

**CUSTOMS EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. 4**

Excise Appeal No. 50114 of 2020

[Arising out of Order-in-Appeal No. IND-EXCUS-000-app-183-19-20 DATED 31.10.2019 passed by Commissioner (Appeals), Customs, CGST & CE, Indore (M.P.)]

FLEXI CAPS AND POLYMERS PVT LTD

162, Sector-D, Sanwer Road,
Indore.

Appellant

Vs.

**COMMISSIONER, CGST & CENTRAL
EXCISE-INDORE**

Respondent

Present for the Appellant : Ms. Priyanka Goel, Advocate

Present for the Respondent: Mr. Nagendra Yadav, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/Decision : **15/09/2021**

FINAL ORDER NO. 51825/2021

RACHNA GUPTA

The appellants herein are engaged in manufacture of excisable goods. They were paying Central Excise Duty and were availing Cenvat Credit of duty / tax paid on inputs, capital goods and input services. Accordingly an application dated 09.07.2018 was filed by the appellant praying for sanction of refund of the Countervailing Duty (CVD) and Special Additional Duty (SAD) paid by the appellant amounting to Rs.14,97,757/- on the ground that the appellant though had obtained the advance license for import of duty free imports but had actually could not

fulfill the conditions of the said license. Accordingly, had approached the office of Director General of Foreign Trade (DGFT) vide letter dated 17 January, 2018 praying for redemption of Export Obligation (EO) under Export Obligation Period (EOP) of the said license. Pursuant to the said request, vide letter dated 17.01.2018, the authority directed the appellant to pay the requisite Custom Duty along with the interest on the excess import which otherwise was made duty free due to the said advance license in favour of the appellant. In addition, penalty of 3% on excess CIF value utilized was also directed to be paid. The entire amount of Rs.24,77,668/- was paid by the appellant. Accordingly, the appellant became eligible to take the credit of CVD and Additional CVD paid on the said imports as per erstwhile Cenvat Credit Rules, 2004. By that time before appellant could utilize said credit, new CGST Law had rolled out being effective from 1st July, 2017. Accordingly, the appellant filed an application dated 8 July, 2018 in terms of section 11B of Central Excise Act, 1944 seeking refund thereof, which has been made permissible even under New GST Regime in terms of section 8 (b) of Section 142 of CGST Act, 2017. However, a Show Cause Notice No.3122 dated 24.09.2018 was served upon the appellant proposing the rejection of the said refund on the ground that since there is no assessment or adjudication order issued in the case and the letter issued by DGFT asking claimant to pay Customs Duty is not an assessment or adjudication. The said proposal was rejected vide the Order-in-Original No.25/18-19 dated 27.02.2019 thereby sanctioning

the refund of Rs.14,97,757/-. However, the Reviewing authority of the Department reviewed the said order and observing the proposition of Show Cause Notice to be correct that an appeal was directed to be filed. Pursuant there-to the appeal was filed before Commissioner (Appeals), however, under the provisions of GST Act, 2017. The said appeal of the Department has been allowed by the Order-in-Appeal No. 183-19-20 dated 31.10.2019. Being aggrieved thereto the appellant is before this Tribunal.

2. I have heard Ms. Priyanka Goel, Id. Counsel for the appellant and Mr. Narendra Yadav, learned D.R. for the Revenue.

3. It is submitted on behalf of the appellant that the inputs were imported by the appellant without making the complete payment of duty as the appellant was already granted the advance license dated 21 March, 2017. Since certain conditions of the said license could not be fulfilled by the appellant that the appellant approached the appropriate authority, the office of DGFT, Indore praying for redemption of Export Obligation (EO) of the aid advance license. In the given circumstances, that the redemption was extended and the said appropriate authority assessed the remaining amount of duty which was duly paid by the appellant alongwith the interest as well as the penalty. It is impressed upon that as per Rule 3 of Cenvat Credit Rules, 2004 appellant is entitled to take Cenvat Credit on CVD paid. Due to which the refund application in question was filed. However,

since before the credit thereof could be taken new Act i.e. GST Act, 2017 became effective but the refund was still available in terms of Section 142 of GST for such amount for which it was otherwise available under erstwhile law section 11B thereof. It is further impressed upon that original adjudicating authority has rightly appreciated the facts while allowing the refund. However the Appellate Authority has ignored the relevant facts and the refund has been rejected on the presumed ground that the order of DGFT was not the final assessment. Same is accordingly prayed to be set aside and Appeal is prayed to be allowed.

