CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

EXCISE Appeal No. 53413 OF 2018

[Arising out of the Order-in-Appeal No. 129/DDN/CE/000/APPL-DDN/RKS/2017-18 DATED 31.05.2018 passed by Commissioner (Appeals) Central Goods & Service Tax Commissionerate, Dehradun]

FLEX FOODS LIMITED **.... Appellant**
Lal Tappar Industrial Area
District – Dehradun (Uttrakhand)

VERSUS

Commissioner of Central Goods and Service Tax, Customs and Central Excise, Dehradun **....Respondent**
CGST, Commissionerate, Dehradun

AND

EXCISE Appeal No. 50130 OF 2019

WITH EXCISE CROSS NO. 50307 OF 2019

[Arising out of the Order-in-Original No 29-30/COMMISSIONER/DDN/2018 DATED 15.10.2018 passed by Commissioner of CGST & Central Excise, Dehradun]

Commissioner of Central Goods and Service Tax, Customs and Central Excise, Dehradun **....Appellant**
CGST, Commissionerate, Dehradun

VERSUS

FLEX FOODS LIMITED **.... Respondent**
Lal Tappar Industrial Area
District – Dehradun (Uttrakhand)

APPEARANCE :

Shri R.M. Saxena, Advocate for the Party
Shri O.P. Bisht, Authorised Representative for the Department

CORAM: HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

DATE OF HEARING : 14.06.2022
DATE OF DECISION: 21.07.2022

FINAL ORDER NO.50634-50635/2022

RAJU :

These cross appeals have been filed by M/s. Flex Foods Limited and Commissioner of Custom Central Excise, Dehradun, against order of Commissioner. M/s. Flex Foods Limited have also filed cross objections against the appeal filed by Commissioner of Custom Central Excise, Dehradun. M/s. Flex Foods Limited are in appeal against demand of Central Excise Duty on the goods cleared by M/s Flex Foods Limited, 100% EOU to the domestic tariff area. Commissioner of Custom Central Excise, Dehradun is in appeal for enhancement of the penalty imposed.

2 The fundamental charge against M/s Flex Foods Limited is that they have cleared goods in domestic tariff area in excess of the value permitted by the Development Commissioner during various years of operation. The matter earlier came up before Tribunal and it was remanded to Commissioner of Central Excise by order No. 53319-53320/2017 dated 16.05.2017. In paragraphs 2, 3 and 4 of the order dated 16.05.2017 of the Tribunal, the dispute has been summed up as under:

> "2. M/s. Flex Foods Ltd. is a 100% EOU who was granted the Letter of Permission (LOP) for manufacture of freeze dried vegetable and tropical fruits, individual quick frozen mushroom, culinary herbs, vegetables and fruits and also dehydrated mushroom, culinary herbs, etc.. They obtained permission from the Development Commissioner Noida SEZ for DTA sale of certain products. Subsequently, at the time of DTA sale they charged payment of central excise duties. The Revenue authorities took the view that the goods cleared in DTA by the assessee were not conforming to the permission granted by the Development Commissioner for DTA sale. Accordingly, they proceeded to demand duty of Rs.3.09 crores by denying the concessional rate of duty available under notification no. 23/2003-CE dated 31.03.2003 for the period 2008-09 to 2012-13. The assessee is in appeal against this order of the Commissioner. For the subsequent period 2013-14, the duty

demand was dropped at the level of the First Appellate Authority against which Revenue is in appeal. Since, the issue is common, both the appeals are being decided through this common order. With the above background, we have heard Shri R.M. Saxena, Consultant for the appellant and Shri H.C. Saini, DR for the respondent.

3. The dispute is arising in the case is whether the DTA clearance made by the assessee were in terms of the LOP granted by the Development Commissioner. The permission for 3 E/51809/2015-EX[DB] & E/52573/2016-EX[DB] DTA sale has been granted in terms of para 6.8 of the Foreign Trade Policy (2009-14) which reads as under:

"Entire Production of EOU/EHTP/STP/BTP units shall be exported subject to following: Units, other than gems and jewellery units, may sell goods upto 50% of FOB value of export, subject to fulfilment of positive NFE, on payment of concessional duties. Within entitlement of DTA sale, unit may sell in DTA, its products similar to goods which are exported or expected to be exported from units. However, units which are manufacturing and exporting more than one product can sell any of these products into DTA, upto 90% of FOB value of export of the specific products, subject to the condition that total DTA sale does not exceed the overall entitlement of 50% of FOB value of exports for the unit, as stipulated above."

4. In terms of the above provision the assessee has been granted LOP for three categories of products – Air dried (AD), freeze dried (FD) and individual quick frozen (IQF). Even though the DTA sale permission was granted under the three broad categories of goods as above, the Revenue authorities went about working out the permissible DTA sales individually for each item such as carrot, bhindietc taking into account the exports made of that item, under the three categories. The lower authorities have held that the sale of specific products namely air dried, freeze dried and individual quick frozen basil, carrot, coriander, mint, French beans, parsley, etc. is in excess (all the 4 E/51809/2015-EX[DB] & E/52573/2016-EX[DB] specified products is considered completely different i.e. not similar to the other products). Accordingly, (in the case of Appeal no. E/51809/2015), the adjudicating authority has held that the appellant will not be entitled to the concessional duty in terms of notification no. 23/2003-CE dated 31.03.2003 in respect of that part of DTA clearance which was in excess of 90% of the value of export of each individual item. In case where no export of a particular item has been done during the relevant period, the concessional rate has been fully denied to the DTA clearances of the items. However, in respect the appeal no. E/52573/2016, the Commissioner (A) has taken the view that the adjudicating authority was wrong in confirming the demands on the basis of specific product. He was of the view that demand, if any, is required to be determined at in the light of the permission given by Development Commissioner NSEZ."

