

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No.10891 of 2019

(Arising out of OIA-JMN-CUSTM-000-APP-01-19-20 dated 01/04/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD)

Nirma Ltd

Nirma House, Ashram Road
Navrangpura, Ahmedabad, Gujarat

.....Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar, Gujarat

.....Respondent

APPEARANCE:

Shri P P Jadeja, Consultant for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
Final Order No. A/ 10028 /2022

DATE OF HEARING: 10.12.2021
DATE OF DECISION:13.01.2022

RAMESH NAIR

The issue involved is that whether refund of deposit made with reference to provisional assessment as a security to the bond executed by the appellant is governed by Section 27 of Customs Act, 1962 and the provision of time limit and unjust enrichment is applicable.

1.1 The brief facts of the case are that the appellant imported a consignment of 51,723 MT Indonesian Coal and filed Bill of Entry No.08/10-11 dated 03.02.2011 with Customs at Bhavnagar and the same was assessed provisionally only for want of original documents and test results. The Bill of Entry shows endorsement dated 03.02.2011 by officers. Provisional duty of Rs.81,97,292/- estimated was paid as per Bill of Entry No.08/10-11 dated 03.02.2011 which was finally assessed on the same estimated duty on 11.10.2011. Vide letter dated 03.02.2011, the appellant claimed benefit of preferential rate of Customs (Basic Duty) duty at the rate of 3% ADV under Notification No.153/2009 Customs dated 31.12.2009 as amended. As desired by the proper officer while provisional assessment, appellant has deposited Rs.16,39,458/- under protest with a bank guarantee and also a bond of Rs.20,49,580 as ordered by the Assistant Commissioner

for allowing provisional assessment of said Bill of Entry filed by the appellant. Accordingly, provisional assessment was ordered and during the process of assessment, proper officer had examined goods and drawn samples from the consignment. Appellant produced all relevant documents desired by the Officers for finalizing the assessment accordingly, the bill of entry No.08/10-11 dated 03.02.2011 was finally assessed by the proper Officers on 11.10.2011. Intimation of final assessment was also issued by Customs vide letter No. BE No.F-08/10-11 dated 02.12.2011 wherein, it has been intimated to the appellant that final assessment was completed determining Customs Duty of Rs.81,97,292/- and entire duty of Rs.81,97,292/- paid on provisional assessment was adjusted and appropriated as finally assessed duty. Bond given was discharged as assessment was finalized and completed. The proper officers did not release security deposit on final assessment. Appellant filed written request on 24.1.2014, 05.06.2017, 20.06.2017 on completion of the final assessment of the said Bill of Entry. After requests and oral persuasions, SCN dated 07.11.2017 was issued to the appellant to clarify as to why claim of Rs.16,39,458/- should not be rejected on time limit and on unjust enrichment. The adjudicating authority has rejected the refund claim holding that Rs.16,39,458/- deposited was duty and claim filed on 24.04.2014 after completing final assessment on 11.10.2011 is beyond the time limit of one year stipulated under Section 27 of the Customs Act, 1962. The claim is also denied on the ground of applicability of unjust enrichment. Being aggrieved by Order-In-Original No.16/CUS-REF-2018-19 issued on 11.06.2018 by the Assistant Commissioner of Customs, Bhavnagar, appellant filed appeal before the Commissioner of Customs (Appeals), Ahmedabad, who has rejected it vide OIA No.JMN-CUSTOM-000-APP-01-2019-20 dated 01.04.2019 upholding the said Order-In-Original therefore, the present appeal filed by the appellant.

02. Shri P P Jadeja, learned consultant appearing on behalf of the appellant submits that the amount of Rs.16,39,458/- was deposited as security deposit with the bond and bank guarantee therefore, the same was not duty estimated as part of provisional duty. The proper Officer should have released this amount in the same manner as was released the bond and bank guarantee. The security deposit is not different from the bank guarantee because both are in the nature of security deposit therefore, the refund of the same is not governed by Section 27 of Customs Act, 1962. He further submits that in the present case as per Regulation 2 of Customs (Provisional Duty Assessment) Regulations 2011 there are two clauses for

provisional assessment namely, (1) Importer executes bond in amount equal to difference between duty that may be finally assessed or re-assessed and the provisional duty (2) Importer deposit with proper officer such sum not exceeding twenty percent of the provisional duty, as the officer may direct. Accordingly, in this case provisional duty amount ordered was Rs.81,97,292/- and other amount directed was twenty percent of the provisional duty i.e. Rs.16,39,458/-. Thus, having deposited entire provisional duty Rs.16,39,458/- was only security deposit and not a duty. Therefore, neither the time limit nor provision of unjust enrichment as provided under Section 27 will apply for returning of Security deposit. He placed reliance on the judgment of Hon'ble Supreme Court in Para 95 in the case of MAFATLAL INDUSTRIES LTD v/S. UOI- 1997 (89) E.L.T. 247 (S.C.) wherein, it was held that no recoveries or refund consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B as the case may be. He further submits that on finalization of provisional assessment it is obligatory on the revenue officers to refund the amount for which even no refund application is required.

2.1 He placed reliance on the decision of the Hon'ble Gujarat High Court in the case of CC Vs. HINDALCO INDUSTRIES LTD- 2008 (231) E.L.T.36 (Guj.). He further submits that the security deposit was paid under protest therefore, in view of the judgment of Hon'ble Gujarat High Court in the case of M/S. CONTEMPORARY PACKAGING TECHNOLOGIES PVT LTD Vs. UOI- 2014 (299) E.L.T. 439 (Guj.) wherein, it was held that excess duty paid under protest was required to be refunded on finalization of provisional assessment even without any claim being made by the assessee. Refund claim in such case was not governed under Section 27 of the Customs Act, 1962 and the assessee is not required to prove that burden of duty not passed on to buyers. He submits that the present case is on better footing as the amount of Rs.16,39,458/- was paid under protest was security deposit and not duty. He placed reliance on the following judgments:-

- M/S IDMC LTD Vs. CC, MUMBAI-II-2013 (289) E.L.T. 389 (Tri.-Mumbai)
- SKF TECHNOLOGIES (I) PVT LTD vs. CC- 2017 (352) ELT (Tri.-Bang)
- CALCUTTA IRON & STEEL COMPANY vs CESTAT- 2017 (350) ELT 327 (Madras)
- S.E.L.I. SOCIETA ESECUZIONE LAVORI IDRAULICI S.P.A. vs. C.C. (IMPORT), MUMBAI- 2015 (327) ELT- 288 (Tri-Mumbai)

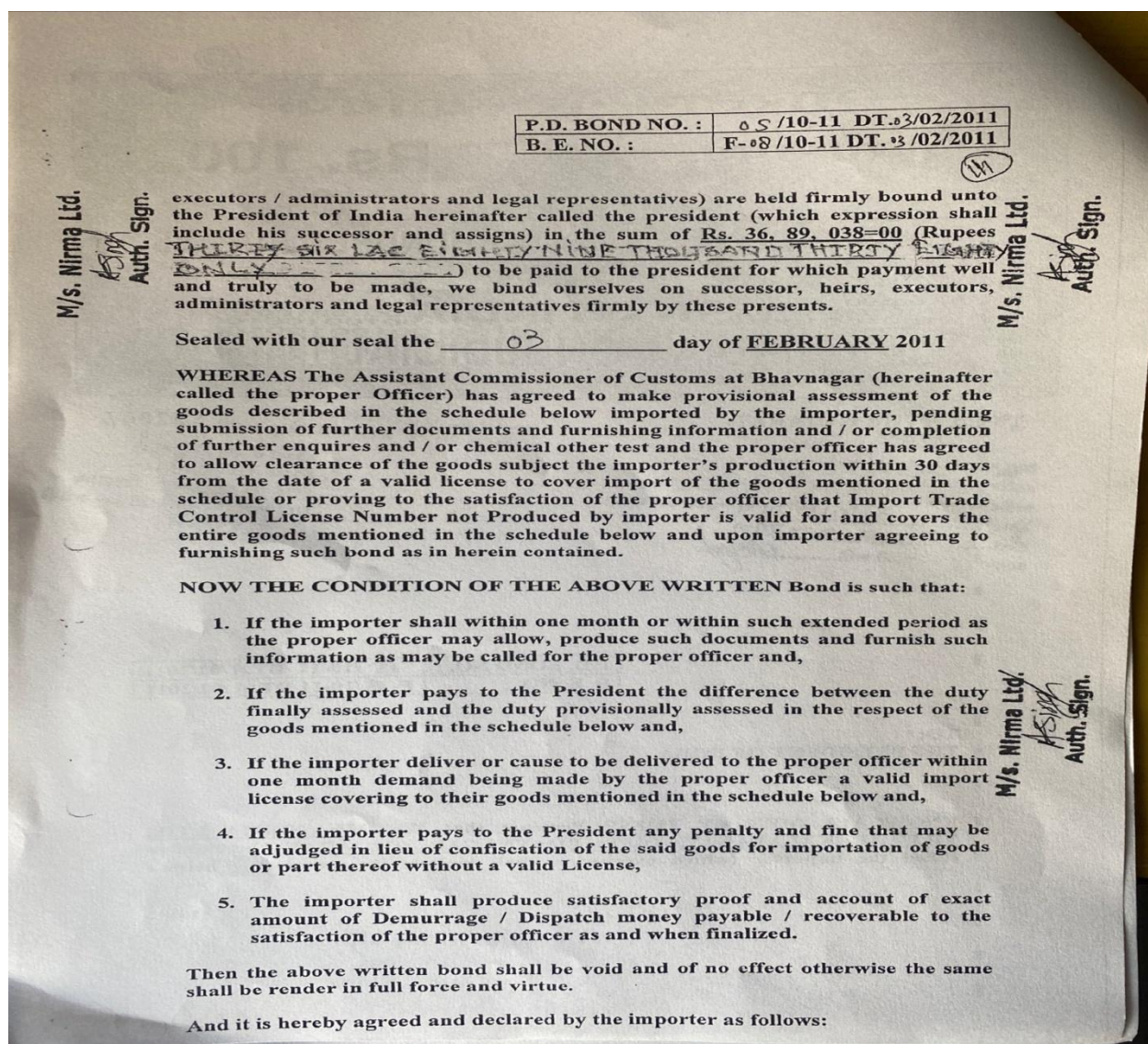
- AGRASEN ENGG. INDUSTRIES LTD Vs. COMMR. OF CUS.(I), NHAVA SHEVA- 2015 (315) ELT 445 (Tri.-Mumbai)
- ENTERPRISE INTERNATIONAL LTD Vs. COMMISSIONER OF CUSTOMS (PORT)- 2012 (281) ELT 47 (Cal.)
- CC (EXPORTS) Vs. CABLE CORPORATION OF INDIA LTD- 2008 (229) ELT 212 (Mad.)

He prays that the impugned order be set aside and appeal be allowed by returning security deposit of Rs.16,39,458/-. The learned counsel also filed an additional submission post hearing which is taken on record.

03. Shri Vinod Lukose, Learned Superintendent (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order. He placed reliance on the following judgments:-

- PUJAN BUILDERS ENGINEERS & CONTRACTORS Vs. CCE, VADODARA-II- 2021 (48) GSTL 24 (Tri-Ahmd)
- BPCL Vs. CC (IMPORT) MUMBAI- 2015 (320) ELT 294

04. I have carefully considered the submissions made by both the sides and perused the records. The issue involved in the present case is that whether the amount for which the refund claim was sought for by the appellant is deposit or duty and accordingly, whether the refund is governed by Section 27 of the Customs Act or otherwise. I find that during the provisional assessment, the appellant has executed Bond No.05/10-11 dated 03.02.2011 in respect of Bill of Entry No.F-08/10-11 dated 03.02.2011, the same is scanned below:-



The schedule above referred to: (Particulars of the goods)

Bill of Entry No. & Date	: B.E. NO. : F- 08 /10-11 DT.: 03/02/2011
IGM NO. and Date	: I.G.M. NO. : F-07/10-11 DT.: 03/02/2010
Name of Steamer	: MV GONG YIN - 1
Description of Goods	: INDONESIAN STEAMING (NON - COKING) COAL IN BULK
Country of Origin	: INDONESIA
Quantity	: 51,723 M.T.
Value Rs.	: RS. 17, 90, 79, 508=00 PS.
Total Customs Duty 5%	: RS. 1,18,86,330=00 PS.
Total Customs Duty 3%	: RS. 81,97,292=00 PS. Challan No.
Differential Customs Duty	: RS. 16,39,458=00 PS. Challan No. 1639458 deposited under protest.
Bank Guarantee	: RS. 20,49,580=00 PS. Of State Bank of India Bank Guarantee No. 0415211BG0000022, Dated 3 rd Feb. 2011, valid upto 2 nd Feb. 2012.

IN WITNESS WHEREOF the importer has herein set and subscribed its hands and seal the day, and month and year first above written.

SIGNED AND DELIVERED BY ON BEHALF OF THE IMPRTER: **M/s. Nirma Ltd.**
Auth. Sign. M/S. NIRMA LTD.

IN WITNESS:

(1) *P. C. Patel*

(2) *J. M. Bhatt*

Verified *03.02.2011*
न. अ. पांड्या / N. A. Pandya
अधीक्षक / Superintendent

03.02.2011
Superintendent of Customs
Customs House, Bhavnagar

Accepted for and on behalf of the President
Of India on the 03 Day of FEBRUARY, 2011

03.02.2011
M. S. DAS
ASSISTANT COMMISSIONER
CUSTOMS, BHAVNAGAR

03.02.2011
ASSISTANT COMMISSIONER
CUSTOMS - BHAVNAGAR

The amount of Rs.16,39,458/- which the appellant is claiming as deposit was clearly paid as differential custom duty as is evident from the above bond. It is further observed that the appellant has paid this amount of Rs.16,39,458/- vide TR6/GAR 7 Challan No.CUS/36/10-11 dated 03.02.2011, the same is scanned below:-

From the aforesaid challan, it can be seen that under the Head of Account it is a customs duty which was paid under account heading No.0037 and also in the description column it is clearly mentioned that the deposit of amount is equal to 20% of provisional duty therefore, the amount of Rs.16,39,458/- has been paid as customs duty only therefore it is not a deposit as has been claimed by the appellant but it is a custom duty. Since in view of the above documentary evidence, it is established that the amount for which refund was sought for by the appellant is not a deposit but it is a duty. Therefore,

the refund is clearly governed by Section 27 of the Customs Act, 1962 therefore, all the provision of limitation and unjust enrichment, etc is clearly applicable.

05. Accordingly, the impugned order is set aside. Appeal is dismissed.

(Pronounced in the open court on 13.01.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Mehul