4. While rebutting these arguments Id. D.R. has foremost objected the jurisdiction of this Tribunal on the ground that the refund application has been filed under the GST Act, 2017 and this Tribunal is not the competent authority. The appeal, accordingly, is prayed to be dismissed on this ground itself. While submitting on merits, it is mentioned that there is no denial for the impugned duty to be of the previous period. Request for refund thereof under the new law is otherwise not sustainable. The findings of learned Commissioner (Appeals) are impressed upon that a letter of DGFT cannot be considered as the assessment. The appeal is, accordingly, prayed to be dismissed.

5. While rebutting these submissions, learned Counsel for appellant has mentioned that the refund application as well as the impugned appeal have been filed under the provisions of the

erstwhile law i.e. Central Excise Act, 1944. In fact, post the Review Order of the Department; it was Department, who filed an appeal before the Commissioner (Appeals) under the new GST Act, 2017. The objection raised by Id. D.R. is rather applicable on the Department itself and in fact, the appeal of the Department before Commissioner (Appeals) was not maintainable. The Order passed by Commissioner (Appeals) is liable to be set aside on this score as well and reiterated the request for appeal to be allowed.

6. After hearing the rival contentions perusing the entire record I observe and hold as follows:-

The apparent fact on record is that the appellant has paid the entire CVD/SAD upon the goods imported by the appellant, as inputs, for manufacturing its final product. No doubt, initially the import was made duty free but for the reason that the appellant was granted an advance license No.5610005102 dated 21.03.2017 as is apparent from the Show Cause Notice itself. It is also nowhere been denied that the appellant could not fulfill the export obligation arising out of the said license. The only course of action with the appellant in the given circumstances was to seek the redemption which has also not been denied. The letter of DGFT dated 17.01.2018 is apparently and admittedly pursuant to the appellant's own request of seeking redemption. The apparent and admitted fact remains on record is that the entire customs duty with respect to the inputs

imported by the appellant stands fully deposited by the appellant not only alongwith interest but also with the penalty as was directed to be paid while seeking said redemption. These admitted facts are sufficient to hold that the appellant became entitled to avail Cenvat Credit of the CVD/SAD paid by him on the imported inputs in terms of Rule 3 of Cenvat Credit Rules, 2004 (CCR).

7. Apparently, the said Cenvat Credit could not be availed any more due to the erstwhile law i.e. Central Excise Act, 1944 being taken over by New GST Act, 2017. Perusal thereof shows that the Act contains a provision to take care of such unutilized credits of the assessee to be refunded to them in cash. The relevant provision is Section 142 of GST Act, with sub-section (3) thereof reads as follows:-

“(3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944.”

and sub-section (8) (a) and (b) reads as follows:-

“(8) (a) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so covered shall not be admissible as input tax credit under this Act;

(b) where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes refundable to the taxable person, the same shall be refunded to him in cash under the said law, notwithstanding

anything to the contrary contained in the said law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944 and the amount rejected, if any, shall not be admissible as input tax credit under this Act.”

In view of these provisions, denying the said entitlement, that too, on the ground that the letter of DGFT cannot be considered as the assessment order is not appropriate to my opinion because the fact still remains is that the requisite duty stands paid in full by the appellant which entitles the appellant to have credit thereof though in the form of cash in terms of the provisions of the new Act. Hence, I hold that the view formed by Commissioner (Appeals) while rejecting the refund is not appropriate. Rather it is beyond the intention of the Legislature.

8. Further, it is also observed that the appeal before Commissioner (Appeals) was filed by the Department not under the erstwhile law but under the GST Act, 2017. As objected by Id. DR himself that this Tribunal is not competent to deal with the appeals under GST Act. The appeal before Commissioner (Appeals) was not maintainable under GST Act for a refund application which was filed under the erstwhile law. The appeal as such was not maintainable. The order under challenge cannot sustain for the said reason as well. Seen either from the point of view of preliminary objection as has come in rebuttal from the appellant and keeping in view the entire above observation as far as the merits of the case are concerned, it is held that the order under challenge has wrongly rejected the refund despite an unambiguous provision not only giving entitlement of refund to the appellant but also recognizing for the refund eligible under

erstwhile law to have been given in cash under new law. Order accordingly, is hereby set aside appeal resultantly stands allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita