

10.1 INTRODUCTION

On import or export of goods, at times, it is found that duty has been paid in excess of what was actually leviable on the goods. Such excess payment may be due to lack of information on the part of importer/exporter or non-submission of documents required for claim of lower value or rate of duty. Sometimes, such excess payment of duty may be due to shortage/short landing, pilferage of goods or even incorrect assessment of duty by Customs. In such cases, refund of excess amount of duty paid can be claimed by the importer or exporter. If any excess interest has been paid by the importer/exporter on the amount of duty paid in excess, its refund can also be claimed. Section 27 of the Customs Act, 1962 refers to this.

10.2 APPLICATION FOR REFUND

10.2.1 Form of application: The refund of any duty and interest can be claimed either by a person who has paid the duty in pursuance to an order of assessment or a person who has borne the duty. Any person claiming refund of any duty or interest, has to make an application in duplicate in the form as prescribed in the Customs Refund Application(Form) Regulations, 1995, to the jurisdictional Deputy/Assistant Commissioner of Customs. Such application is to be made before the expiry of six months from the date of payment of duty and interest. However, in case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, application for refund can be made before the expiry of one year from the date of payment of duty and interest [Section 27(1)].

The application for refund is required to be filed with documentary or other evidence including documents relating to assessment, sales invoice and other like documents to support the claim that the duty and interest was paid in excess, incidence of duty or interest has not been passed on by him to any other person, and the refund has not been obtained already.

Where on scrutiny, the application is found to be complete in all respects, the Customs issues an acknowledgement in the prescribed Form as per the Customs Refund Application(Form) Regulations, 1995. However, in case the application is found to be incomplete, the Customs has to return the application to the applicant, pointing out the deficiency. The applicant has to re-submit the application after making good the deficiency, for scrutiny by Customs again for

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admissibility of the refund claim.

If an appealable order passed by an authority is not challenged by filing an appeal, it is not open to the assessee to question the correctness of the order subsequently by filing a refund claim. [*Flock (India) Private Ltd. 2000 (120) ELT 285 (SC)*]

Refund claim is not maintainable when assessment order is not challenged [M.F. (D.R.) Circular No. 24/2004 – Cus., dated 18.03.2004].

10.2.2 Relevant dates for submission of a refund application: As stated above, application for refund is required to be filed within six months from the date of payment of duty and interest and in case of any import made by an individual for his personal use or by Government or by an educational, research or charitable institution or hospital, application for refund is to be filed within one year from the date of payment of duty and interest.

No time limit in case of duty paid under protest: The duty is paid under protest in a case where the assessment has not been accepted by the importer. In such a case, the limitation of one year or six months, as the case may be, does not apply where any duty and interest has been paid under protest.

Normally, the time limit of six months or one year is computed from the date of payment of duty. However, in following situations, the relevant dates for computing the time limits are different:

S. No.	Case	Relevant date
1.	In case of goods exempted by an ad-hoc exemption order issued under sub-section (2) of section 25	The date of issue of such order
2.	In case of provisional payment of duty under section 18	The date of adjustment of duty after the final assessment
3.	Where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court	The date of such judgment, decree, order or direction
4.	If refund claim is filed by purchase (person other than importer)	The date of purchase of goods

10.3 PROCESSING OF REFUND CLAIM [SECTION 27(2)]

The application of refund found to be complete in all respects by Customs, is processed to see if the whole or any part of the duty and interest paid by the applicant is refundable. In case the whole or any part of the duty and interest is found to be refundable, an order for refund is passed. However, in view of the provisions of unjust enrichment enshrined in the Customs Act, the amount found refundable has to be transferred to the Consumer Welfare Fund. Only in

following situations, the amount of duty and interest found refundable, instead of being credited to the Consumer Welfare Fund, is to be paid to the applicant:

- (a) if the importer has not passed on the incidence of such duty and interest to any other person;
- (b) if imports were made by an individual for his personal use;
- (c) if the buyer who has borne the duty and interest, has not passed on the incidence of such duty and interest to any other person;
- (d) if amount found refundable relates to export duty paid on goods which has returned to exporter as specified in section 26;
- (e) if amount relates to drawback of duty payable under section 74 and 75;
- (f) if the duty or interest was borne by a class of applicants which has been notified for such purpose in the Official Gazette by the Central Government.

