CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH - COURT No. III

Customs Appeal No. 40346 of 2025

(Arising out of Order-in-Appeal Seaport C.Cus.II No.1231 & 1232/2024 dated 12.12.2024 passed by Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai 600 001)

M/s.Ankit Impex **.... Appellant**
D-658, Saraswati Vihar,
Pitampura,
New Delhi 110 034
Through its Proprietor Mr. Ankit Gupta

VERSUS

The Principal Commissioner of Customs ... Respondent
60, Rajaji Salai,
Custom House,
Chennai 600 001.

WITH

Customs Appeal No. 40449 of 2025

(Arising out of Order-in-Appeal Seaport C.Cus.II No.1231 & 1232/2024 dated 12.12.2024 passed by Commissioner of Customs (Appeals-II), 60, Rajaji Salai, Custom House, Chennai 600 001)

M/s.SBB International **.... Appellant**,
D-658, Saraswati Vihar,
Pitampura,
New Delhi 110 034
Through its Proprietor Mr. Ajay Kumar

VERSUS

The Principal Commissioner of Customs ... Respondent
60, Rajaji Salai,
Custom House,
Chennai 600 001.

APPEARANCE :

Shri Prem Ranjan Kumar, Advocate for the Appellant
Ms. Rajni Menon, Authorized Representative for the Respondent

CORAM :

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER Nos.40179-40180/2026

DATE OF HEARING : 10.09.2025
DATE OF DECISION : 04.02.2026

Per: Shri P. Dinesha

M/s.Ankit Impex & M/s.S.B.B. International, New Delhi had imported the item self-declared as 'Recycled LDPE Granules' vide various Bills of Entry listed in the Annexure A & B of the Show Cause notice including Bill of Entry No.268168 dated 22.07.2009 classifying them under CTI 39019090 and paid Basic Customs Duty (BCD) @ 5% by availing benefit of exemption under Sl.No.477 of the Customs Notification No.21/2002, Education Cess-3% and CVD-8% (totally 18.624%). The Bill of Entry was filed through the Customs Broker M/s.Premier Shipping Agencies,

Chennai and assessed provisionally and goods were released on Bond.

2. It appears that based on specific intelligence to the effect that various importers of plastic re-processed granules including M/s.S.B.B. International and M/s.Ankit Impex, Delhi were resorting to undervaluation of their imports and thereby evading payment of appropriate duties of Customs, investigation was initiated by the DRI resulting in consequential search at the premises of Shri Vijay Gupta, Director of M/s.S.B.B. International and Shri Ankit Gupta, Proprietor of M/s.Ankit Impex in the presence of S/Shri Vijay Gupta Ankit Gupta and other independent witnesses. During the search, it appears that incriminating documents including actual invoice bearing No.YS 090711 dated 07.07.2009 pertaining to Bill of Entry No.268168 dated 22.07.2009 was recovered and seized under Mahazar dated 17.07.2009. Further, 2 MTs of recycled plastic granules totally valued at Rs.1,28,865/- were also seized under mahazar dated 07.01.2020.

3. It is the case of the Revenue that imported items viz. Recycled LDPE Granules are not assessable with the value declared in the Bills of Entry listed in Annexure A & B to the SCN, but on the value re-determined with the actual Invoice recovered and residual values submitted by the DRI for levying correct duty; apart from invoking other penal provisions of the Customs Act, 1962 imposing upon the importers. Hence, a Show Cause Notice dt. 23.08.2013 was issued to the Appellants proposing to reject the declared value in respect of the goods imported vide 27 Bills of entry listed in Annexure A & B, to re-determine the value in respect of goods imported vide Bill of Entry No.268168 dated 22.07.2009, to demand differential duty, to confiscate the goods under Section 111 (m) of the Customs Act, 1962 and to impose penalty under Section 112(a)/Section 114A and Section 114AA of the Customs Act, 1962. After due process, the Adjudicating Authority passed Order-in-Original No.45/2023 dated 29.03.2023 whereby he rejected the assessable value declared by the Importers, re-determined the value of goods as proposed in respect of Bill of Entry No.268168 dated 22.07.2009, demanded differential duties, confiscated the goods by giving option of redeeming the goods on payment of redemption fines, appropriated the

payments made voluntarily by importers and imposed penalties under Section 114A/114AA ibid. Aggrieved by the order of Adjudicating Authority Appeal was filed before Commissioner (Appeals), Chennai which having been rejected *vide* Order-in-Appeal No.1231 & 1232/2024 dated 12.12.2024, the present Appeals are filed by Appellants-Importers.

4. Heard Shri Prem Ranjan Kumar, Advocate for the Appellants-Importers and Ms. Rajni menon, Ld. Deputy Commissioner for the Respondent-Revenue. We have carefully considered the rival contentions and also the documents placed on record.

5. A perusal of Order-in-Original makes it clear that the Adjudicating Authority has held that the importer has not explained with written submissions to the SCN despite the relied upon documents had already been provided to the Noticee along with the SCN and they had continuously sought for the relied upon documents to the SCN to submit their reply. The Adjudicating Authority has informed them to submit reply based on the available documents but they

appear to have not responded. The Adjudicating Authority has held that the imported item is "Recycled LDPE Granules" as per declaration in the respective 28 Bills of Entry (subject Bs/E) detailed in Annexure A & B of the SCN with examination of goods pertaining to Bill of Entry No.268168 dated 22.07.2009 having been carried out by the DRI officers. Shri Ankit Gupta in his voluntary statements appear to have agreed that the recovered invoice is the actual invoice of the supplier and the one submitted to the Customs was fabricated, to evade payment of Customs duty by M/s.Ankit Impex and M/s.S.B.B. International. Thus, it is held to have proved that the importer had undervalued subject import goods by submitting false invoices at the time of filing the said Bills of Entry to the Customs. Hence, the Adjudicating Authority was of the view that the importer had knowingly submitted the false invoices in respect of the subject Bills of Entry with an intention to evade appropriate Customs duties. Accordingly, he has held that the transaction value under Rule 3(1) of CVR 2007 declared by the importer in respect of 27 Bills of Entry except Bill of Entry No.268168 dated 22.07.2009 is incorrect and the same is to be rejected under Rule 12 (1) of CVR 2007 for assessment to duty. It is further observed that the imported

item is reprocessed LDPE Granules, the contemporary database values of identical goods and similar goods were not congenial to be taken under rule 4 & 5 of CVR 2007; in the absence of reliable, quantifiable and verifiable data, the value of the goods could not be determined under Rule 6,7 & 8 of the CVR 2007; and concluded that importer has declared only half the actual value of the imported goods for the cleared 27 Bills of Entry detailed in Annexure A & b of the SCN and hence, it is appropriate to apply Rule 9 of CVR, 2007 by doubling the value declared under the Residual method.

6. The Commissioner (Appeals) failed to take note of the record of personal hearing wherein the Adjudicating Authority himself recorded that the relied upon documents requested by the Appellant are not available with the Adjudicating Authority and that efforts are being made to obtain the same from the DRI and on receipt of the same it will be provided. However, the Adjudicating Authority while passing the Impugned Order wrongly held that the relied upon documents has already been provided to the Appellant along with the Show Cause Notice and seeking the same

again and again is an afterthought and delaying tactics. This assertion of the Adjudicating Authority was contrary to the facts on record as vide Letter dated 05.08.2019 the office of the Adjudicating Authority had itself intimated the DRI that the documents which have been sought for by the Appellants are also not available in their file received from DRI and therefore, a request was made to provide the same to the office of the Adjudicating Authority and also to the Appellants.

7. The Commissioner (Appeals) failed to appreciate that Show Cause Notice under Section 28(4) of the Customs Act, 1962 is not maintainable since the consignments were cleared provisionally and these remained to be finalised for want of test reports. This Tribunal vide its Final Order No. 40819 to 40823/2024 dated 09.07.2024 in the case of **M/s. Shami Impex Vs Commissioner of Customs & Ors**. has held that when the assessment was provisional demand cannot be raised under Section 28 of the Customs Act, 1962. It is also pertinent to mention here that the show cause notice issued to the present Appellants also relied upon the

facts of the alleged under valuation pertaining to the same period for the similar product by M/s.Shami Impex.

8. In this case, we find that though relied upon documents have been mentioned in the SCN, it is claimed by the Assessee that such relied upon documents have not been given to them along with the SCN, as against which the Adjudicating Authority asserts that the RUDs were given along with the SCN, but the same does not go well with his own findings at paras 3.A & B of the Order-in-Original.

9. This apart, the other ground urged during the hearing before us is the sustainability of demand raised Under Section 28 of the Act primarily on the ground that the consignments in question were cleared provisionally while awaiting test reports and hence, no demand could be raised under Section 28 *ibid*. Ld. Advocate thus contended that when the assessment itself was not finalised, raising demand by invoking Section 28 *ibid* is too premature, that none of the requirements of said section has been held to be unfulfilled by the Appellant and hence, the Adjudicating Authority has only jumped the gun in a haste.

10. In this regard, Ld. Advocate has placed reliance on a decision/Order of this very Chennai Bench in the case of **M/s. Shami Impex and Others Vs Commissioner of Customs** [Final Order Nos. 40819-40823/2024 dated 09.07.2024] wherein the Bench has set aside the demands raised under Section 28 *ibid*.

