2021 (DIN 20210974NF000000BFAA)	12/2021-22/SJ/Pr. Commissioner dated 27.09.2021 (DIN 20210974NF000081338A)
Demand of duty	Rs. 81,14,536/- + interest	Rs. 1,21,19,893/- + interest
Penalty imposed	Rs. 81,14,536/- u/s 114A of the Customs Act, 1962.	Rs. 1,21,19,893/- u/s 114A of the Customs Act, 1962
Personal Penalty	Rs. 4,00,000/- each on the Directors u/s 112 (a) of the Customs Act, 1962.	Rs. 6,00,000/- on the Authorized Signatory u/s 112 (a) of the Customs Act, 1962.
Demand beyond/ within the normal period of limitation	25 Bills of Entry filed upto 16.11.2014 (involving demand of Rs.75,34,208/-) are beyond the normal period of limitation. Only 3 bills of Entry filed post 16.11.2014(involving demand of Rs. 5,80,328/-) are within the normal period of limitation.	56 Bills of Entry filed upto 16.11.2014 (involving demand of Rs. 1,08,41,143/-) are beyond the normal period of limitation. Only 4 bills of Entry filed post 16.11.2014(involving demand of Rs. 12,78,750/-) are within the normal period of limitation.

2. The appellant importers imported the goods described as "0.1 per cent natural brassinolide fertilizer" and classified it as fertilizer under various headings of Chapter 31 of Customs Tariff as discussed above. The Bills of Entry were assessed by proper officers. In many cases, the officers also called for literature from the appellants, examined it and thereafter assessed the Bills of Entry. Thereafter, on receiving intelligence from the Directorate of Revenue Intelligence[2] the Commissionerate investigated the matter, sought expert opinion, recorded statements and came to the conclusion that natural brassinolide is not a fertilizer at all

[2] **DRI**

but it is a plant growth regulator classifiable under CTH 38 08. Accordingly, show cause notices[3] were issued to the appellant importers proposing to re-classify the consignments imported by them under CTH 3808 and recover the differential duty along with interest. It further proposed a penalty of equal amount under section 114A on the appellant importers. It was also proposed to impose personal penalties under section 112 upon the Directors/ authorized signatories. Extended period of limitation was invoked in both SCNs and only three Bills of Entry in case of Midas Fertchem Impex Pvt Ltd. and four Bills of Entry in case of Midas Import Corporation were within the normal period of limitation.

3. The Principal Commissioner passed orders–in-original confirming the demands of duty along with interest and imposing penalties. On appeal, all these matters were remanded to the Commissioner by the Final Order dated 19.02.2018[4] by this Tribunal. Before the Tribunal, the appellants had not disputed that the brassinolide was a plant based regulator but raised a new ground which was not raised before the original authority. It was argued that in terms of section 1(a)(2) of Chapter 38 of the Customs Tariff, separately defined chemicals are not classifiable under CTH 3808 unless they were put up in packings for retail sale and brassinolide imported by the appellants was not put up in packing for retail sale. The Tribunal remanded the matter to

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[3] **SCN**

[4] **2018 (14) GSTL 260 (Tri.-Del)**

the original authority as this ground was not raised by the appellant and hence was not considered by the original authority during the first round of litigation. Paragraphs 6, 7 and 8 of order of this Tribunal in the first round of litigation are reproduced below:

> " 6. However, the appellants raised a legal issue regarding classification under Heading 3808. This is with reference to note 1 (a) (2) of the said Chapter 38. The learned Counsel fairly accepted that this was not examined earlier as this was not raised/contested also. Since, this has a bearing of classification this aspect should be examined before arriving at classification under 3808 as the same is guided by chapter note also. Further, in the absence of chemical test in the present imports the classification has necessarily to be done based on documents recovered, literature filed by the appellant. When specifically asked about availability of current imports or samples from past imports we were informed no such samples were available and no imports currently. In such situation the classification has to be done with available literature and import documents only.
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> 7. In view of the above discussion and analysis, we note that the matter has to go back to the Original Authority to re-decide based on the observations made above. The applicability of chapter note and also the instructions issued by the Board alongwith that of competent authorities of Central Insecticides Board & Registration Committee, Insecticides Act etc. are to be examined by the Original Authority. The applicability of limitation as strongly contended by the appellant, as well as liability of the penalty, may also be decided afresh.
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> 8. Keeping in view of the above observation, the appeals are allowed by way of remand."

4. Thereafter, the Commissioner passed the orders impugned in these appeals again confirming the demands along with interest and imposing penalties. Several issues were raised by the learned Counsel for the appellants which

were countered by the learned authorised representative for the Revenue which we proceed to discuss below.

A. Show Cause Notice under section 28 was issued without assailing the assessment

5. Learned counsel for the appellant submitted that one of the grounds which was taken by him before the adjudicating authority was that the SCN issued under section 28 is not sustainable at all because the assessments were finalized and as per the judgment of the larger bench of the Supreme Court in the case **ITC Ltd. Vs. Commissioner of Central Excise Kolkata IV**[5] all assessments including self-assessments can be appealed against before the Commissioner (Appeals) by either side. Having not appealed against the assessments, Revenue could not have issued a notice under section 28. He submits that in the impugned order, the Commissioner did not agree with this submission holding that the **ITC Ltd.** pertained to refunds and not to demands under section 28. According to the learned counsel, this view was not correct and the judgment equally applies to demands under section 28 and having not assailed the assessments before Commissioner (Appeals), no SCN under Section 28 could have been issued. He placed reliance on the following decisions of the Tribunal:

(i) **P V Electroplast Ltd. vs. Pr. CC, Noida,**[6] paragraph 7 of which reads:

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[5] **2019(368)ELT 216(SC)**

