

9.1 REFUND OF DUTY

Refund of any duty of excise and interest, if any, paid on such duty is governed by section 11B of the Central Excise Act, 1944. By definition, refund includes rebate of duty paid on goods exported out of India or on materials used in the manufacture of goods exported out of India. The refund claim can be filed within one year from the relevant date in the specified Form by an assessee or even a person who has borne the duty incidence, to the Deputy/Assistant Commissioner of Central Excise having jurisdiction over the factory of manufacture.

The “relevant date” has been defined in the said section and refund of duty paid can be sought provided the manufacturer has not passed on the burden of duty. In case the burden of duty has been passed on, the refund can be claimed by the person who has actually paid the duty or, in the alternative, the amount can be deposited in the Consumer Welfare Fund created by the statute.

9.2 INTEREST ON DELAYED REFUND

The Central Excise Act also provides for payment of interest on delayed payment of refund. As per section 11BB, if any duty ordered to be refunded under section 11B has not been refunded within three months from the date of receipt of the refund application in the prescribed manner and form along with the supporting documentary evidence as laid down in the relevant rules, interest at the rate notified by the Government which should not be below 5% and should not exceed 30% per annum (notified as 6% p.a. as per *Notification no. 67/2003 dated 12.9.2003*) shall have to be paid on such duty from the date immediately after the expiry of three months from the date of receipt of application till the date of refund of such duty.

9.3 THEORY OF UNJUST ENRICHMENT

Section 11B of the Central Excise Act, 1944 is perhaps the most important provision governing refunds. Explanation to section 11B defines the term “refund” to include rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods exported out of India. The definition is inclusive and therefore would govern all refunds except for which there could be a special procedure.

Section 11B was inserted with effect from 11.7.1980. The most important amendment took

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place on 20.9.91 wherein the theory of unjust enrichment was built into the statute. This theory postulates that only the person who has not passed on the incidence of duty will be eligible to claim the refund. The section today recognises that a buyer of goods can also claim refund. The most important decision on refund is by a Nine Member Bench of the Supreme Court in *Mafatlal Industries Ltd. v. U.O.I.*- 1997 (89) E.L.T. 247. The salient features of this judgment can be summarised as under :

- (a) The theory of unjust enrichment is valid and constitutional. However, the theory that the manufacturer would be unjustly impoverished in case of demands has not been agreed to.
- (b) All pending applications as on 20-9-1991 would be governed by this theory of unjust enrichment.
- (c) Sections 11B and 27 (Customs Act) are self contained codes for refunds and resort to civil suits or writs is not permissible unless the taxing provision is struck down as unconstitutional. The general theory laid down in certain judgments of both the Supreme Court and High Courts that refund could be claimed within three years of discovery of mistake has been disapproved.
- (d) Unless the levy is struck down as unconstitutional, all Courts must exercise jurisdiction in terms of section 11B and refuse to grant relief if the incidence of tax has been passed on.
- (e) Whatever amount is collected as duty will have to be paid to the Government. If excess is collected than that payable, it would be credited to the Consumer Welfare Fund or given as refund to the person who has borne the incidence of duty.

The Supreme Court has held in *Solar Pesticides case 2000 (116) ELT 401* that refunds will not be allowed on captive consumption of inputs.

Further, the Supreme Court in the case of *CCE v. Allied Photographics 2004 (166) ELT 3* has held that doctrine of unjust enrichment applies even when duty is paid under protest. It has been held that even if there is no change in price before and after assessment (i.e. before and after imposition of duty), it does not lead to the inevitable conclusion that incidence of duty has been passed on to the buyer, as such uniformity may be due to various factors.

According to section 11B(2), the Assistant Commissioner, on being satisfied that excise duty and interest paid on such duty is refundable, shall grant refund to the applicant only in the following cases :

- (a) Rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (b) Unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise;
- (c) Refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

- (d) The duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest to any other person;
- (e) Duty of excise and interest, if any, paid on such duty borne by the buyer if he has not passed on the incidence of such duty and interest to any other person;
- (f) The duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by Notification in the Official Gazette, specify.

(No notification under clause (f) shall be issued unless the Central Government is of the opinion that the incidence of duty has not been passed on by the persons concerned to any other person. No refund shall be made except herein provided).

In other cases, the Assistant Commissioner shall make an order that the whole or any part of the duty is refundable and the amount so determined shall be credited to the "Consumer Welfare Fund" established under section 12C. The following shall be credited to the Fund:

- (a) the amount of duty of excise as per section 11B(2) or section 11C(2) or section 11D(2);
- (b) the amount of duty of customs as per section 27(2) or section 28A(2), or section 28B(2) of the Customs Act, 1962;
- (c) any income from investment of the amount credited to the Fund and any other monies received by the Central Government for the purposes of this Fund;
- (d) the surplus amount referred to in sub-section (6) of section 73A of the Finance Act, 1994.

Any money credited to the Fund shall be utilized by the Central Government for the welfare of the consumers. The Central Government shall maintain or, if it thinks fit, specify the authority which shall maintain, proper and separate account and other relevant records in relation to the Fund in such form as may be prescribed in consultation with the Comptroller and Auditor-General of India.

It must be noted that as per rule 7(6) of the Central Excise Rules, 2002 refunds pertaining to finalisation of provisional assessments are also governed by the law of unjust enrichment.

Other than the cases mentioned listed above, the courts have laid few circumstances for which the unjust enrichment concept does not apply. They are

- (a) If the refund relates to pre-deposit of duty made under section 35F - *Suvidhe Ltd. v. U.O.I.* - 1996 (82) E.L.T. 177 (Bom). (Contrarily AP High Court has held in case of *ITW Signode India Ltd. v. AC* - 2000 (122) E.L.T. 651, pre-deposit under section 35F will also be subject to the provisions of section 11B).
- (b) Refunds arising out of settlements between parties under contract - *Living Media Ltd. v. U.O.I.* - 1998 (104) E.L.T. 3 (S.C.).

9.4 ASSESSMENT DOCUMENTS TO SHOW DUTY PAYMENT PARTICULARS

1. Section 12A makes it obligatory on the person liable to pay duty to indicate on the invoice

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or like documents, the amount of duty which will form part of the price at which such goods are sold.

2. Section 12B casts a presumption that duty has been passed on to the buyer. This presumption is rebuttable.
3. The amount of excise duty to be mentioned is not the actual duty paid or payable on the goods but only the actual duty being passed on to the buyer as part of the price of goods sold.
4. The document relating to assessment are :
 - (a) Invoices/AR1
 - (b) Monthly RT-12 return
 - (c) Receipted treasury challans on which deposits were being made.
 - (d) Original and duplicate copies of the account-current and also of account in Cenvat credit records as the case may be.
 - (e) The obligation under this section is applicable only to persons who are liable to pay excise duty – viz. manufacturers, curers etc. It does not apply to wholesale dealers, traders etc.

9.5 TIME-LIMIT FOR MAKING THE APPLICATION FOR REFUND OF DUTY

1. Under Section 11B, the application for refund has to be made within **one year** from the relevant date.
2. The meaning of the term “relevant date” is set out in the Explanation (B) to section 11B.
3. The relevant date in the various cases is as follows :
 - (a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,
 - (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or,
 - (ii) if the goods are exported by land, the date on which such goods pass the frontier, or
 - (iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;
 - (b) in the case of goods returned for being remade, refined, reconditioned or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;
 - (c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a

factory after having been removed from such factory for export out of India, the date of entry into the factory;

- (d) in the case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;
- (e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;
- (f) in case of goods which are exempt from payment of duty by a special order under section 5A(2), the date of issue of such order;
- (g) in case of provisional assessment, the date of adjustment of duty after final assessment;
- (h) in case where the duty becomes refundable as a consequence of judgement, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the date of such judgement, decree, order or direction;
- (i) in any other case, the date of payment of duty.

4. The aforesaid period of limitation will not apply if duty is paid under protest.

Unless the duty is paid under protest, the application for refund claim should be filed within one year from the relevant date. In this context, the Supreme Court in the case of *CCE Vs Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (S.C.)* has held that where the assessee has not challenged the adjudication order in time despite being appealable, such order cannot be questioned by filing refund claim after the time limit on the ground that adjudicating authority has committed an error in passing earlier order.

9.6 PRESENTATION OF REFUND CLAIM

Any person, who deems himself entitled to a refund of any duties of excise or other dues, or has been informed by the department that a refund is due to him shall present a claim in proper Form, along with all the relevant documents supporting his claim and also the copies of documents/records supporting his declaration that he has not passed on the duty incidence.

The claim will be filed with the Deputy/Assistant Commissioner of Central Excise with a copy to the Range Officer.

The claim shall be presented in duplicate and shall be duly signed by the claimant or by a duly authorised person on his behalf and shall be pre-receipted (with revenue stamp on original copy, where necessary).

It may not be possible to scrutinise the claim without the accompanying documents and decide about its admissibility. If the claim is filed without requisite documents, it may lead to delay in sanction of the refund. Moreover, the claimant of refund is entitled for interest in case refund is

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not given within three months of the filing of claim. Incomplete claim will not be in the interest of the Department. Consequently, submission of refund claim without supporting documents will not be allowed. Even if post or similar mode files the same, the claim should be rejected or returned with Query Memo (depending upon the nature/importance of document not filed). The claim shall be taken as filed only when all relevant documents are available. In case of non-availability of any document due to reasons for which the Central Excise or Customs Department is solely accountable, the claim may be admitted that the claimant is not in disadvantageous position with respect to limitation period.

Subsequent to filing of the application, the Range Officer will complete the scrutiny of the papers within 2 weeks from the date of receipt of the claim in the Range Office and send a report to their scrutiny to the Divisional Deputy/Assistant Commissioner of Central Excise.

The Divisional Office will scrutinise the claim, in consultation with Range, and check that the refund application is complete and is covered by all the requisite documents. This should be done, as far as possible, the moment refund claim is received and in case of any deficiency, the same should be pointed out to the applicant with a copy to the Range Officer within 15 days of receipt.

In the Divisional Offices, final processing of refund claims after the receipt of Range Officer's report should be completed including the verification of the fact whether the assessee has passed on the duty incidence to their buyer (in cases where the refund claim is filed by a manufacturer or owner of warehoused goods). The types of cases to which this provision will not be attracted are already specified in section 11B itself. Where the duty incidence has been passed on, the duty refund, if otherwise admissible, will be ordered in file, but will also be ordered to be credited to the Consumer Welfare Fund. The burden of proving that the duty incidence has not been passed on, is on the claimant and the latter may be required to submit sufficient documentary proof for this purpose. It is clarified that the question of unjust enrichment has to be looked into case by case. There cannot be a general instruction indicating the documents and /or record, which the claimant should produce as a proof that he has not passed on the duty incidence to any other person.

Claim for refund of less than Rs. 100 shall not be entertained in respect of all excisable commodities.

9.7 PAYMENT OF REFUND

Where the claim has been admitted whether in part or in full, and claimant is eligible for refund, the Deputy/Assistant Commissioner of Central Excise should ensure that payment is made to the party within 3 days of the order passed after due audit, if any.

All claims shall be paid to the applicant by a cheque on the authorised bank with which the sanctioning authority maintains account.

9.8 POST AUDIT

All refund claim papers should be sent by the Divisional Deputy/Assistant Commissioner to the Commissionerate Headquarters (to the Additional/Joint Commissioner–Audit) within a week

after the payment thereof irrespective of the amount involved. At the Commissionerate Headquarters, a special cell comprising Deputy/Assistant Commissioner (Audit) – for immediate supervision – one superintendent, one Inspector and two Deputy Office Superintendents - may be created out of the sanctioned strength of the audit staff in the Commissionerate for post-audit of these claims.

This cell may undertake examination on merits of each such claim where the amount of refund granted is Rs. 5 lakh or more. In regard to the remaining refund claims involving amounts below Rs. 5 lakh, post audit may be undertaken on the basis of random selection by the Deputy/Assistant Commissioner (Audit). This post audit may be completed before the expiry of three months from the date of payment and where ever the grant of refund is not found to be correct, action should be taken in terms of provisions contained in section 35E of the Central Excise Act, 1944. This special Cell may work directly under the charge of Additional/Joint Commissioner (Audit).

9.9 MONITORING AND CONTROL FOR TIMELY DISPOSAL OF REFUNDS

The Commissioner of Central Excise should devise appropriate control to ensure that the refund/rebate claims are expeditiously sanctioned within the time limit stipulated above.

9.10 PROVISIONS RELATING TO INTEREST ON DELAYED REFUNDS [SECTION 11BB]

Statutory provisions:

1. Interest is payable to the assessee if the amount claimed as refund is not paid within three months of receipt of refund claim. The interest shall be paid at such rate not below 5% and not exceeding 30% p.a.
2. The interest rate has been fixed by the Board as 6% per annum (*Notification No. 67/2003 – C.E. (N.T.) dated 12.9.2003*).
3. The person must take the following safeguards:
 - a. the application must be in the proper form (Form R or C)
 - b. the application must be filed before the Assistant Commissioner only.
 - c. A checklist of the documents must be enclosed with the application. See *CBEC Circular 130/41/95 CX dt..30.5.95 1995 (77) ELT T64*.
4. The Department must take the following measures:
 - a. The application should be scrutinised within 48 hours of receipt of application and the acknowledgement must be given forthwith.
 - b. If the application is deficient, a letter must be issued forthwith to the assessee pointing out the deficiencies.
 - c. Only when the deficiencies are made good, will the application be acknowledged.

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Interest will start from the expiry of three months after date of acknowledgement of application. However, if the matter is pending before the Settlement Commission, the period commencing from date of filing of application and ending with the date of receipt of the case sent back to the officer will be excluded for calculation of interest [Sec.32L(3)].

Self-examination questions

1. What is the time limit for making the application for refund of duty?
2. What are the relevant dates as set out in the explanation (B) to section 11B?
3. Enumerate the circumstances under which refund of duty would be granted to the assessee instead of being credited to the Consumer Welfare Fund.
4. The refund of an encashed bank guarantee for all or part of the disputed excise duty, pursuant to an order of the Court, is governed by the provisions of section 11B. Discuss the correctness or otherwise of the statement with the help of decided case law, if any.

Answers/Hints

4. Supreme Court in the case of *Oswal Agro Mills Ltd. v. Assistant Collector of C.Ex., Ludhiana 1994 (70) ELT 48 (SC)* has held that refund of an encashed bank guarantee for all or part of the disputed excise duty pursuant to an order of the Court is not governed by the provisions of section 11B, since furnishing of a bank guarantee is not equivalent to payment of excise duty.

The Supreme Court stated that section 11B applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. It is then that the excise authorities would be required to repay or refund the excise duty.

The Apex Court explained that a bank guarantee is a security for the Revenue for recovering the dues in the event the Revenue succeeds in the dispute concerning the duty. However, if the bank refuses to honour its guarantee, the revenue or the principal administrative officer of the Court (where the bank guarantee is in his favour) has to file a suit against the bank for the amount due upon the bank guarantee. Therefore, the amount of the disputed tax or duty that is secured by a bank guarantee cannot be considered as having been paid to the Revenue. Thus, there arises no question of its refund and hence provisions of section 11B would not be attracted.