

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 89937 OF 2018

[Arising out of Order-in-Appeal No: 680 (CRC-I)/2018 (JNCH)/Appeal-II dated 23rd July 2018 passed by the Commissioner of Customs (Appeals), Mumbai – II.]

Huhtamaki PPL Ltd
LBS Marg Majiwade, Thane - 400601

... Appellant

versus

Commissioner of Customs (NS III)
Jawaharlal Nehru Custom House, Nhava Sheva
Tal: Uran, Dist: Raigad - 400707

...Respondent

APPEARANCE:

Shri Virat Chanda, Advocate for the appellant

Shri Manoj Das, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A / 85716 /2022

DATE OF HEARING:	21/02/2022
DATE OF DECISION:	22/08/2022

The issue in this appeal of M/s Huhatamaki PPL Ltd (formerly styled as M/s Positive Packaging Industries Ltd) is the denial of refund of ₹ 16,98,720, claimed on 28th December 2016, for being

beyond the threshold of limitation prescribed in section 27 of Customs Act, 1962 because the liability of ₹ 3,01,64,821 had been discharged between 1st August 2014 and 28th May 2015 in seven tranches as intended for adjustment towards duty foregone of ₹ 1,13,24,798 at Jawaharlal Nehru Custom House (JNCH) and of ₹ 67,85,174 at Air Cargo Complex (ACC) with attendant interest of ₹ 60,33,995 and ₹ 33,04,358 and penalty of ₹ 16,98,720 and ₹ 10,17,776 respectively. The liability to penalty, reduced to 15% of the amount payable otherwise under section 114A of Customs Act, 1962 by the newly incorporated clause (5) in section 28 of Customs Act, 1962 subject to discharge of duty and interest in full, having been made applicable for a limited time in specific circumstances, prompted payment on 28th May 2015 to such extent, arising out of proposal in show cause notice dated 30th April 2015.

2. The said show cause notice initiated proceedings under section 28 of Customs Act, 1962 to recover duty foregone on imports effected by recourse to benefit of notification no. 104/2009-Cus dated 14th September 2009 available to holders of scrips under 'status holder incentive scrip (SHIS)' for which the appellant was ineligible owing to having been issued with 'zero duty export promotion capital goods (EPCG)' scheme in the same year, i.e, 2010-11 as stipulated in notification no. 102/2009-Cus dated 11th September 2009. With the compliance noted *supra*, the proceedings were deemed to have

concluded in order no. 11/2015-16 dated 28th September 2015.

3. The claim for refund was triggered by public notice no. 30/2015-20 dated 8th September 2016 of Director General of Foreign Trade (DGFT) and circular no. 45/2016 dated 23rd September 2016 of Central Board of Excise & Customs (CBEC). The rejection of the claim was challenged by the appellant herein and, *vide* order-in-appeal no. 680 (CRC-I)/2018 (JNCH)/Appeal-II dated 23rd July 2018, Commissioner of Customs (Appeals), Mumbai-II upheld the order of the original authority leading to this appeal.

4. Learned Counsel for appellant and Learned Authorized Representative were heard at length. It is not in dispute that the appellant was in possession of 'scrip' and 'authorization' issued in the same year which, in accordance with para 2(4) of notification no. 102/2009-Cus dated 11th September 2009, disentitled them to usage of the scrip. Thus it was that the appellant commenced the process of restitution of the duty foregone in imports effected by availing of the scrip.

5. There is no doubt that public notice no. 30/2015-20 dated 8th September 2016 did prescribe mode of surrender of one or the other to be exercised within nine months thereof with the observation that penal consequences and detriment would not follow. The disinclination of the lower authorities to adhere to this

commitment in the public notice, adopted in its entirety by Central Board of Excise & Customs (CBEC) in circular no. 45/2016-Cus dated 23rd September 2016, was the direction in the latter that ‘pending cases’ be disposed off accordingly. The lower authorities declined to perceive concluded proceedings as pending and, taking note of absence of protest while discharging the liability, held the claim for refund to be ineligible.

6. The duty and interest liability were made good before issue of show cause notice despite which proceedings under section 28 of Customs Act, 1962 were initiated and, it would appear, as mandatory penalty under section 114A of Customs Act, 1962 was invocable. The recovery was required to be completed by issue of adjudication order; however, under the new incorporation in section 28 of Customs Act, 1962, facility of reduced penalty was made available and the appellant opted for the benefit bringing the proceedings to a conclusion on their own which, even without a speaking adjudication order, is closure and not dropping of proceedings. Revisit of such concluded, deemed in law or *de facto*, proceedings is possible only through the appellate process and excess paid, if any, is accessible only by consequential relief. The existence of ‘protest’ is not germane to consequential relief with its own self-contained frame of limitation.

7. For this reason, the claim for refund is not maintainable; that

would be tantamount to interference with concluded, and unchallenged, proceedings. Appeal is dismissed.

(Order pronounced in the open court on 22/08/2022)

(C J MATHEW)
Member (Technical)

**/as*