11. We have perused the above decision/Order and the relevant para reads thus:

> *'…*
> *7.3 Its only after final assessment that the relevant date for issue of a notice to recover duty which has not been levied or has been short levied etc. involving fraud, if any, becomes operative. By issuing a legally defective notice, the opportunity to examine the probative value of the documents including statements on which reliance was placed by the department, in support of its allegations, was lost. The judgments cited by revenue regarding fraud are hence not found relevant in the peculiar facts of this case.*
>
> *8. We also find that there have been a number of judgments of Constitutional Courts giving clarity on this issue.*
>
> *8.1 The Hon'ble Supreme Court **in Canon India Pvt. Ltd. Vs Commissioner of Customs** [2021 (376) E.L.T. 3 (S.C.) held that the nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, under section 28 of CA 1962, is broadly a power to review the earlier decision of assessment. Hence the section comes into play only when assessment is final. The relevant portion of the judgment reads as follows:*
>
> > *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."

(emphasis added)

*8.1 In the case of **AS Syndicate (Warehousing) P. Ltd. Vs Commissioner of Customs (Port)** [2009 (12) TMI 609-CALCUTTA HIGH COURT)], the Hon'ble High Court had an occasion to analyse the issue as to whether the demand under Section 28 of the Customs Act, 1962 can be raised before the finalization of assessment. The Hon'ble High Court after referring to the analogous provisions under Rule 9- B(1) of Central Excise Rules, 1944, held that there being no final assessment, the demand-cum Show Cause Notice is without jurisdiction and quashed the same. The relevant Paragraphs reads as under:-*

"4. Between March, 1997 and October, 2000, consignments of the said goods imported by the petitioners, covered by 54 bills of entry, were provisionally assessed under Heading 21.06 as per the order of the Commissioner of Customs (Port) in File No. S202 Gr. I (P) 29/97A dated 27th March, 1997.

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

6. Even before finalization of assessment, a demand-cum-show cause notice dated 4th July, 2001 was issued to the petitioners under Section 28 of the Customs Act, 1962, inter alia demanding Rs. 4,15,03,279/- along with penalty and interest.

7. The short question involved in this writ application is whether any show cause notice under Section 28 of the Customs Act, 1962 can be issued, unless there has been final assessment.

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

18. The submission of the respondents, that what is relevant is the substance of the show cause notice and not its form, may be correct. It is, however, difficult to accept the argument that the show cause notice is, for all practical purposes, under Section 18 of the Customs Act, 1962.

19. As rightly argued by Counsel appearing on behalf of the petitioners, there is no provision for issuance of show cause notice for finalization of assessment.

Moreover, it is patently clear that a demand in terms of Section 28(1) has been raised. The nomenclature also shows that the impugned notice is a demand-cum- show cause notice.

20. The argument that by the impugned show cause notice, the petitioners were only given an opportunity to make their submissions before final assessment, cannot be accepted, since the petitioners have also been directed to show cause why the goods should not be held confiscable and why penalty should not be imposed. There could be no question of confiscation, penalty or interest till after final assessment."

(emphasis added)

8.2 The Hon'ble High Court of Bombay in the case of ***Commissioner of Customs (Import), Mumbai Vs Mahesh India*** *[2006 (7) TMI 306 - BOMBAY HIGH COURT] held that the Show Cause Notice issued under Section 28 when the goods have not been finally assessed is bad in law and not maintainable. The relevant Paragraphs reads as under:-*

"2. The dispute in the present case pertains to the show cause notice issued by the Directorate of Revenue Intelligence unit of the customs department ("D.R.I." for short) on 22-3-93 in respect of the goods admittedly cleared on provisional assessment basis.

3. By an order-in-original dated 9th February, 1996, the Commissioner of Customs, Mumbai had held that the above show cause notice issued by DRI was bad in law because the goods were provisionally assessed and moreover final assessment order has been passed on 22-6-94 that is after the impugned snow cause notice by DRI.

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

6. It is true that in the light of the Judgment of this Court in the case of ***Electron Textile Exports (P) Ltd.*** *& Anr. (supra), the findings recorded by the Tribunal that the officers of D.R.I. are not entitled to issue show cause notice under Section 28 and 124 of the Customs Act cannot be sustained. However, in view of the finding given by the Tribunal that on the date on which the impugned show cause notice was issued, the goods were provisionally assessed, the impugned notice was not maintainable. Therefore, even if the D.R.I, had jurisdiction to issue show cause notice, in the facts of the present case, since the goods were provisionally assessed, there could not be any short levy and*

consequently show cause notice on the ground of short levy could not be issued."

