

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

WEST ZONAL BENCH

EXCISE APPEAL NO: 85791 & 85792 OF 2014

[Arising out of Order-in-Appeal No: SK/300 & 301/RGD/2013-14 dated 31st October 2013 passed by the Commissioner of Central Excise (Appeals) – II, Mumbai.]

Gem Synthetics & Polymer (India)

Plot No. 69/7-A Wakan Pali Road, Rabgaon Village
Tal: Sudhagad, Dist: Raigad – 410 205

... Appellant

versus

**Commissioner of Central Excise & Customs
Raigad**

Kendriya Utpad Shulk Bhavan, Plot No.1, Sector 17
Navi Mumbai – 410 206

...Respondent

APPEARANCE:

Shri Sachin Chitnis and Shri Siddhanth Sriram, Advocates for the appellant
Shri Xavier Mascarenhas, Superintendent (AR) for the respondent

CORAM:

**HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: 85258-85259/2024

DATE OF HEARING:	06/09/2023
DATE OF DECISION:	05/03/2024

PER: C J MATHEW

The limited issue in these two appeals of M/s Gem Synthetics &

Polymer (I) Ltd, arising from common order¹ of Commissioner of Central Excise (Appeals) – II, Mumbai and disposed off in this common proceedings, is the fastening of duty liability of ₹ 42,96,130 and ₹ 9,87,632, for April 2006 to December 2010 and for January 2011 to December 2011 respectively, under section 11A of Central Excise Act, 1944, along with attendant penalty under section 11AB of Central Excise Act, 1944, besides imposition of penalty of like amount under section 11AC of Central Excise Act, 1944 is the correctness of such levy on the ground of ‘process loss’ being excessive. It is seen from the records that the proceedings were initiated owing to yield of 79% on deployment of 228584 kgs of raw materials in 2006-07 for production of 146295 kgs of finished product leaving 48002 kgs unexplained.

2. The appellant is a manufacturer of ‘alkyd resins’, ‘mellic resins’, ‘phenolic resins’ etc. in which ‘rosin’, ‘PTBP’ and ‘pentaerythritol’ are used by using chemical reactor and the explanation submitted by them, having been found deficient, culminated in the impugned order charging them duty liability on such raw material that was not adequately responded to.

3. We have heard Learned Counsel for appellant and Learned Authorized Representative for Revenue at length. The former submitted that duty liability was confirmed on presumption and

¹ [order-in-appeal no. SK/300 & 301/RGD/2013-14 dated 31st October 2013]

conjecture without any evidence. It was pointed out by Learned Authorized Representative that short payment of duty in the guise of process loss warranted the consequence now impugned.

4. We take note that the impugned order has proceeded to uphold the demand and penalty thus

'9. The appellants claim to process loss is unusually high. It will be very difficult, in the present days of severe competition, for any kind of industry to survive with 15% to 16% process loss. Every industry try to bring the process loss to minimum i.e. 1 or 2% so that the cost of the product would be minimum and their profits would rise. But this kind of 15% to 16% process loss is unusually high. Whereas the process loss discussed in the impugned order dt. 17.1.2012 is 21%. In such a situation, the onus is absolutely on the appellants to prove their claim precisely and scientifically.

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11. The appellants also claim that as per the Input Output norms fixed by the DGFT, it is 13%. Here I observe that the rules governing for DGFT is to grant drawback and other Customs benefits. These rules cannot be uniformly applied for deciding process loss in the manufacturing units. The appellants have given details of process loss in their Dombivli unit. But what is essential is the details of process in their industry for comparison with the appellants claim. In the absence of any evidence to support of the appellants claim, the appeal cannot be allowed. In support of my above views I refer to the following case laws :

(i) Hon'ble Tribunal in the case of Rutvi Steel & Alloys as reported in 2009 (243) ELT 154 (Tri-Ahmd) observed that

"Cenvat/Modvat - Inputs -Process Loss - Onus is on assessee for full accountal of inputs, especially if unusual quantity is claimed as loss - It is more so as assessee is claiming benefit of credit - Rule 53 of erstwhile Central Excise Rules, 1944 - Rule 9 of Central Excise Rules, 2002. In the instant case, the process loss is unusually high and the appellants have filed to prove their claim.

(ii) Hon'ble Tribunal in the case of Hindustan Copper Ltd as reported in 2013 (290) ELT 701 (Tri-Mumbai) observed that "Penalty - Imposition of - Preocess Loss – Copper waste/scrap conversion to cathodes by heating/melting - Loss to the extent of 5.4% - HELD : Loss was reasonable – there was no technology available which could eliminate such process loss - So long as it was within reasonable limits, it has to be permitted" . Whereas in the instant case, the loss is unreasonable.

(iii) Hon'ble Tribunal in the case of Shree Kanga Steel (P) Ltd, as reported in 1998(100) ELT 253 (Tri), it was held that uDemand -Clandestine removal - Shortage - Evidence - Physical examination of the input material carried out by Departmental officers and basis of the same was accepted by the assessee's authorised representative - This cannot be taken to mean that the departmental officers had admitted the estimation of the goods to have been carried out only on visual basis - Explanation of Managing Director that percentage of loss was high due to defective raw material and a lower percentage of loss recorded wrongly in their record, not accepted by the Dy. Collector - Clandestine removal when alleged of goods manufactured by using raw materials which was reflected by the shortage noticed of such raw material, there cannot be complete corroborative evidence to support the shortage - Clandestine removal established - Rule 9(2) of the Central Excise Rules, 1944". In the instant case, the appellants have failed to produce evidence in support of their claim.'

5. We find that appellant had deployed various raw materials in different proportions for manufacture of finished goods. The lower authorities, without considering the material mix and reaction loss of each separately, have merely presumed that weight of raw materials should be found to match that of finished goods and that, in the event of gap if any, the difference should be explained.

6. We find no provision in Central Excise Act, 1944 that authorises duty recovery in such circumstances. There is no allegation of clandestine removal in the show cause notice let alone any evidence thereon. Even if such gap was ascertained, and explanation not found acceptable, this could, at best, be used to corroborate alleged illicit removal which is not alleged here. Effectively, duty is sought to be collected on what be alleged to be inefficiency which the statute does not envisage.

7. Accordingly we find no reason to sustain the demand, interest and penalty. We set aside the impugned order to allow the appeals.

(Order pronounced in the open court on 05/03/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)