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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 9th April, 2012.

7 CEAC 44/2011

SUNIL MITTAL Petitioner
Through Ms.Seema Jain with Mr.Ajay K.Jain &
Ms.Savita Singh, Advs.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through Mr.Kamal Nijhawan , Sr.Standing
Counsel with Mr.Sumit Gaur, Adv.

8
+ CEAC 45/2011

RAJESH MITTAL Petitioner
Through Ms.Seema Jain with Mr.Ajay K.Jain &
Ms.Savita Singh, Advs.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through Mr.Kamal Nijhawan , Sr.Standing
Counsel with Mr.Sumit Gaur, Adv.

9
+ CEAC 46/2011

TANISHQ WIRES & CONDUCTORS EXCISE Petitioner

Through Ms.Seema Jain with Mr.Ajay K.Jain &
Ms.Savita Singh, Adv.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through Mr.Kamal Nijhawan , Sr.Standing
Counsel with Mr.Sumit Gaur, Adv.

16

+ CEAC 41/2011

DINESH KUMAR GUPTA Petitioner
Through Ms.Seema Jain with Mr.Ajay K.Jain &
Ms.Savita Singh, Adv.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through Mr.Kamal Nijhawan , Sr.Standing
Counsel with Mr.Sumit Gaur, Adv.

17

+ CEAC 42/2011

NATRAJ PLAST INDUSTRIES LTD. Petitioner
Through Ms.Seema Jain with Mr.Ajay K.Jain &
Ms.Savita Singh, Adv.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through Mr.Kamal Nijhawan , Sr.Standing
Counsel with Mr.Sumit Gaur, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

SANJIV KHANNA,J: (ORAL)

These appeals under Sections 35G of the Central Excise Act, 1944 ("Act" for short) arise out of a common order passed by the Customs Excise and Service Tax Appellate Tribunal ("Tribunal" in short) dated 4th July, 2011. As the facts are similar and the issues raised are interconnected, we deem it appropriate to examine the issues and contentions raised in this common order.

2. Appeal No.42/2011 filed by the Natraj Plast Industries Ltd., for the sake of convenience and with the consent of the counsel for the parties, is treated as the lead case.

3. The contention of the appellant is that the impugned order passed by the Tribunal holding that there was clandestine removal of resin CP172SG by Natraj Plast Industries Ltd. to the extent of 768.03 Mt is perverse. The Tribunal has wrongly and erroneously recorded that 768.03 Mt of resin was sold and transported to M/s Aditya Plastics, sole proprietorship of Mr. Rajesh Mittal and M/s Mukesh Industries, sole proprietorship of Mr. Sunil Mittal.

4. Learned counsel for the appellant accepts and admits that there was clandestine removal and sale of resin CP172SG by Natraj Plast Industries Ltd. to Aditya Plastics and Mukesh Industries but it is submitted that the quantity computed by the Tribunal is based upon surmises and conjectures and there is no concrete evidence or material to hold that 768.03 Mt. of resin CP172SG was clandestinely sold.

5. Resin CP1725Sg is manufactured by one company in India, namely M/s Chemiplast Sanmar Ltd. There is no dispute that the appellant, Natraj Plast Industries Ltd., has purchased 1102.715 MT of the aforesaid resin from M/s Chemiplast Sanmar Ltd. during the period 1/11/2001 to 14/2/2006. On 14/2/2006, a search was conducted in the premises of Natraj Plast Industries Ltd. and statement of Dinesh Kumar Gupta, one of the Directors, was recorded. He admitted to clandestine removal and sale of resin CP172SG. Mr.Dinesh Kumar Gupta in his statement had also stated that he had partly used and consumed the resin in the manufacture of Filler Cords. In a subsequent statement, he claimed that Resin CP172SG was also used in the manufacture of PVC Tapes. In the statements made on different dates, Mr.Dinesh Gupta had never claimed or stated that resin CP172SG was also used for manufacture of PVC compound. The said contention/stand was raised for the first time during the course of

the assessment proceedings. The Tribunal while dealing with the said aspect has rejected the contention that resin CP172SG was used in the manufacture of PVC compound giving the following reasoning:-

