

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 564 of 2008

(Arising out of Order-in-Appeal No. CEX/GOA/MP/12 & 13/2008 dated 28.02.2008 passed by the Commissioner of Customs (Appeals), Goa)

M/s GKB Vision Ltd.

27 & 28, Pilerne Indl. Estate, Saligao, Goa

.... Appellant

Versus

Commissioner of Customs (NS-V),

ICE House, EDC Complex, Plot no. 6, Patto,
Panaji, Goa

.... Respondent

WITH

Customs Appeal No. 565 of 2008

(Arising out of Order-in-Appeal No. CEX/GOA/MP/12 & 13/2008 dated 28.02.2008 passed by the Commissioner of Customs (Appeals), Goa)

M/s GKB Opthlmics Ltd.

27 & 28, Pilerne Indl. Estate, Saligao, Goa

.... Appellant

Versus

Commissioner of Customs (NS-V),

ICE House, EDC Complex, Plot no. 6, Patto,
Panaji, Goa

.... Respondent

AND

Customs Appeal No. 566 of 2008

(Arising out of Order-in-Appeal No. GOA/CUS/MP/10/2008 dated 27.02.2008 passed by the Commissioner of Customs (Appeals), Goa)

M/s GKB Vision Ltd.

27 & 28, Pilerne Indl. Estate, Saligao, Goa

.... Appellant

Versus

Commissioner of Customs (NS-V),

ICE House, EDC Complex, Plot no. 6, Patto,
Panaji, Goa

.... Respondent

AND

Customs Appeal No. 567 of 2008

(Arising out of Order-in-Appeal No. GOA/CUS/MP/09/2008 dated 27.02.2008 passed by the Commissioner of Customs (Appeals), Goa)

M/s GKB Opthlmics Ltd.

27 & 28, Pilerne Indl. Estate, Saligao, Goa

.... Appellant

Versus

Commissioner of Customs (NS-V),

ICE House, EDC Complex, Plot no. 6, Patto,
Panaji, Goa

.... Respondent

AND

Customs Appeal No. 936 of 2008

(Arising out of Order-in-Appeal No. GOA/CUS/MP/24& 25/2008 dated 23.05.2008 passed by the Commissioner of Customs (Appeals), Goa)

M/s GKB Vision Ltd.

27 & 28, Pilerne Indl. Estate, Saligao, Goa

.... Appellant

Versus

Commissioner of Customs (NS-V),

ICE House, EDC Complex, Plot no. 6, Patto,
Panaji, Goa

.... Respondent

AND

Customs Appeal No. 937 of 2008

(Arising out of Order-in-Appeal No. GOA/CUS/MP/24& 25/2008 dated 23.05.2008 passed by the Commissioner of Customs (Appeals), Goa)

M/s GKB Opthlmics Ltd.

27 & 28, Pilerne Indl. Estate, Saligao, Goa

.... Appellant

Versus

Commissioner of Customs (NS-V),

ICE House, EDC Complex, Plot no. 6, Patto,
Panaji, Goa

.... Respondent

Appearance:

Shri C.S. Biradar, Advocate for the Appellant

Ms. Trupti Chavan, AC, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85017-85022/2022

Date of Hearing: 26.07.2021

Date of Decision: 17.01.2022

Per: P. Anjani Kumar

The Appellants, a recognized 100% Export Oriented Unit, are engaged in the manufacture of ophthalmic lenses falling under sub heading 90014000 of Central Excise Tariff Act, 1985; the rough ophthalmic lenses blanks required for the manufacture of ophthalmic lenses were imported by the appellants without payment of duty of Customs in terms of Notification No. 52/2003-Cus dated 31.03.2003, which exempts, inter alia, raw materials imported by the EOU for use in the manufacture of export goods; Revenue alleged that breakage, wastage and scrap of the lenses generated by the appellant were more than 9.09% provided for in the SION; show cause notices were issued and were confirmed by the Original Authority as well as first Appellate Authority; being aggrieved by the order, appeals were preferred before the Hon'ble Tribunal, which vide order dated 13.09.2017 & 14.09.2017 confirmed that duty was recoverable as the wastage permitted was more than 9%; however, Tribunal set aside the penalty under Section 112(b) and 117 of Customs Act, 1962; applications for rectification of mistake, filed by the appellant were also dismissed; the appellant filed appeals before the Hon'ble High Court at Bombay at Goa; High Court set aside the orders and remanded back to the Tribunal for fresh disposal on merits in accordance with law and also to consider the Ministry decision dated 23.09.2008 and 26.11.2008; hence, the present appeals.

2. Learned Counsel for the appellants submits that its alleged that breakages, wastages and rejects of the lenses, during the

process of production, exceeded the limit of 9.09% prescribed by the Input-Output norms (110:100); the appellants moved an application dated 05.09.2006, to DGFT, for the modification of SION; Ministry of Commerce and Industry, Government of India, New Delhi, vide letter, F.No.01/87/162/164/AM-08/DES-IV/ 2175 dated 23.09.2008, informed the appellants that the NORMs COMMITTEE in its meeting no.22/09 dated 27.08.2008 has taken a decision to fix the wastage norm for appellant product to 15%; Appellants represented, to the Ministry of Commerce and Industry, Government of India, vide letter dated 24.09.2008, that the NORMs COMMITTEE vide its meeting dt 29/09/2008 changes the description of the import item from "Relevant Ophthalmic Lenses of Glass" to " Relevant Ophthalmic Blanks of Flass" as mentioned in the decision dated 27.08.2008; Ministry, vide letter F.No. No. 01/87/162/614/AM-08/DES-IV/2830 dated 26/11/2008 informed that the wastage norms fixed are to be given retrospective effect.

3. Learned Counsel for the appellants submits that the wastage norm fixed for their product by the NORM COMMITTEE was 15% and that too with a retrospective effect and thus, no demand is sustainable. Learned Counsel for the appellants also submits that as the wastage is admittedly still lying in the factory premises (as per Para 7 of the Notice); no custom duty can be demanded while the goods are still within the warehouse; as per 1989(44) ELT 598(SC), in case of imported goods cleared in to bond and placed in a warehouse, the duty is to be recovered on only expiry of bond period i.e. de-bonding or the

clearances for home consumption whichever is earlier; demand is premature as per the following judgments

- *L.M.L. Ltd – 2002(242) ELT 273 (SC)*
- *Kiran Spinning Mills – 1999(113) ELT 753 (SC)*
- *Apar Pvt Ltd- 1999 (112) ELT 3 (SC)*

4. Learned authorized representative for the Department reiterates the findings of OIOs & OIAs.

5. We find that the issue involved in the present set up appeals is as to whether revenue was correct in demanding duty on wastage/ breakage, over and above the permissible limit, of raw materials imported duty free, during the course of manufacture of final products by the EOU. This bench, vide order dated 29/9/2017, held at law required that customs duty forgone in respect of impermissible wastage-shall be realizable; accordingly learned authority is correct to realize such duty on the impermissible quantum of wastage occurred; if at all any duty has been paid, there shall be no recovery and the duty if any has been realized shall be set off against ultimate liability.

6. We find that after the decision by this bench the appellants approached the bench again seeking rectification, in view of the revised fixation of SION norms by the Ministry of Commerce as communicated by decision dated 23/9/2008 and 26/11/2008. Tribunal vide order dated 7/6/2018, held that the Ministry's decision was not cited by the appellants when the original judgment was passed on 14/7/2017 and therefore, no case for rectification has been made by the appellant.

7. The appellants approached the Hon'ble High Court of Goa who vide order dated 20/2/2020 remand at the matter with a direction that Tribunal will have to address these two main grounds as also consider the appellant's contention based upon the Ministry's decision dated 23/9/20018 and 26/11/2008

8. The twin issues that required consideration in this case are that as to whether the appellants would be eligible for the higher norms fixed by Ministry in respect of wastage/ loss/ breakage of raw materials and as to whether the demand is premature. On going through the records of the case, we find that the appellants have represented to the Ministry to revise the SION norms in blanks imported by them. Ministry after considering the request of the appellants have communicated to the development commissioner that a wastage of 15 percent has been fixed and the development commissioner may take necessary action under para 6.7(e) of Hand Book of Procedures Volume-I. Thus, we find that in view of the decisions dated 23/9/2008 and 26/11/2008 of the Commerce Ministry, in the appellant's case the wastage norms were fixed at 15 percent as against the earlier norms of 9.09 percent. We are of the considered opinion that the Revenue is bound by the norms fixed by SION norms fixed by the Ministry of Commerce and therefore the benefit of the same has to accrue to the appellants. We find that to that extent the impugned orders are not sustainable and as per the directions of the Hon'ble High Court of Goa, the order dated 29/9/2017 passed by this bench needs to be amended/ rectified to that extent.

9. Coming to the other submission of the appellants that demand of duty, if any, from the EOU can only be made at the closure of the bonding period are at the time of debonding, we find that the submissions of the appellants are legally correct and acceptable. We find that the same has not been considered by this bench vide order cited above. Therefore, we are of the considered opinion that the demand of duty was premature.

10. We find that Bombay High Court in the case of *Sarala Performance Fibres Ltd. Vs UOI 2008 (226) ELT 45 (Bom)* held that there is always an inherent power in the Tribunal to do justice; in these circumstances technicalities by themselves should not stand in the way if otherwise there is merit in the contention of the petitioners. Considering the circumstances, the order in so far as the petitioners are concerned is set aside. In view of the above we find that in the interest of Justice and as per the direction of Hon'ble High Court of Goa, we can take into account submissions of the appellants on both issues.

11. In view of the discussion above the applications/ appeals filed by the appellants are allowed, with consequential relief, if any. The final order A/89748-89751/2017/CB stands modified in the above terms.

(Pronounced in open court on 17.01.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)