

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

+ **CEAC 1/2012**

% **Date of Decision : 18th January, 2012**

HIMGIRI PLASTICS Petitioner

Through: Mr. Naveen Mullick and
Mr. Daman Preet singh, Advs.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent

Through: Mr. Satish Kumar, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

CM No.1023/2011

This is an application for condonation of delay of 105 days in filing the appeal under Section 35G of the Central Excise Act, 1944. In the appeal the appellant has impugned two orders passed by the Customs, Excise and Service Tax Appellate Tribunal dated 14.3.2011 and

10.10.2011. Order dated 10.10.2011 was passed on an application for modification/rectification. It is stated that as the rectification application was pending consideration before the Tribunal, there has been delay in preferring the present appeal.

2. Mr. Satish Kumar, Advocate who appears for the Central Excise has been heard on this application for condonation of delay. He waives right to file reply.

3. Considering the facts and the reasons given, we allow the present application and the delay in filing the appeal is condoned.

4. Application is disposed of.

CEAC 1/2012

1. A limited issue arises for consideration and therefore we have heard the counsel for the appellant and the respondent. The following substantial question of law is framed:-

“Whether the Customs, Excise and Service Tax Appellate Tribunal is right in directing the appellant to deposit Rs.70 lakhs as a pre-condition for hearing of the appeal vide order dated 28.3.2011?”

2. The appellant herein is a partnership firm of two brothers Joginder

Kumar Talwar and Sanjeev Kumar Talwar. They are engaged in manufacture of lay-flat-tubing, plastic bags, fillers and master batches in their factory at 364A, Hastasal Industrial Area, Delhi. There was another factory located in plot No. 24 khasra No.107/1 Hastasal Village, Uttam Nagar, Delhi. The case of the appellant is that this second factory is the manufacturing unit of another partnership firm M/s. Himalayan Polycolours of which Neelam Talwar and Rimi Talwar are partners. Neelam Talwar is the wife of Joginder Kumar Talwar and Rimi Talwar is the wife of Sanjeev Kumar Talwar. On 11.12.2007 a search was conducted in the premises of Hingiri Plastics. Subsequently, search was also conducted on the premises of Himalayan Polycolours on the same day. Thereafter, show cause notice was issued to the appellant herein. It was alleged in the show cause notice that the entire production of the partnership firm M/s. Himalayan Polycolours was required to be clubbed with the production carried out by the appellant. The second allegation made in the show cause notice was that there was clandestine removal of manufactured goods and the appellant and M/s. Himalayan Polycolours had incorrectly under declared their production.

3. The appellant herein filed a detailed reply to the show cause notice raising several contentions. It was submitted that the so-called exercise copy found during the search was a production diary and did not reflect sales of additional production which was removed clandestinely. The exercise book contained details of production which were also duly recorded in the books of account maintained on regular basis. With regard to the first allegation it was submitted that the two partnership firms are independent entities, manufacturing different products and clubbing of production of the two separate entities was not permissible without financial flow back or common administration. Mere relationship of the partners of the two firms, cannot be a ground to club their production.

4. Commissioner vide order dated 13.9.2009 rejected the contentions of the appellant and held that the production of the two units i.e. Himgiri Plastics and M/s. Himalayan Polycolours should be clubbed. He also computed the clandestine sales with reference to the excise book. He held that the figures mentioned in the excise book have to be added to the figures of the actual production recorded in the regular books. This has

created the demand of Rs.1,28,26,111/- for the period 2003-04 to 2007-08. The appellant was also liable to an equal amount towards penalty and pay interest. In addition personal penalty of Rs.1,30,000/- each has been imposed on the four partners and against the authorised signatory of Himalayan Polycolours, Puneet Talwar.

5. In the impugned order dated 14.3.2011 the Tribunal has examined the contention of the appellant that there was no common administrative control or financial flow back between the two firms but has prima facie rejected the said contention. With regard to the clandestine removal, the Tribunal has observed that once there was seizure of unofficial or private documents, the clandestine removal stands proved. It has also been recorded that the appellant had failed to file complete copy of the balance sheet for the year 31.3.2009 and therefore they have not been able to establish and show the financial difficulty. At any rate, the appellant did not file balance sheets for the year 31.3.2011.