10.4 INTEREST ON DELAYED REFUND

The Customs has to finalize refund claims immediately after receipt of the refund application in proper form along-with all the documents. In case, any duty ordered to be refunded to an applicant is not refunded within 3 months from the date of receipt of application for refund, interest is to be paid to the applicant. Such interest should not be below 5% and should not exceed 30%. Currently, the interest is 6% vide *Notification No. 75/2003-Cus (NT) dated 12.09.2003*. The interest is to be paid for the period from the date immediately after the expiry of 3 months from the date of receipt of such application till be date of refund of such duty. For the purpose of payment of interest, the application is deemed to have been received on the date on which a complete application, as acknowledged by the proper officer of Customs, has been made.

Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any Court against an order of the Assistant Commissioner/Deputy Commissioner of Customs, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or by the Court, as the case may be is deemed to be an order for the purpose of payment of interest on delayed refund.

The interest on delayed refund is payable only in respect of delayed refunds of Customs duty and no interest is payable in respect of deposits such as deposits for project imports, security for provisional release of goods etc. [Section 27A]

10.5 REFUND OF EXPORT DUTY IN CERTAIN CASES [SECTION 26]

This section provides as follows:

Where on the exportation of any goods any duty has been paid, such duty shall be refunded to the person by whom or on whose behalf it was paid, if -

- (a) the goods are returned to such person otherwise than by way of re-sale;

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- (b) the goods are re-imported within one year from the date of exportation; and
- (c) an application for refund of such duty is made before the expiry of six months from the date on which the proper officer makes an order for the clearance of the goods.

This provision is intended to compensate for a situation where the goods, which are exported are rejected and returned by the buyer. The time period set is one year from the date of exportation. The time set for submitting a claim for refund is six months from the date on which the proper officer makes an order for clearance of returned goods.

10.6 REFUND OF IMPORT DUTY IN CERTAIN CASES [SECTION 26A]

Sub-section (1) of section 26A provides that in the following cases the import duty paid on clearance of imported goods for home consumption shall be refunded to the person who has paid such duty if on importation the goods are capable of being easily identified as such imported goods:

(a) Goods are defective/not as per specifications: The goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods. However, the goods should not have been worked upon, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;

(b) Goods identified as imported goods: The goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;

(c) No drawback claimed: The importer does not claim drawback under any other provisions of this Act; and

(d) Importer exports the goods/relinquishes title to goods/destroys or renders them commercially valueless

- (i) the goods are exported; or
- (ii) the importer relinquishes his title to the goods and abandons them to customs; or
- (iii) such goods are destroyed or rendered commercially valueless in the presence of the proper officer

in the prescribed manner within 30 days from the date on which the proper officer makes an order for the clearance of imported goods for home consumption under section 47. However, the period of 30 days may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding 3 months.

It may be noted that the provisions of this section do not apply to the goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

Application for refund of import duty: An application for refund of duty shall be made before the expiry of 6 months from the relevant date in such form and in such manner as may be prescribed [sub-section 2].

Meaning of relevant date: Explanation to sub-section (2) provides the relevant dates in various circumstances as under:-

S.No.	Case	Relevant date
1.	In case of goods exported out of India	Date on which the proper officer makes an order permitting clearance and loading of goods for exportation under section 51
2.	In case of relinquishment of title to the goods	Date of such relinquishment
3.	In case of goods being destroyed or rendered commercially valueless	Date of such destruction or rendering of goods commercially valueless

No refund in case of perishable goods: In respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period, the refund shall not be allowed [sub-section (3)].

The Board may, by notification in the Official Gazette, specify any other condition subject to which the refund may be allowed [sub-section (4)].

10.7 DOCTRINE OF UNJUST ENRICHMENT WITH RESPECT TO REFUND OF DUTY

When an importer imports goods, he has to pay the customs duty on such goods. This duty is recovered from the purchasers when these goods are sold by the importer. In other words, the burden of duty is passed on to the purchaser. Subsequently, if the importer makes a claim for refund of duty and on acceptance of such claim if he retains the amount of refund with himself without passing it to the purchaser, then this would be called as unjust enrichment.

Therefore, wherever there is an over assessment or excess collection of duty, the refund shall be given only to the person who at the material time of grant of refund, bears the burden of duty and interest, if any. When the person who bears the burden of duty refunded is not identifiable or has not come forward to claim the refund, the refund shall be paid into a fund called 'Consumer Welfare Fund'. The importer or the clearing agent has to prove that he has not passed the burden of duty, in order to claim refund of duty.

♦ Example:

The importer has imported an article, which has been valued at Rs. 1000/-. The customs duty on this article comes to Rs. 250/-. Now the importer adds his profit margin of say Rs. 250/- and sells the article for Rs. 1500/-. Now the price charged by the importer consists of the duty element which has been passed on to the buyer.