“Statement dated 14.02.2006, 14.03.2006, 28.04.2006, 15.06.2006, 23.06.2006, 3.8.2006, 28.08.2006, 22.09.2006, 3.10.2006, 7.11.2006, 8.11.2006 and 10.11.2006 of Shri Dinesh Gupta, Director of M/s. Natraj, recorded under Section 14 of the Central Excise Act, 1944, none of which have been retracted. While in his statement dated 14.02.2006, Shri Dinesh Gupta stated that they were manufacturing only a Single Type PVC Compound in which they were changing the flexibility of the compound by changing the quantity of stabilizer etc. and that in the manufacture of PVC Compound they were using Resins of 6701 grade manufactured by M/s. Reliance, Shri Ram Industries and M/s. Finolex to the extent of 56%, that the Resin CP 172 SG procured by them from M/s. Camplast was being used in the manufacture of PVC Filler Cord where it was being added to the extent of 25% and that surplus quantity of CP 172 SG resin left after manufacture of the PVC Filler Cord was being sold to the manufacturers of battery separators without any invoice or bills and that he was doing so as his financial condition was not good, in the subsequent statements dated 28.08.2006 and 22.09.2006, he however, claimed that in addition to manufacturer of PVC Filler Cord, CP 172 SG Resin was also being used in the manufacture of PVC Tapes to the extent of 56%. However, the quantity of PVC Tapes using CP172SG Resin Claimed to have been manufactured is only 411.31 MTs in which

the use of CP 172 SG Resin would be to the tune of 230.80 MT only and total use of CP 172 SG Resin including its use in the manufacture of Filler Cord would be to the tune of 334.8 MT only as against the quantity of 1112.705 MT of Resin purchased by them, which indicates that the bulk of the quantity has been illicitly diverted.”

6. Apart from the fact that Mr.Dinesh Gupta in his statements had never claimed that he has used resin CP172SG for manufacture of PVC compound, the Tribunal has noticed that resin 6701 was used in the manufacture of PVC compound. The said resin was purchased by the Natraj Plast Industries Ltd. from three companies. Moreover, it was for Natraj Plast Industries Ltd. to show and establish that the resin 6701, procured and purchased by them, was not sufficient for manufacture PVC compound as recorded and, therefore, resin CP172SG was used in the said manufacture. The Tribunal has referred to PVC compound as single type and as per the findings recorded by the Tribunal, resin 6701 was used for manufacture of the said compound. We do not find any error in the findings by the Tribunal on the said aspect or any reason to hold that the finding is perverse or not justified.

7. The aforesaid quantum, i.e. 768.03 Mt., has been calculated by the Tribunal on the basis of the quantity purchased, less the consumption for production of PVC compound as recorded in the records/books. The Tribunal has given benefit of doubt to the

Appellant Natraj Plast Industries Ltd. and other appellants on use of resin CP172SG in the manufacture of PVC Tapes to the extent of 230 Mt. The reasons given by the Tribunal in this regard are reproduced:-

“5.1 During the period from 1.11.2001 to 14.2.2006 M/s Natraj had purchased 1102.715 MT of CP- 1725G resin from M/s Chemplast Sammar and had availed the cenvat credit in respect of this quantity. Out of this quantity use of 104.01 MT in the manufacture of PVC Filler Cord has been accepted by the department and according to department the balance of 98.705 MT of CP – 1725G resin has been illicitly diverted. The use of this resin in the manufacture of PVC compound has not even been claimed by Shri Dinesh Gupta and he has claimed its use only in the manufacture of PVC filler cord and PVC tape. But total PVC tape manufactured by M/s Natraj during the period of dispute is 412.149MT (1.314 MT during 2003-04 + 210.127 MT during 2004-05 +200.708 MT during 2005-06), in the manufacture of which at the rate of 56%, only 230.72MT of CP 172 SG resin could be used, which leaves 768.03 MT of resin still unaccounted. The department’s allegation based on test report of CIPET, Lucknow in respect of sample of PVC tape manufactured by M/s Natraj in presence of investigating officers by using CP1725G resin to the extent of 56% is that CP172 SG resin has not been used in the manufacture of PVC tape supplied to M/s Motherson Sumo Systems and other buyers, as the elongation, tensile strength, tear strength and shrinkage of the sample of the PVC tape supplied to M/s Motherson Somu, which are claimed to have been manufactured by using CP172 SG resin are different.

But on this point we agree with the appellants Plea that this difference in elongation, shrinkage, tensile strength and tear strength of the PVC tape manufactured in presence of the officers and the PVC tape supplied to M/s Motherson Sumo may be due to :-

- (a) Difference in thickness 0.4mm the case of PVC tape manufactured in the presence of officer and 0.3mm in case of PVC tape supplied to M/s Motherson Sumo;*
- (b) Minor change in ratio of CP 1725G resin, plasticizer, filler, stabilize and master batch and difference in the temperature at which the product has been extruded; and*
- (c) Difference in the method of testing while CIPET has tested the tensile strength, tear strength and elongation by ASTM D882, ASTM D 1004 and ASTM D882 method respectively, the method adopted by Inhouse Laboratory of M/s Motherson Somu is not known.*