(emphasis added)

*8.3 The Hon'ble High Court of Calcutta in the case of **Jaju Petro Chemical Pvt. Ltd. & Another Vs. Commissioner of Customs (Port) & Others** [2017 (354) ELT 614 (Cal) / 2017 (7) TMI 633 - CALCUTTA HIGH COURT], considered the issue with regard to the demand raised under Section 28 of the Customs Act, 1962 when the assessment was only provisional. It was observed that when the duty to be paid is yet to be finalised the importer cannot be saddled with the guilt of not paying the duty or short paying the duty. The relevant Paragraph reads as under:-*

"2. Learned advocate for the petitioner submits that, the petitioner had imported certain materials into India. The petitioner had applied under Section 18(1) of the Customs Act, 1962. The application under Section 18(1) of the Act of 1962 has not been finally adjudicated upon under Section 18(2) of such C/40144/2019 Act. Without a final adjudication under Section 18(2) of the Act of 1962, the authorities have sought to invoke Section 28 of the Act of 1962, read with Section 124 thereof. He submits that, the authorities are entitled to invoke Section 28 of the Act of 1962, if and only if, the petitioner is guilty of not paying the levy or short-paying the same or for the reasons specified in Section 28 thereof. None of the grounds available to invoke Section 28 of the Act of 1962 exists in the facts of the present case. The levy payable by the petitioner is yet to be adjudicated upon, for the petitioner to have defaulted in payment of the same and Section 28 being invoked.

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

15. The petitioner had imported what is claimed to be slack wax. DRI had initiated an investigation on the suspicion of undervaluation. Such investigation conducted by DRI was commodity specific rather than importer specific. This fact appears from the impugned show cause notice as also the affidavits of the authorities.

16. The records made available to Court establish that, the petitioner had applied under Section 18(1) for the purpose of assessment. Section 18(1) of the Customs Act, 1962 permits the importer, where he is unable to make self-assessment, to make a request to the proper

officer for assessment. In the present case, the petitioner had done so. Under Section 18(2) of the Act of 1962, it is the duty of the officer concerned to inform the duty leviable on the goods imported as finally assessed. In the present case, a final assessment of the duty has not happened. Nothing has been placed on record to suggest otherwise. The Customs Authorities have invoked Section 28 of the Act of 1962 without a final order of assessment. Section 28 of the Act of 1962 allows the Customs Authorities to recover duties not levied or short- levied or erroneously refunded. In the present case, none of the situations contemplated under Section 28 has arisen. The duty is yet to be finally assessed for the petitioner to be said to be guilty of not paying the duty or paying short-levy of the duty payable. The question of refund does not arise at all. Therefore, a failure contemplated under Section 28 of the Act of 1962 not happening, the authorities should not have invoked Section 124 of the Act of 1962. Section 124 of the Act of 1962 allows issuance of show cause notice before confiscation of goods."

(emphasis added)

8.4 We also find that a Coordinate Bench of this Tribunal in the case of ***Lan Esenda Ltd. Vs. Commissioner of Customs, Mumbai*** *[2005 (192) ELT 305 (Tri.- Mumbai)] held that the penalties imposed alleging under valuation of goods before finalisation of assessment cannot sustain. A similar issue has also been recently examined by a Coordinate Bench of this Tribunal in* ***M/s. Shell India Markets Private Limited Vs Commissioner of Customs****, Chennai [2024 (3) TMI 1189 - CESTAT CHENNAI]. The judgment relied upon the case of* ***AS Syndicate (Warehousing) P. Ltd.*** *(supra).*

8.5 In the hierarchical judicial system like ours, the norm is that wisdom of the Tribunal has to yield to the higher wisdom of the Constitutional Courts above. Further it is also a well-accepted norm of judicial discipline that a Bench of co-equal strength must follow the earlier decision of another Bench of co-equal strength, more so when it is based on the judgments of superior courts.

9. Based on the discussions above, we have no hesitation in setting aside the impugned order and allowing the appeals. Once the demand itself fails the appropriation of deposits towards duty, the penalties imposed on the appellants and the confiscation of the goods also fail. The appellants are eligible

for consequential relief as per law. The appeals are disposed of accordingly.'

12. In view of the above clear findings of this Bench which squarely applies to the facts of the present Appeals as well, we have to hold that the demands, the appropriation of deposits towards duty, the penalties imposed on the Appellants and the confiscation of the goods have to be set aside, which we hereby do. The Appellants are eligible for consequential reliefs as per law. The Appeals are disposed of accordingly.

(Order pronounced in open court on 04.02.2026)

sd/- sd/-

(VASA SESHAGIRI RAO) **(P. DINESHA)**
Member (Technical) Member (Judicial)

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