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If later on it is found that there was an error in assessment resulting in excess collection of duty, such excess collection is liable to be refunded. But as may be seen above, the importer has passed on the burden of duty to the purchaser and if any refund is granted to him, it would confer on him, the benefit to which he does not have a valid right. Therefore in such cases the refund is credited to the "Consumer Welfare Fund".

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. Section 11B and section 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.

The principle of unjust enrichment applies in case of refund after provisional assessment as what is paid at the time of provisional assessment is customs duty and not only deposit [*Bussa Overseas v. UOI 2003 (158) ELT 135(Bom.)*]. As per *CBEC Circular No. 40/2002-Cus. dated 17.07.2002*, unjust enrichment provisions apply to provisional assessment also.

Section 28D provides that every person who has paid duty under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

10.9.1 Exceptions to the Doctrine of Unjust Enrichment: As per first proviso to sub-section (2) of section 27 the doctrine of unjust enrichment does not apply to the refund of

duty and interest, if any, paid on such duty if such amount is relatable to:

- (i) drawback of duty payable under sections 74 and 75;
- (ii) export duty as specified in section 26;
- (iii) the duty and interest, if any, paid on such duty paid by the importer or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest to any other person;
- (iv) the duty and interest on imports made by an individual for his personal use;
- (v) the duty and interest borne by the buyer, if he had not passed on the incidence of such duty and interest to any other person;
- (vi) the duty and interest borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify. However, no notification under clause (vi) shall be issued unless in the opinion of the Central Government the incidence of duty and interest has not been passed on by the persons concerned to any other person.

Self-examination questions

1. With reference to the Customs Act, 1962, explain the circumstances under which refunds will not be credited to the Consumer Welfare Fund.
2. Discuss the provisions in respect of interest on delayed refunds.
3. List the document to be attached with the refund claim.
4. ABC Ltd. imported certain products and filed a bill of entry. The amount of duty payable was assessed but was not acceptable to ABC Ltd. and hence the same was paid by it under protest. Subsequently, a refund claim was filed by ABC Ltd. on the ground that the duty had been wrongly levied. However, the claim was rejected by the Department on the ground that since no appeal had been filed against the assessment order, the refund claim was not maintainable.

ABC Ltd. contended that according to section 27 of the Customs Act, 1962 a claim for refund could be made by any person who had paid duty in pursuance of an order of assessment or a person who had borne the duty. It was submitted that the words "in pursuance of assessment" necessarily implied that a claim for refund could be made without challenging the assessment in an appeal. Further, if the assessment was not correct, a party could file a claim for refund and the correctness of the assessment order could be examined whilst considering the claim for refund.

Give your opinion on the issue with the help of decided case laws, if any.

5. Does the principle of unjust enrichment apply to refund of import duty paid on capital goods?

Answers

4. The Supreme Court in the case of *Priya Blue Industries Ltd. v. Commissioner of Customs*
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(Preventive) 2004 (172) E.L.T 145 (S.C.) has stated that once an order of assessment has been passed, the duty would be payable as per that order. Unless that order of assessment has been reviewed under section 28 and/or modified in an appeal, that order would be enforceable. So long as the order of assessment is effective, the duty would be payable as per that order of assessment. A refund claim is not an appeal proceeding. The officer considering a refund claim cannot sit in appeal over an assessment made by a competent officer. The officer considering the refund claim can also not review an assessment order.

The Apex Court clarified that as the words “in pursuance of assessment order” come after the words “Any person claiming refund of any duty and interest, if any, paid on such duty paid by him”, they only indicate the party/person who can make a claim for refund. Thus, these words must be understood in the limited context only. They enable a person who has paid duty in pursuance of an order of assessment to claim refund. These words do not lead to the conclusion that a claim for refund can be maintained without modifying the order of assessment in an appeal or reviewing the same under section 28. The Supreme Court held that a refund claim cannot be filed against an assessment order, which has not been modified in an appeal or reviewed under section 28.

The ratio of the abovementioned decision can be applied in the present case also. Therefore, the stand taken by the Department is correct.

5. The Large Bench of the Tribunal in the case of *SRF Ltd. v. CCus. Chennai 2006 (193) ELT 186 (Tri. - LB)* has held that the doctrine of unjust enrichment would be applicable in case of imported capital goods used captively for manufacture of excisable goods.

It may be noted that in case of *Grasim Industries v. CCE 2003 (157) ELT 123 (CESTAT)* it was held that question of passing of excise duty would not arise in case of capital goods used captively. However, this decision has now been overruled by the above-mentioned judgement of the Large Bench of the Tribunal.