[6] **2020 (373) ELT 415 (Tri.-All.)**

"7. We have carefully gone through the record of the case and submissions made by both the sides. From the perusal of the impugned Order-In-Original, we note that Original Authority has denied cross-examination of the persons whose statements were relied upon for issuance of said show cause notice dated 29 May, 2015. Further we note that at Para 7.3.18 the learned Original Authority has held that the most clinching part of the investigation is the admission made by Shri Vishal Gupta, Director of M/s P G Electroplast in his voluntary statements recorded under Section 108 of the Customs Act, 1962 that M/s P G Electroplast, overvalued the price of colour picture tubes to avoid payment of anti dumping duty. From the said part of the impugned order we note that Revenue did not have any evidence to corroborate with the voluntary statements. We note that it is settled principal of law that the assessment of Bill of Entry is an adjudication order and if within the period provided under customs act appeal before Jurisdictional Commissioner (Appeals) is not filed then the assessment becomes final and such final assessment cannot be reopened. In the present case the assessment were made during the period from May 2010 to January 2011 and after the appeal period of around three months were over the said assessment became final and therefore through the said show cause notice dated 29 May, 2015 the said assessments were not open for reassessment. Further we note that the assessment were finalized during May 2010 to January 2011 and all the information required for assessment was provided by the appellant and therefore the allegation of suppression of fact made on 29 May, 2015 are not sustainable. Therefore, the proceedings are hit by limitation. We therefore hold that the impugned order is neither sustainable on merits nor sustainable on point of limitation. We, therefore, set aside the impugned order and allow both the appeals."

(ii) **Commissioner of C. Ex. Aurangabad vs. Vediocon Appliance 2009 (235) ELT 513 (Tri.-Mumbai).** Paragraph 8 reads as follows:

"8. It is fact the Bills of Entry were finally assessed by the authorities and duty liability

> was discharged by the respondent. Subsequently, short levy demand under Section 28 has been raised from the appellant, which is unsustainable on the ground that the assessment of the said B.O. Entry has not been challenged by the authorized. We find that the decision of the Hon'ble Supreme Court in the case of Priya Blue Industries (Supra) squarely covers the issue before us."

6. Learned authorised representative, on the other hand, supports the impugned order and says that **ITC Ltd.** pertained to only refunds which cannot be sanctioned unless the refund arises out of the assessment itself. The reason for this is that the officer sanctioning the refund cannot sit in judgment over or modify the assessment or sanction refund so as to effectively modify the assessment. This legal position was clarified by the Supreme Court in **Priya Blue**[7] and **Flock India**[8]**.** This was reaffirmed by the Supreme Court in **ITC Ltd.** further clarifying that no refund can be sanctioned so as to modify the assessment even in cases of self-assessment. According to the learned authorized representative, a demand under section 28 is a completely different quasi-judicial process which involves demanding duty not levied, short levied, not paid, short paid or erroneously refunded. The officer adjudicating the SCN revises the assessment already made which is within the framework of law. By contrast, a refund under section 27 is a mere mechanical process of refunding the duty paid in

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[7] Priya Blue Industries vs Commissioner of Customs 2004 (172) E.L.T. 145 (SC)

8Collector of Central Excise, Kanpur v.Flock (India) Pvt. Ltd., 200 0 (120) ELT 285 (SC)

excess. Therefore, according to the learned authorized representative, a demand under section 28 can be issued without getting the assessment modified through an appeal. He relies on the judgment of Supreme Court in **Jain Vanaspati Ltd.**[9] to assert that a demand under section 28 can be issued without either the assessment under section 17 or the order clearing the goods for home consumption under section 47 being revised through appeal. Paragraph 5 of which is reproduced below:

> "5. It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder commencing from the "relevant date"; "relevant date" is defined by subsection (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. **The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130**.
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7. We have considered the submissions on both sides on this issue.

8. The short question which needs to be answered is whether SCN under section 28 can be issued after the assessment is finalized (either through self assessment or through assessment by an officer) without first appealing

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[9] **1996 (86) ELT 460 (SC)**

against the assessment. The answer to this question lies in the judgment in **Priya Blue Industries** paragraphs 6,7 and 8 are reproduced below:

> "6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) case (2000) 6 SCC 650. **Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an appeal, that order stands**. So long as the order of assessment stands the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim cannot also review an assessment order**.**
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> 7. We also see no substance in the contention that provision for a period of limitation indicates that a refund claim could be filed without filing an appeal. Even under Section 11 under the Excise Act, the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)'s case (supra), that in the absence of an appeal having been filed no refund claim could be made.
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> 8. The words "in pursuance of an order of assessment" only indicate the party/person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an order of assessment to claim the refund. These words do not lead to the conclusion that without the order of assessment having been modified in appeal or reviewed a claim for refund can be maintained."

9. It needs to be noted that in **Priya Blue Industries** the Supreme Court had reaffirmed the law laid down in **Flock India.** This decision in **Priya Blue Industries** was again referred to the Supreme Court in **ITC Ltd.** Thus, the law laid down by the Supreme Court in all three judgments is that once an assessment is made it stands **unless it is reviewed under section 28 or modified in an appeal. Thus, any assessment can be modified in two ways- the first is through an appeal and other is through a process of review under section 28.**

10. There is a distinction between the provision for refund under section 27 (or section 11B of the Central Excise Act) and the provision for raising a demand under section 28 (or section 11A of the Central Excise Act). Refund provisions are not quasi-judicial proceedings. The officer can sanction refund only if excess duty is paid over what is to be paid as per the assessment. He cannot modify the assessment. Self-assessment is done under section 17(1) and re-assessment is done under section 17(5). The process of assessment (self assessment and re-assessment) under section 17 comes to an end once an order permitting clearance of goods for home consumption under section 47 is issued by the proper officer. Thereafter, the goods cease to be imported goods and no assessment of duty is possible under section 17. The only exception is where the duty is provisionally assessed for want of documents, test reports, etc. and goods are cleared for home consumption in which case the process of assessment gets completed when the assessment is finalized.

11. Once an order under section 47 permitting clearance of goods for home consumption is issued, the assessment can be modified either through an appeal by either side before the Commissioner (Appeals) or through an SCN under section 28. While the option of appeal is open to both sides to assail the assessment on any ground, the scope of an SCN under section 28 is limited by WHO, WHEN and WHY. Only 'the proper officer' can issue the SCN, within the

normal period of limitation or the extended period of limitation of five years (as the case may be), and 'only to collect the duties not levied, short levied, not paid, short paid or erroneously refunded'. **It has been made clear by Supreme Court in Priya Blue, Flock India and further in ITC Ltd. that the assessments can be modified by either of these two methods.** It was also clarified by the Supreme Court in **Jain Shuddh Vanaspati** that a notice under section 28 can be issued without modifying the order permitting clearance of goods for home consumption under section 47.