In view of the above, so far as the claim of M/s Natraj regarding use of 230.72MT of CP1725G resin in the use of PVC tape is concerned, they have to be given the benefit of doubt. However, with regard to 768.03 MT of CP1725G resin, the department's allegation that the same had been illicitly diverted is on strong footing and the same is upheld. M/s Natraj will therefore, have to pay along with interest the amount of cenvat credit taken on 768.03 Mt of CP1725G resin. Since this quantity of resin has been illicitly diverted by fraudulent means without reversing the cenvat credit, for recovery of cenvat credit on this quantity, longer limitation period under proviso to Section 11 A (1) Central Excise Act, 1994 would be available to the department and for the same reason penalty under Rule 15(2) of Cenvat Credit

Rules, 2004 read with Section 11AC of Central Excise Act, would be imposable on M/s Natraj.”

8. Under Rule 15(1) of Cenvat Credit Rules, 2004, any input or capital goods, in respect of which cenvat credit has been taken wrongly, are liable for confiscation. In this case, the illicitly diverted CP1725Sg resin was liable for confiscation under this Rule, as in respect of this illicitly diverted resin, cenvat credit had been wrongly taken. Since Natraj Plast Industries Ltd., Tanishq Wires & conductors Pvt. Ltd. and Sh. Sunil Mittal and Rajesh Mittal had dealt with the illicitly diverted resin knowing very well that the same was liable for confiscation, they were liable for penalty under Rule 26 of Central Excise Rules, 2002. Tribunal, after recording the said findings, has upheld imposition of penalty on them under Rule 26 of Central Excise Rules, 2002.

9. Learned counsel for the appellant next submitted that Natraj Plast Industries Ltd. and Tanishq Wires & Conductors Pvt. Ltd. are limited companies incorporated under Companies Act, 1956 and, therefore, no penalty can be imposed on them under Rule 26 of the Central Excise Rule 2002. It is submitted that the said companies cannot be attributed with requisite mensrea and the requirement of the Rule is that the person should have knowledge or attributed with reason to believe, that the goods are liable for confiscation under the Act or these Rules. We do not find any merit in the said

contention and the same has been rightly rejected in view of the decision of the Supreme Court in ***Agarwal Trading Corporation and Ors v. Assistant Collector of Customs, Calcutta (1983 E.L.T. 1467 SC)*** in which it has been held:-

“The second contention that because the firm is not a legal entity, it cannot be a person within the meaning of Section 167(3), (8) and (37) of the Sea Customs Act, is equally untenable. There is of course, no definition of ‘person’ in either of these Acts but the definition in section 2 (42) of the General Clauses Act 1897, or section 2 (3) of the Act of 1868 would be applicable to the said Acts in both of which ‘person’ has been defined as including any company or association or body of individual, whether incorporated or not. It is of course contended that this definition does not apply to a firm which is not a natural person and has no legal existence, as such clauses (3), (8) and (37) of section 167 of the Sea Customs Act are inapplicable to the appellant firm. In our view, the explanation to section 23C clearly negatives this contention. In that a company for the purposes of that section is defined to mean any body corporate and includes a firm or other association of individuals and a Director in relation to a firm means a partner in the firm. The High Court was clearly right in holding that once it is found that there has been a contravention of any of the provisions of the foreign Exchange Regulation Act read with Sea Customs Act by A firm, the partners of it who are in-charge of its business or are responsible for the conduct of the same, cannot escape liability, unless it is proved by them that the contravention took place without

their knowledge or the exercised all due diligence to prevent such contravention.”

10. We may also note that a similar contention was raised before Supreme Court in ***Standard Chartered bank and Ors. V Directorate of Enforcement and Ors. (2005) 275 ITR 81***. The majority view elucidated that a company can be prosecuted and punished for an offence under Section 56(1) (i) of the Foreign Exchange Regulation Act, 1973, even though imprisonment for a term of not less than six months was compulsory. It was also held that legislative intent to prosecute corporate bodies for the offence committed by them is clear and explicit and the statute never intended to exonerate them from being prosecuted. The Legislature never intended to give immunity from prosecution or penalty for grave economic crimes. In such cases it is not possible to impose penalty of imprisonment because the company is a corporate body and not a natural person but fine or cash penalty can be imposed.