3. After examining the above facts, the Tribunal came to the following conclusion:

> "7. The DTA sale of finished products is permissible in terms of para 6.8 of the FTP 2009-14. The Development Commissioner has granted permissions for DTA sale from time to time on the basis of the export obligation fulfilled by the assessee in various Financial years. The various permissions granted by the 5 E/51809/2015-EX[DB] & E/52573/2016-EX[DB] Development Commissioner are copied below for ready reference:
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> 8. As can be seen from the above tabulation of permissions the Development Commissioner has been giving the permission specifying the products differently from time to time. It is to be noted that the 100% EOU scheme is licensed and administered by the Department of Foreign Trade through the Development Commissioner. The letter of permission as well as the permission for DTA sale, on the basis of export obligation fulfilled by the EOU, is determined by the Development Commissioner. Accordingly, DTA sale as per LOP granted by Development Commissioner needs to be supervised and enforced by the Customs authorities. Hence, it is necessary for the Customs 6 E/51809/2015-EX[DB] & E/52573/2016-EX[DB] authorities to monitor and ensure that the concessional rate of duty in terms of notification no. 23/2003-CE is extended only to the goods cleared in DTA by the EOU within the limits specified by Development Commissioner. It is a corollary to the above statement that the limit upto which concession is permitted is required to be determined in the same terms in which the permission for DTA sale has been given by the Development Commissioner. In respect of the permission granted by Development Commissioner dated 29.0.2007, we note that clearance of all the specified items upto a total value of Rs. 1236.90 lakhs is permitted for sale in DTA. However, in the permission letter dated 30.11.2009, separate value limits have been prescribed for vegetables, culinary herbs and culinary spies. In the permission letter dated 13.04.2012, the goods produced by the EOU have been grouped into three categories and separate value limits specified for each group.
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> 9. As explained supra, the entitlement for concessional duty is required to be evaluated strictly in terms of the various permissions granted by the Development Commissioner. We note that in the impugned order dated 20.02.2015 the method adopted for determining the concessional duty benefit is not in accordance with the specific permissions granted by the Development Commissioner. We also note that the stand adopted by the Ld. Commissioner (A) in the impugned order dated 19.04.2016 is also strictly not in conformity with the DTA permission. 7 E/51809/2015-EX[DB] & E/52573/2016-EX[DB]
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> 10. Consequently, we are of the view that both the impugned orders are required to be set aside and the issue remanded back to the Ld. Jurisdictional Commissioner for de novo decision

> covering the entire period in the two appeals. He will redetermined the eligibility for the concessional notification no. 23/2003-CE strictly in terms of the permissions granted by the Development Commissioner. **All issues are kept open for the de novo decision**. Additional evidence may be admitted as per law."

4. A perusal of above order of Tribunal shows that the issue of limitation was not been examined by Tribunal in its order dated 16.05.2017. The matter was earlier remanded for fresh examination of the manner in which the eligibility to the concessional Notification No. 23/2003-CE was also to be examined. The remand order dated 16.5.2017 keeps all issues open in the *de novo* consideration of the dispute before the Adjudicating Authority.

5. In the remand proceedings the Commissioner examined the issues on merit, but on the issue of limitation the Commissioner observed as follows:

> "5.23 As regard to the issue of extended period raised by the party, I find that the case has been remanded bake to me for limited purpose for requalification of duty on the basis of permissions granted by the Development Commissioner. **The issue regarding extended period was neither raised by the party before the Hon'ble CESTAT nor has this issue been remanded for my consideration. Therefore, I do not consider it relevant to go into this issue at this stage**."

6. It is seen that the Commissioner came to a conclusion that the issue on limitation was not raised by the appellant in their earlier appeal and therefore it was not examined by the Tribunal. M/s. Flex Foods Limited in this appeal has enclosed copy of the appeal earlier filed by them before Tribunal, which was numbered as E/51809/2015-EX [DB]. A perusal of the said appeal shows that the issue of invocation of the extended period and limitation was specifically challenged by the appellant in paragraph 7 of the said appeal

memorandum. It is seen that arguments on limitation were also raised by the appellant. The Tribunal, however, did not take note of the said argument nor gave any findings, presumably because the matter was being remanded on merit itself. In this background we find that the observation of the Commissioner in the impugned order that the issue on limitation was not raised by the appellant before Tribunal is incorrect. It is also noticed that the remand order of Tribunal dated 16.05.2017 had also kept all issues open, which implies that the issue of limitation was also open.

7. In view of above the impugned order cannot be sustained and is, therefore, set aside. Consequently the appeal filed by the revenue, which solely relates to quantum of penalty, also becomes infructuous. The cross objection filed by M/s. Flex Foods Limited against revenue appeal also become infructuous.

8. In view of above, the impugned order is set aside and the matter is remanded to the Commissioner for fresh adjudication on merits as well as on limitation. The appeal of M/s. Flex Foods Limited is allowed by way of remand. The appeal of revenue and cross objections filed by M/s. Flex Foods Limited are disposed of as having been rendered infructuous.

(Order Pronounced on **21.07.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(RAJU)
MEMBER (TECHNICAL)

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