12. Learned counsel for the appellant draws attention to paragraph 43 of **ITC Ltd.** which is as follows:

> "43. As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression **'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment**."

13. According to the learned counsel for the appellant, since both sides can appeal against self-assessment, it means that no SCN under section 28 can be issued without first appealing against the assessment. This submission cannot be accepted. Firstly, the above paragraph only says that both sides can appeal against self-assessment and does NOT say both sides can ONLY appeal against self-assessment. It does not state that such an appeal and modification of the self-assessment is a pre-condition for issuing a notice under section 28. Secondly, such an interpretation may lead to absurd consequences. After a

notice under section 28 is issued, it is followed by adjudication by either Commissioner or by an officer junior to the Commissioner. If the assessment is already modified on appeal by the Commissioner (Appeals), then the question of the Assistant Commissioner or Joint Commissioner or even Commissioner further adjudicating the matter does not arise as they cannot sit in judgment over the order of Commissioner (Appeals). If on Revenue's appeal, the Commissioner (Appeal) modifies the assessment and more duty becomes payable, the assessee has to pay the amount and if he does not, appropriate steps under the law can be taken to recover the dues. If Commissioner (Appeals) upholds the assessment, the assessment merges with the order-in-appeal of Commissioner (Appeal) and there is no assessment order which can be reviewed under Section 28. Thus, if the learned counsel's submissions are accepted, section 28 becomes otiose.

14. A question may arise as to what is the nature and scope of SCN under section 28 if an appeal against assessment (including self-assessment) before Commissioner (Appeals) is available to both sides. This has been answered by the Constitution Bench of the Supreme Court in **Cannon India Pvt. Ltd. Vs. Commissioner of Customs**[10] and the relevant portion of the judgment is as follows:

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10 2021 (376) ELT 3 (SC)

> **" 12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions.** The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods."

15. Thus, the power to issue SCN under section 28 is the power of review of the assessment which is specially conferred by law and through this SCN and the consequent adjudication, assessment can be modified. The assessment can also be modified through an appeal process. The submission by the learned counsel that an SCN under section 28 can be issued only after an appeal is filed and the assessment is modified by the Commissioner (Appeals) is not correct. In **Jain Shudh Vanaspati Ltd.** also the Supreme Court had categorically affirmed this position. The decisions of coordinate benches of this Tribunal in **P G Electroplast Ltd. and Videacon Appliances** relied upon by the learned counsel are contrary not only to this legal provision but also are contrary to the judgments of the Supreme Court in **Priya Blue, Flock India, ITC Ltd.** and **Cannon India** and hence are *per incuriam* which is an exception to the principle of *stare decisis.* In **M/s Case New Holland Construction Equipment (I) Pvt. Ltd vs**

Commissioner, Ujjain[11], this Tribunal examined the principle of *per incuriam* as a relaxation to the rule of *stare decisis*. Relevant portions of this decision are as follows:

> 34. The principle of per incuriam has been developed in relaxation to the rule of stare decisis. While referring to exception to the rule of stare decisis, it has been observed in 'Precedent in England Law' by Rupert Cross, 1961 Edition:
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> > "No doubt any court would decline to follow a case decided by itself or any other court (even one of superior jurisdiction), if the judgment erroneously assumed the existence or non-existence of a statute, and that assumption formed the basis of the decision. This exception to the rule of stare decisis is probably best regarded as an aspect of a broader qualification of the rule, namely, the courts are not bound to follow decisions reached per incuriam."
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> 35. In **State of U.P.** vs. **Synthetics and Chemicals Ltd**[12], the Supreme Court observed:
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> > "40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young vs. Bristol Aeroplane Co. Ltd[13]) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."
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> 36. The maxim 'per incuriam' is derived from the latin expression that means 'through inadvertence'. The literal meaning of the expression 'per incuriam' is 'through want of care'. In Black's Law Dictionary, 5th Edition, it has been defined as "through inadvertence". In Halsbury's Law of England Fourth Edition, Volume 26, it has been stated:
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> > "A decision is given per incuriam when the court has acted in

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11 **EXCISE APPEAL NO. 52867 OF 2018 decided on 23 August 2021**

12 **(1991) 4 SCC 139**

13 **(1944) 2 All ER 293 (CA)**

> ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statue or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the court had not the benefit of the best argument, and as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some consistent statue or binding authority. Even if a decision of the Court Appeal must follow its previous decision and leave the House of Lords of rectify the mistake."

37. In **Babu Parasu Kaikadi (Dead) by Lrs.** vs. **Babu (Dead) Through Lrs.[14],** the Supreme Court observed:

> "14. Having given our anxious thought, we are of the opinion that for the reasons stated hereinbefore, the decision of this Court in Dhondiram Tatoba Kadam having not noticed the earlier binding precedent of a coordinate Bench and having not considered the mandatory provisions as contained in Section 15 and 29 of the Act had been rendered per incuriam. It, therefore, does not constitute a binding precedent."

38. In **Yeshbai** vs. **Ganpat Irappa Jangam[15]**, a Division Bench of the Bombay High Court observed:

> "27. Now, a precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. The rule apparently applies even though the earlier court knew of the statute in question. If it did not refer to and had not present to its mind, the precise terms of the statute. Similarly, a court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such incuriam as to vitiate the decision. These are the

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14 **(2004) 1 Supreme Court Cases 681**

15 **AIR 1975 Bom 20: (1974) 76 BOMLR 278**

> commonest illustrations of decision being given per incuriam. In order that a case can be decided per incuriam, it is not enough that it was inadequately argued. It must have been decided in ignorance of a rule of law binding on the court, such as a statute. (See the observations in 'Salmond on Jurisprudence" Twelfth Edition, pages 150 and 169)."

39. It, therefore, follows that the principle of per incuriam can be applied for such decisions which have been given in ignorance of some statutory provision or some authority that is binding.

16. To sum up:

a) an appeal against an assessment (including self-assessment) of any Bill of Entry is available to both sides;

b) the proper officer can also review the assessment under section 28 as has been held by the Supreme Court in **Priya Blue, Flock India, ITC Ltd. and Cannon India.**

c) The decisions in **P G Electroplast Ltd.** and **Videocon Appliances,** which learned counsel for the appellants relied on are *per incuriam* because they are contrary to the judgments of the Supreme Court;

d) Holding a view that a notice under section 28 can be issued only after the assessment is modified on appeal renders section 28 itself otiose because there cannot be any SCN and adjudication by an officer to modify the assessment after an order in appeal is passed by the Commissioner (Appeals).

B. Scope of remand

17. Learned counsel vehemently argued that the impugned order travelled beyond the scope of the remand order and cannot be sustained. The appellants had classified the imported goods as fertilisers under Chapter 31 of CTH. After investigation and seeking expert opinion, Revenue found that the imported goods were not fertilisers but were plant growth regulators. Revenue also found that although the importers classified the good as fertilisers in Bills of Entry, they had been selling it to its customers as plant growth regulator. The Show Cause Notice was issued proposing to classify the goods as Plant Growth Regulator under Chapter heading 3808.

18. During the first round of litigation, learned counsel for the appellant did not dispute that the imported good was Plant Growth Regulator but contested classification under Chapter 38 on a new ground that the imported goods were not in retail packages and hence were not classifiable under Chapter 38 in view of Chapter Note 1(a) (2). The note reads as follows:

> 1. **This Chapter does not cover**:
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> (a) **separate chemically defined elements or compounds with the exception of the following** :
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> (1) artificial graphite (heading 3801);
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> (2) insecticides, rodenticides, fungicides, herbicides, anti-sprouting pro-ducts and **plant-growth regulators**, disinfectants and similar products, **put up as described in heading 3808;**
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> xxxxxx

19. The matter was remanded by this Tribunal by order dated 19.02.2018 and the operative part of the order is as follows:

> "5. We have heard both the sides and perused the appeal record. The point under dispute is the correct classification of Brassinolide. The appellant claimed the same as fertilizer. The Department contends the product to be plant growth regulator. We note that there is only a fine distinction between 'fertilizer' and a 'plant growth regulator'. While fertilizer is generally for promoting the growth of plant or crop for desired increased harvest, the plant growth regulators work on specific areas resulting in modified growth or even retardation of certain growth. Without further going into the technicalities, we note that the experts who are dealing with the products of Indian market namely, Central Insecticides Board & Registration Committee and also the statutory provisions of Insecticides Act clearly recognize Brassinolide as plant growth regulator. The Board's classification dated 06/04/2016 also elaborately discusses about the scope of 'fertilizer' and 'plant growth regulators' for customs purposes. The impugned goods are listed by the said circular as "growth stimulators" for agricultural and horticulture crops. This clarification has been issued after detailed examination of technical literature as well as common trade practice. As such, we find that the claim of the appellant regarding the product being only a fertilizer and not a plant growth regulator is not tenable.
>
> **6. However, the appellants raised a legal issue regarding classification under Heading 3808. This is with reference to note 1 (a) (2) of the said Chapter 38. The learned Counsel fairly accepted that this was not examined earlier as this was not raised/contested also.** Since, this has a bearing of classification this aspect should be examined before arriving at classification under 3808 as the same is guided by chapter note also. Further, in the absence of chemical test in the present imports the classification has necessarily to be done based on documents recovered, literature filed by the appellant. When specifically asked about availability of current imports or samples from past imports we were informed no such samples were available and no imports currently. In such situation the classification has to be done with available literature and import documents only.

> 7. **In view of the above discussion and analysis, we note that the matter has to go back to the Original Authority to re-decide based on the observations made above**. **The applicability of chapter note and also the instructions issued by the Board along with that of competent authorities of Central Insecticides Board & Registration Committee, Insecticides Act etc. are to be examined by the Original Authority. The applicability of limitation as strongly contended by the appellant, as well as liability of the penalty, may also be decided afresh**."

20. Chapter heading 3808 mentions three forms in which the goods under the heading could be. It reads as follows:

> **"3808** Insecticides, Rodenticides, Fungicides, Herbicides, Anti-Sprouting Products and Plant-Growth Regulators, Disinfectants and Similar Products, put up **in Forms or Packings for Retail Sale or as Preparations or Articles** (For Example, Sulphur-Treated Bands, Wicks And Candles, And Fly-Papers)."

21. As may be seen, this heading covers products which are put up in **forms or packings for retail sale OR as preparations OR articles**. The Commissioner has, in the impugned order, found that the imported goods were put in packings for retail sale and also that the imported goods were preparations. There is no dispute that they were not articles. Learned counsel's submission is that although Chapter heading 3808 covers all three categories of goods mentioned above and the remand order required the Commissioner to examine whether the goods fall under 3808 or they were excluded by the Chapter Note 1(a) (2) to Chapter 38, since the remand order was given on his submission that the goods were not in retail packings, the

Commissioner should not have examined if they were preparations and hence fall under Chapter heading 3808.

22. Learned authorised representative for the Revenue, on the other hand, submits that the order of remand by this Tribunal nowhere restricted the Commissioner to examine only if the goods were in retail packings and forbid the Commissioner from examining if they were preparations or articles. Therefore, the Commissioner was correct in examining and observing that the imported goods were preparations in addition to finding that they were in retail packings.

23. We have considered the submissions on both sides.

24. Like in any judgment or order, the Final Order passed by this Tribunal in the first round of litigation also recorded the submissions from both sides and passed the order. The submissions by either side do not constitute the findings or operative part of the order of the Tribunal. There is nothing in the order of remand to show that the Commissioner was required to examine Chapter Note 1(a) (2) of Chapter heading 3808 partly only to the extent of the submissions by the learned counsel. The submission of the learned counsel that the scope of the Tribunal's order gets circumscribed by the appellant's submissions during the proceedings cannot be accepted. The Commissioner was correct in examining

whether the goods were preparations and such an examination was within the scope of the remand order.

C. Retail packages- scope

25. The Customs Tariff does not define 'retail packings'. According to learned counsel for the appellant, the finding in the impugned order that the packages in which the impugned goods were imported were retail packages is based on a total misconstruction of facts, only on assumptions, without any factual or legal basis and without any supporting evidence. According to the learned counsel, the Commissioner's findings in this regard are not correct for the following reasons.

(i) Based on enquiries on some e-commerce sites, the learned Principal Commissioner, in paragraph 5.4.2 of the impugned order observed that the goods imported by the Appellants in 20 Kg. drum or 25 packets of 1 Kg. each are available for retail sale and are in retail packages.

(ii) These enquiries were made behind the back of the Appellants and were neither relied upon in the SCN nor were disclosed to the Appellants at any stage during the proceedings, therefore, reliance on the same is in gross violation of the principles of natural justice.

(iii) Without prejudice to the above, the said finding of the learned Principal Commissioner is based on a total misconstruction of the factual position. Mere

availability of the goods on the e-commerce sites cannot be taken to mean that it is for retail sale and are in retail packages, unless, the requirement of these being for sale to the ultimate consumer for consumption by an individual or a group of individuals is also satisfied. The impugned order discloses no evidence that any consumer requires and actually purchased the goods in the packages of 25 kg or 25 packets of 1 kg each.

(iv) This finding is also contrary to Department's own investigation with the buyers of the Appellants who clearly disclosed using the impugned goods as raw material for further manufacture of their products.

(v) He relies on Rule 2(i) and 2(k) of Legal Metrology (packing commodities) Rules 2011 to assert that the imported goods were not in retail packings. These read as follows:

> **" Rule 2. Definition.**
> (j) "retail dealer" in relation to any commodity in packaged form means a dealer who directly sells such packages to the consumer and includes, in relation to packages as are sold directly to the consumer, a wholesale dealer who makes such direct sale to the consumer.
> (k) "retail package" means the packages which are intended for retail sale to the ultimate consumer for the purpose of consumption of the commodity contained therein and includes the imported packages."

(vi) Relying upon Rule 2(k) above, he submits that the appellant's products were not in packings meant for use by the consumer and therefore, they do not qualify as retail packages.

26. Learned authorized representative for the Revenue submits that since "retail packing" is not defined in the chapter note, Legal Metrology Rules, in particular, Rule 3 which reads as follow must be referred:

> **"3. Applicability of the Chapter-** The provisions of this Chapter shall not apply to,-
> (a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg; and
> (b) packaged commodities meant for industrial consumers or institutional consumers.
> Explanation :- For the purpose of this rule,-
> i) "institutional consumer" means the institutional consumer like transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use by that institution.
> ii) ii) "industrial Consumer" means the industrial consumer who buy packaged commodities directly from the manufacturer for use by that industry."

27. Learned authorised representative submits that it can be inferred from Rule 3 of Legal Metrology Rules that packings in excess of 25 kg or litres are definitely not retail packings. However, the appellant imported goods which were in packings of 25 kg or less. Therefore, they qualify as retail packings and hence fall squarely within the Customs Tariff heading 3808 and are not excluded by Chapter note 1(b).

28. We agree with the learned counsel for the appellant that the Commissioner has erred in collecting data and information in the form of enquiries through internet to come to the conclusion that the imported goods were not in retail packings. This evidence was never provided to the appellants to give them an opportunity to refute.

29. Both sides agree that 'retail packing' is not defined in the tariff. Both sides refer to different Rules of the Legal Metrology Rules to interpret the term. According to the learned counsel for the appellant, the goods were not in packings meant for consumer and hence were not retail packings in terms of Rule 2(k) of the Legal Metrology Rules. According to the learned authorised representative for the Revenue, since only packages of more than 25 kg or 25 litres are excluded as per Rule 3 of the Legal Metrology Rules, the packages in question, being of up to 25 kg do qualify as consumer packings. We find that while it is true that all packings over 25 kg are clearly excluded from the Legal Metrology Rules, it does not necessarily mean that all packings up to 25 kg are included from them and further that all such goods get covered by the definition of retail packings. There could be substances of much higher value, such as saffron or spices which will be sold even in wholesale in much smaller packings than 25 kg. Therefore, it needs to be seen if there is sufficient evidence on record to suggest that the goods which were imported were in retail packings. We do not find sufficient evidence to hold so, if we exclude the survey on internet and e-commerce websites conducted by the Commissioner after concluding the hearing and before passing the impugned order which we already have found cannot be used against the appellant.

D. Preparations

30. Learned counsel for the appellant submits that the finding of the Commissioner in the impugned order that the goods were a form of a preparation is without any factual or legal basis or any expert opinion and without any supporting evidence and the same is also beyond the terms of the remand order of this Tribunal and beyond the allegations in the SCN.

31. Learned authorised representative supports the impugned order and asserts that the goods in question were preparations and hence were clearly covered by CTH 3808.

32. We have considered the submissions. The first objection of the learned counsel to this finding is that it is beyond the allegations in the SCN. This submission cannot be accepted. This entire round of litigation was started not because of the SCN but because of a new ground raised by the appellant itself before the Tribunal in the first round of litigation; the ground was not raised or discussed before the lower authorities. It is in this context, that the question as to if the goods were in the form of preparations had to be examined.

33. The second submission of the learned counsel is that it is beyond the scope of the remand. As we have already noted, the remand was with a direction to examine if the impugned goods get excluded from CTH 3808 because of the Chapter Note which excluded separately defined chemicals other than products in forms mentioned in CTH 3808. One of

these forms is preparations. The Commissioner had, therefore, to examine if the goods were preparations.

34. The third submission of the learned counsel is that the finding has no legal basis nor any expert opinion was sought. An expert opinion or test or analysis is required if there is a question of the composition of the goods. In this case, there is no dispute the imported good is 0.1% Brassinolide. The rest are other inert material which predominate by weight. However, undisputedly, the essential character of the product is that of Brassinolide; and it was declared as such and was also sold as such.

35. We find that the statement of Smt. Rashmi Jain dated 06.05.2015, which is enclosed as Relied Upon Document 18 to the SCN dated 16.11.2015, clarified that the imported goods were in the form of powder which can be dissolved 1 gram in 10 litres of water and sprayed. The relevant portion of the statement is as follows:

> "On being asked specifically about the product 0.1% Natural Brassinolide Fertilizer, mentioned at Sl. No. (v) above, I stated that it is a natural extracted product from Cole Pollen and the 0.1% Natural Brassinolide Fertilizer is water soluble and a ready to use fertilizer.
>
> On being asked specifically about the description of the 0.1% Natural Brassinolide Fertilizer, I state as per the best of my knowledge, 01.% Natural Brassinolide is an extract of cole pollen which is a part of cole plant (rape seed of Brassica Napus). On being asked about the composition of the 01.% natural brassinolide, I state that it is (22R, 23R, 24S)-2alpha-3alpha, 22, 23

tetrahydroxy-24 methyl-B-Home-7 Oxa-5 alpha-Cholestan-6-one.