6. Learned counsel for the appellant has taken us to the order passed by the Commissioner and has pointed out that the figures and computation of alleged clandestine sales and the findings with regard to common

administrative control and financial flow back. It is highlighted that the findings are not correct. He submits that the law does not bar or prohibit a wife of a partner setting up and doing partnership business. He states that the decisions in the case of **Poly Printer vs. C.C.E., Delhi I**, 2002 (139) ELT 295 and **Kiran Biscuits and Foods Ltd. vs. C.C.E., Hyderabad**, 2005 (179) ELT 566 have been referred to in the impugned order but the ratio and impact has not been properly appreciated. With regard to the trade names under which goods were sold, it is submitted that this did not prove or establish that there was common administrative control or financial flow back. He states that insignificant loans of Rs.36,000/- or Rs.20,000/- were later on repaid and even otherwise this does not show and establish that there was financial flow back. In this regard our attention has been drawn to the figures and computation of alleged clandestine sales mentioned by the Commissioner in his order and to the turnover as declared in the books. It is submitted that the Commissioner had made assumptions without dealing with the defences raised.

7. A small scale industrial unit which has turnover of Rs.1,00,00,000/- (Rs.1,50,00,000/- w.e.f. 2007-08) are exempt from payment of excise

duty. It is stated that in case the turnover of Himalayan Polycolours is not clubbed with the turnover of Himgiri Plastics, the excise duty payable on the alleged clandestine sale as per the figures and computation of the Commissioner would come down drastically to Rs. 50 lakhs. In case the figure of clandestine sales is interfered with, there would further reduction.

8. With regard to the clandestine sales and figures computed by the Commissioner it is submitted that the Commissioner has not discussed and examined the contention of the appellant that the figures given in the exercise book include the turnover recorded in the books of accounts regularly maintained. He has drawn our attention to the findings of the search party. It is stated that as per search report/panchnama total inventory was valued at about Rs.4 lakhs in the case of appellant-Himgiri Plastics and Rs.9 lakhs in the case of Himalayan Polycolours. He further submits that as per the show cause notice, Himgiri Plastics was operating from the premises which was taken on rent of Rs.8,000/- per month. He submits that the figures with regard to clandestine sales mentioned by the Commissioner are exorbitant and are not realistic.

9. During the course of hearing it was put to the counsel for the appellant whether the appellant or their partners have immovable property and they are ready and willing to furnish surety or create a charge so that recovery can be made in case the demand is accepted and the appeal filed by the appellant is dismissed. The appellant has accepted the suggestion.

10. We may also note that the appellant has stated that the total turnover of the appellant has come down drastically due to constraints and adverse market conditions as manufacture and sale of plastic bags is discouraged by the Government in view of the environmental concerns. Our attention has been drawn to the balance sheet which has been placed on record. As per the balance sheet the annual turnover of the appellant is about Rs.14 lakhs. It is submitted that the appellant is not in a position to pay the pre-deposit of Rs. 70 lakhs and thus would be deprived of his right to be heard and press their appeal.

11. Learned counsel for the respondent has submitted that the clandestine removal and production has been established. Clubbing was justified and the appellant must pay for their lapses.

12. Having considered the rival contention we are of the view that the appellant has made out the prima facie case. Even the tribunal has accepted the same as waiver of pre-deposit has been allowed to some extent. The primary question is whether the turnover of the two partnership firms should be clubbed does merit consideration. The Revenue has emphasized that prima facie there is material with regard to clandestine removal but the main or core issue is the quantum of the clandestine removal on which excise duty has been evaded. The appellant should be given an opportunity to press their appeal. At the same time, interest of Revenue has to be protected and some payment must be made.

13. Keeping in view the aforesaid factors, we are inclined to modify the directions of the tribunal and direct as under:-

1. The appellant will pay a sum of Rs.40 lakhs to the respondent as per the following schedule:-

(i) Rs.10 lakhs will be paid on or before 10.2.2012;

(ii) Thereafter, the appellant will deposit a sum of Rs. 5 lakhs every two months. The first deposit will be made on or before 16.4.2012.

We have fixed the aforesaid schedule as we are informed that the present appeal will be taken up for hearing only after three years.

(iii) The appellant will deposit the papers/title documents of the property bearing No.364-A, Hastasal Industrial Area, Delhi with the respondent Excise Department (concerned Divisional Commissioner) by 10.2.2012. The appellant will also file an undertaking that they shall not dispose of, sell, or encumber or rent out property No. 364A, Hastasal Industrial Area, Delhi till the disposal of the appeal before the Tribunal. In case of any adverse order and non payment of the demand after disposal of the appeal, it will be open to the respondent-Excise Authorities to sell the property to recover the amount payable.

14. The question of law is accordingly answered. The appeal is allowed to the extent indicated above. No costs.

SANJIV KHANNA,J

R.V.EASWAR, J

JANUARY 18, 2012
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