11. In view of the aforesaid legal position, we do not think any substantial question of law arises on the said aspect.

12. The third contention raised by the appellant is with regard to fine Rs. 5 lacs each which has been imposed under Rule 26 on Sunil Mittal and Rajesh Mittal. It is submitted that the aforesaid fine

imposed under Rule 26 is not justified as the Tribunal was not able to quantify the exact quantity of resin CP172SG clandestinely dealt with or transported/sold etc. to them. We do not find any merit in the said contention. In such cases of clandestine removal, there is always an element of estimation. At the time of search in the premises of Sunil Mittal and Rajesh Mittal, resin CP172SG procured and purchased by Natraj Plast Industries Ltd. was found. It is appropriate to reproduce the findings recorded by the Tribunal:-

“Shri Dinesh Gupta in his statements, while claiming the use of certain quantity of CP172 SG Resin purchased by him for manufacture of PVC Filler Cord, PVC Tapes admitted that substantial quantity had been sold as such without reversing the Cenvat credit and that some of the parties to whom CP 172 SG resin had been sold were Shri Rajesh Mittal of M/s. Aditya plastics, Shri Sunil Mittal of M/s. Mukesh Industries and Shri Rajesh Bansal, Proprietor of M/s. Micro Sec Industries. On inquiry with Shri Rajesh Mittal of M/s. Aditya Plastics, it was found that they were purchasing CP 172 SG Resin directly from M/s. Chemplast and that the quantity was being sold mostly under invoices, but for supply of this resin to the manufactures of battery separators, who wanted the same without invoices, they were procuring this resin from M/s. Natraj who was supplying the same without any invoices. Shri Sunil Mittal of M/s. Mukesh in his statement dated 7.7.2006 admitted that he was purchasing the CP 172 Sg Resin directly from M/s. Chemplast and also from M/s Natraj Shri Rajesh Bansal, Proprietor of M/s. Micro

Sec in his statement dated 3.7.2006 admitted that he was engaged in the manufacture of Battery Separators for which principal raw material is CP 172 SG Resin and that while same had been purchased directly from M/s. Chemplast under invoices, substantial quantity had been purchased without any invoices from M/s. Natraj.

1.6 It was also found that while in course of search of the premises of M/s. Aditya Plastics on 14.02.2006, 100 bags of CP 172 SG Resin of Batch No. 369 had been recovered, 148 bags of CP 172 SG Resin of the same batch had been supplied by M/s. Chemplast to M/s. Natraj under invoice date 30.12.2005, which indicated that 100 bags of CP 172 SG Resin seized from the premises of M/s. Aditya Plastics had come from M/s. Natraj, as there was no purchase of CP172 SG resin of Batch No.369 by M/s. Aditya from M/s. Chemplast. In case of M/s. Mukesh Industries, in course of search of their premises on 14.02.2006, 520 bags of CP 172 SG Resin of Batch No.408,409,410,411 and 414 had been found. On inquiry with M/s. Chemplast, it was found that these batches had been manufactured in their manufacturing unit at Salem, Tamil nadu, from where the same had been transferred to their depot at Delhi on 13.01.2006, 15.01.2006, 18.01.2006 and 17.01.2006. However, the last purchase of CP 172 SG Resin by M/s. Mukesh Industries from M/s. Chemplast was under invoice dated 30.12.2005. Since other than M/s. Chemplast, there is no other manufacture of CP 172 SG Resin, it appeared that the stock of 172 SG Resin with M/s. Mukesh Industries was unaccounted. Further, inquiry revealed that the above mentioned CP 172 SG Resin of batch No. 408,409,410,411 and 414 manufactured at Salem, Tamil Nadu and stock transferred to Delhi had been purchased by M/s. Natraj,

which clearly showed that the stock of CP 172 Sg Resin found in the premises of M/s. Mukesh Industries had come from M/s. Natraj.”

13. We may note that the finding of the Tribunal is that the entire quantity of 768.03 MT of resin CP172SG was procured and sold to either Rajesh Mittal or Sunil Mittal. Keeping in view the facts and circumstances as recorded/ found and the quantum of penalty/fine of Rs. 5 lacs each which has been imposed, we do not find any reason or ground to entertain the present appeal on the said ground. No substantial question of law arises.

14. The last contention raised by the learned counsel for the appellant is regarding fine of Rs. 15 lacs which has been imposed on Mr. Dinesh Gupta. It is submitted that the said fine has been imposed on Mr. Dinesh Gupta as he was a Director of Tanishq Wires & Conductors Pvt. Ltd. We do not find any merit in the said contention. We may notice that the Tribunal gave benefit of doubt to Mr. Gaurav Gupta, son of Mr. Dinesh Gupta and the fine imposed on Mr. Dinesh Gupta under Rule 26 has been reduced from Rs. 50 lacs to Rs. 15 lacs. Mr Dinesh Gupta was a Director both in Natraj Plast Industries Ltd. and in Tanishq Wires & Conductors Pvt. Ltd.

15. In view of the aforesaid discussion, we do not find any merit

in the present appeal. No substantial question of law arises. The appeals are dismissed. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

April 09, 2012
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