As stated above that product at Sl No. (v) is used for the growth of plant. On being asked about the manner in which the said product is used for the growth of plant, **I state that we have to dilute 1 gm in 10 ltr of water and foliar spray directly on the plant. I am submitting the write up of the functions of our said product to your goodself."**

36. According to the learned counsel for the appellant the imported goods were not preparations. As is commonly understood, a preparation is a mixture of the chemical/drug with other substances so as to make it ready to use directly or after a few steps such as dissolving in water. In pharmaceutical industry, any drug is first manufactured as bulk drug which is then converted into preparations such as tablets, capsules, syrups and injections which can be used either by the patient or administered by the doctor or nurse to the patient. Similarly, in pesticides, herbicides, plant growth regulators, the pure form of the chemical is mixed with other inert materials to convert it into powders, solutions, emulsifiable concentrates (EC), etc. which can be easily used in the field after mixing with water. Undisputedly, the brassinolide imported by the appellant is only of 0.1% concentration; the remaining 99.9% being inert material. As per the statement given by Smt. Rashmi Jain, this powder can be dissolved in water @ 1 gram in 10 litres water and sprayed. Therefore, it is not a technical

grade plant growth regulator but a preparation in powder form.

37. Learned authorised representative draws attention to the Explanatory Notes to HSN 3808, which, *inter alia,* clarifies as follows:

> **"These products are classified here in the following cases only:**
>
> (1) When they are put in packings (such as metal containers or paperboard cartons) for retail sales ……
>
> (2) When they have the character of preparations, whatever the presentation (e.g., as liquids, washes, or powders). These preparations consist of suspensions or dispersions of the active product in water or in other liquids (e.g. a dispersion of DDT (ISO)……. Solutions of active products in solvents other than water are also included here (e.g., solutions of a pyrethrum extract) or copper naphtahalene in a mineral oil.
>
> **Intermediate preparations requiring further compounding to produce the ready-for-use insecticides, fungicides, etc. are also classified here, provided, they already possess insecticidal, fungicidal, etc. properties."**
>
> …….

38. It is undisputed that the imported goods were brassinolide. Its strength is only 0.1% and the rest is not made up of impurities but other inert material. It has been stated in the statement of Smt. Rashmi Jain referred to above, that it should be mixed in the proportion of 1 gram in 10 litres water and sprayed which makes it clearly a preparation of Brassinolide. Even if the submission of the learned counsel that it is sold to other companies which prepare further preparations is considered, the imported goods will be intermediate preparations which are also squarely covered by CTH 3808 as per the explanatory notes to HSN 3808. **We thus find that the imported good was**

clearly a preparation of Brassinolide and was not excluded from CTH 3808 by Chapter note 1(a)(2) to Chapter 38.

E. On merits of classification

39. The imported goods were described as '0.1% Natural Brassinolide Fertilizer' and the appellant classified them under Chapter 31 of CTH as fertilisers. However, the appellant had sold it as Plant Growth Regulator. The SCN proposed classification as Plant Growth Regulator under Chapter heading 3808 based on the investigations and expert opinion. During the first round of litigation and also before us, learned counsel does not dispute that the good was Plant Growth Regulator. His submission during the first round of litigation was that even plant growth regulators cannot be classified under Chapter 38 in view of the Chapter Note 1(a) (2) which excludes "specially defined chemicals" from the Chapter unless they are in the forms as described in 3808 and since their goods were not put up in packings for retail sale, they cannot be classified under 3808. His submission is that once the classification proposed in the SCN fails, the importer's classification under Chapter Heading 31010099, must survive, even if it is not correct because no notice has been served proposing any other classification.

40. Learned authorised representative, on the other hand, relies on the judgment of the Supreme Court in **Pesticides**

Manufacturers & Formulators Association of India vs. Union of India[16] and submits that even if the plant growth regulators were of technical grade, they are still classifiable under 3808. He also submits that even the exclusion from Chapter 38 by Chapter Note 1(a) (2) does not support the appellant's case because this Chapter Note excludes specially defined chemicals except when they are put up in the forms described in Chapter heading 3808, viz., as retail packings or as preparations or as articles. The imported goods meet two of these criteria as they are preparations and were also in retail packings.

41. We find that the 'brassinolide' imported by the appellant is a plant growth regulator is no longer in dispute. Although it was described as 'fertilizer' in the invoice and documents of the Chinese supplier and also in the Bills of Entry by the appellant, after importing, the appellant sold the goods as 'plant growth regulator'. Evidently, it is understood as plant growth regulator even in the trade. This is consistent with the expert opinion from IARI and the CBEC's Circular based on which the SCN was issued. The appellant had not contested this fact before us or before this Tribunal in the earlier round of appeal.

42. The appellant's case during the first round of litigation was that even though it is a plant growth regulator, it is still not classifiable under 3808 in view of the Chapter Note 1(a) (2) to Chapter 38 and to examine this claim, the matter was

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[16] **2002 (146) ELT 19**

remanded to the original authority because this defence was not taken before the original authority. The Chapter Note excludes specially defined chemicals from Chapter 38, except when they are put up in forms described in 3808 viz., as retail packings, as preparations and as articles. Of these, there is no dispute that the imported brassinolide were not articles which leaves with retail packings and preparations. We have already found that the imported brassinolide was a preparation. Since the brassinolide is in the form indicated in CTH 3808 by being preparation, it is not excluded by Chapter Note 1 (a) (2). Therefore, it falls under CTH 3808.

F. Extended period of limitation

43. The SCN invoked extended period of limitation under section 28 which can be invoked when the duty was not levied, not paid, short levied, short paid or erroneously refunded by reasons of

(a) any collusion;

(b)any willful mis-statement; or

(c) suppression of facts

44. The SCN invoked extended period of limitation on the ground that the appellant had malafide intention to evade its customs duty liability. Relevant extract of SCN dated 16.11.2015 issued to M/s Midas Fertchem is as follow:

> "(viii) Authorized signatory of the said importer during their statement has stated that they took the verbal guidance from their overseas supplier M/s Chengdu Newsun, also a manufacturer of Brassinolide who guided them that Brassinolide is a

> fertilizer. They also tried to support their stand by submitting the copies of Invoice of M/s Chengdu Newsun wherein the word 'Fertilizer' is used by the said supplier. However, a copy of literature of said product retrieved from the web page of M/s Chengdu Newsun, clearly reveals that Brassinolide is a 'Botanic PGR From mentioning the word "fertilizer" and CTH "31010099" in the invoice of M/s Chengdu Newsun and in the Bill of Entry of importer, it appears that the importer had a malafide intention since the start of their import of the said product. It also appears that the said importer either forged the documents supplied by the supplier or influenced the supplier to quote the word fertilizer in their Invoice for the purpose of evasion of duty.
>
> Secondly, literature of M/s Chengdu Newsun as retrieved from the office premise of the party as mentioned in Para 10.2 supra clearly described Natural Brassinolide 90%, 70%, 2% TC, 0.1%, 0.2% SP, 0.0075% SL as a 'Plant Growth Regulator. From this it also appears that the fact of Brassinolide being a PGR was in the notice of the said importer firm, but they intentionally mis- declared their said product as fertilizer while filing the Bills of Entry instead of declaring it as Plant Growth Regulator with an intention to evade payment of appropriate duty of Customs. It also appears that by imparting different versions of the manufacturer of the said product, the party is thereby mis-leading the department to support their stand on Brassinolide being a fertilizer and not a plant growth regulator, which appears to be incorrect and an act of malafide intention to evade their Customs duty liability."

45. The impugned order confirmed the demand on the grounds that the appellant misrepresented and suppressed facts. The relevant paragraphs are as follows:

> " The importer by mentioning fertilizer on the BE and submitting incorrect facts before the assessing authorities has misguided them and cannot take the plea that the department was aware of the facts. This misrepresentation and suppression of facts at the time of assessment comes within the purview of sub section 4 of Section 28 of the Customs Act warranting invocation of extended period of limitation. The documents submitted by the importer are accepted on their face value being correct however suppression and misrepresentation of facts could only be detected upon detailed investigation which included search of the premises examining incriminating records and other

aspects which in this case has led to detection of fraud and the malafide intent of the importer."

46. Learned counsel submitted even if the matter is decided on merits against the appellant, extended period of limitation cannot be invoked as none of the three elements essential to invoke extended period of limitation were present. The appellant imported the goods which were exported by the Chinese supplier as 'brassinolide fertilizer'. All documents including invoice, packing list, etc. described the imported goods the same way and hence the Bills of Entry were filed accordingly classifying the goods under CTH 31010099. The officers assessing the Bills of Entry sought additional information and literature in respect of several Bills of Entry, which was provided to them. After examining the literature and information, the proper officers accepted the appellant's classification of the goods. What the appellant did after importation and how it sold in the market are irrelevant because the goods must be assessed as they are imported. The appellant sold the imported goods as Plant Growth Regulators in the market because that is how they are known in the Indian market. No information was hidden and all literature sought by the officers was promptly provided. So, there is no evidence of any collusion or willful misstatement or suppression of facts.

47. Learned counsel further submitted that claiming classification of the imported goods under a particular CTH does not amount to mis-declaration but is only self-

assessment. Such self-assessment is subject to re-assessment by the officers and they also accepted the classification after examining the literature.

48. Learned authorized representative for the Revenue submits that it is clearly a case of mis-declaration of plant growth regulators as fertilizers. The appellant was fully aware that they were plant growth regulators and sold them as such. Despite such knowledge, the appellant mis-declared the nature of goods to evade paying the duty. Therefore, extended period of limitation has been correctly invoked.

49. We have considered the submissions on both sides. Section 46 of the Act requires the importer of any goods to make an entry thereof by presenting a Bill of Entry. It also requires the importer to make a declaration that the contents of the Bill of Entry are true. Section 17(1) requires the importer to self-assess the duty payable on the goods which is subject to any re-assessment by the proper officer under section 17(4). These two sections read as follows:

> **"Section 46. Entry of goods on importation. -**
> **(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting electronically on the customs automated system] to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed** :
> *****
> **(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed**.

***

Section 17. Assessment of duty. –

(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.

(2) The proper officer may verify the the entries made under section 46 or section 50 and the self assessment of goods referred to in sub-section (1) and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.

Provided that the selection of cases for verification shall primarily be on the basis of risk evaluation through appropriate selection criteria.

(3) For the purposes of verification] under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any document or information, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self- assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods."

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50. In practice, the importer makes an entry under section 46 and also self-assesses duty under section 17(1) by filing the Bill of Entry. There is no separate mechanism to self-assess duty. The columns pertaining to classification, valuation, rate of duty and exemption notifications which determine the duty liability are part of the Bill of Entry which is also an entry under section 46. Thus, although the Bill of Entry requires the importer to make a true declaration and further to confirm that the contents of the Bill of Entry are true and correct, the columns pertaining to classification,

exemption notifications claimed and in some cases even the valuation are matters of self-assessment and are not matters of fact. Self-assessment is also a form of assessment but the importer is not an expert in assessment of duty and can make mistakes and it is for this reason, there is a provision for re-assessment of duty by the officer. Simply because the importer claimed a wrong classification or claimed an ineligible exemption notification or in some cases, has not done the valuation fully as per the law, it cannot be said that the importer mis-declared. As far as the description of the goods, quantity, etc. are concerned, the importer is bound to state the truth in the Bill of Entry. Thus, simply claiming a wrong classification or an ineligible exemption notification is not a mis-statement. Assessment, including self-assessment is a matter of considered judgment and remedies are available against them. While self-assessment may be modified by through re-assessment by the proper officer, both self-assessment and the assessment by the proper officer can be assailed in an appeal before the Commissioner (Appeals) or reviewed through an SCN under section 28. Therefore, any wrong classification or claim of an ineligible notification or wrong self-assessment of duty by an importer will not amount to mis-statement or suppression.

51. Insofar as the description of the goods is concerned, usually, the import documents reflect the true nature and quantity of the goods imported but sometimes they may not.

The importer is required to make a true declaration of the goods which are actually imported and not just the goods declared in the import documents. Thus, if the goods actually imported are more or different from what is declared in the Bill of Entry, the importer would have made a mis-declaration.

52. Extended period of limitation can be invoked in case of collusion or any willful mis-statement or suppression of facts. According to the Revenue, the appellant had wrongly declared the imported goods as fertilizers and they were also declared so in the invoices, packing lists, etc. supplied by the Chinese suppliers. The appellants were fully aware that the imported goods were plant growth regulators and were also selling the goods as plant growth regulators. Therefore, according to the Revenue, the appellant has willfully mis-stated the nature of the imported goods in the Bills of Entry as fertilizers and hence extended period of limitation was correctly invoked.

53. We find Revenue is correct in submitting that the appellants had sold the imported goods as plant growth regulators and hence must have been aware that they were not fertilizers and hence had wrongly classified them as fertilizers. It is equally true that the assessing officers were also aware of the nature of the goods and had, on more than one occasion, called for the technical literature on the product which the appellants had provided. After studying

the technical literature, the officers cleared the goods as fertilizers. Balancing these two facts on record, we do not find that sufficient grounds exist to invoke extended period of limitation in this case. We, therefore, find that extended period of limitation could not have been invoked in the present case. In our considered view, demand can be sustained only within the normal period of limitation along with applicable interest.

G. Penalties

54. In the impugned orders, penalty under section 114A was imposed on the appellant importers while penalty under section 112 was imposed on Smt. Rashmi Jain and Shri Manish Jain. According to the learned counsel for the appellants, the penalties on both the importer appellants and on the individuals are not imposable because these are merely matters of opinion. The appellants self-assessed the duty on the imported goods in the Bills of Entry as fertilizers which was also accepted by the proper officers of Customs during re-assessment, that too, after calling for and examining the technical literature. Simply because DRI sent an alert and after consulting the experts CBEC had issued Circulars according to which the goods deserve to be classified as plant growth regulators, it does not mean that the appellant have mis-declared or suppressed any facts. Therefore, no penalties are imposable.

55. Learned authorized representative for the Revenue supports the impugned orders and asserts that the importer

was fully aware that the imported goods were plant growth regulators but had wrongly declared them as fertilizers and classified them accordingly to evade duty. This becomes evident from the fact that the appellant itself has, after importing the goods, been selling them as plant growth regulators. Therefore, it is not a case of innocent mis-declaration. Therefore, the penalties have been correctly imposed.

56. We have considered these submissions. The two sections under which penalties were imposed are section 114A and section 112. These read as follows:

> **"Section 114A. Penalty for short-levy or non-levy of duty in certain cases.**
>
> **Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined**:
> **Provided** that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined:
> **Provided** further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :
> **Provided** also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate

Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account:

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

SECTION 112. Penalty for improper importation of goods, etc.-

Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such

person under this section shall be twenty-five per cent. of the penalty so determined;]
(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;
(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;
(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest."

57. As may be seen the ingredients necessary for imposing a penalty under section 114A are identical to the ingredients necessary to invoke extended period of limitation. We have found that extended period of limitation cannot be invoked in these cases. Logically, the penalty under section 114A imposed on the appellant importers also cannot be sustained for the same reason.

58. As far as the penalty under section 112 is concerned, it is imposable on any person whose acts or omissions render the goods liable to confiscation under section 111 or who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111. In these

cases, **goods were held liable for confiscation under section 111 (d) and (m)** and consequently penalty was imposed under section 112. However, since the goods were not physically available **no order of confiscation was issued nor was any redemption fine was imposed by the impugned orders**. Section 111(d) and (m) read as follow:

> **"Section 111. Confiscation of improperly imported goods, etc.**
> The following goods brought from a place outside India shall be liable to confiscation: -
> (a)******
> ****
> (d) any goods which are **imported** or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, **contrary to any prohibition i**mposed by or under this Act or any other law for the time being in force;
> *****
>
> (m) **any goods which do not correspond in respect of value or in any other particular with the entry made under this Act** or in the case of baggage with the declaration made under section 77 (2) in respect thereof or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;"
>
> ******

59. As far as section 111(d) is concerned, there is nothing on record to show that there was any prohibition on import of the goods and so it does not apply to the present case. As far as 111(m) is concerned, we do not find any mis-declaration of the goods, although they deserved to be classified under CTH 3808 as "plant growth regulators" but all the documents including literature was made available to the officer during assessment. **We, therefore, also find**

section 111(m) does not apply. Consequently, penalties under section 112 cannot be sustained.

60. We, therefore, find that the penalties under sections 114A and 112 imposed on the appellants are not sustainable and need to be set aside.

H. Quantum of penalty cannot take into account Additional Duty of Customs and SAD because these are levied under the Customs Tariff Act,1975 and not under the Customs Act, 1962 and the provisions of penalty under Customs Act, were not made applicable to these levies.

61. The alternative submission of the learned counsel for the appellants is that if penalties are upheld then they need to be re-determined only based on the basic customs duty and not considering the additional duty of customs or the Special Additional Duty of Customs. As we have found that the penalties themselves cannot be sustained, it is not necessary to examine this alternative submission.

62. In view of the above, all five appeals are disposed of as below:

a) **Customs Appeal 52239 of 2021** filed by M/s.Midas Fertchem Impex Pvt. Ltd. is partly allowed and partly rejected upholding the classification of the imported goods under CTH 3808 in the impugned order and upholding the confirmation of demand of differential duty for the normal period only along with applicable interest. The demand of duty for extended period of limitation is set aside. The penalty under

section 114A imposed on the appellant is also set aside.

b) **Customs Appeal 52240 of 2021** filed by Smt. Rashmi Jain is allowed and the penalty imposed on her by the impugned order is set aside.

c) **Customs Appeal 52241 of 2021** filed by Shri Manish Jain is allowed and the penalty imposed on him by the impugned order is set aside.

d) **Customs Appeal 52242 of 2021** filed by M/s. Midas Import Corporation is partly allowed and partly rejected upholding the classification of the imported goods under CTH 3808 in the impugned order and upholding the confirmation of demand of differential duty for the normal period only along with applicable interest. The demand of duty for extended period of limitation is set aside. The penalty under section 114A imposed on the appellant is also set aside.

e) **Customs Appeal 52243 of 2021** filed by Smt. Rashmi Jain is allowed and the penalty imposed on her by the impugned order is set aside.

[Order pronounced in open court on **13.01.2023**]

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)

Tejo