

## Question 1

Write a detailed note on claim for refund of duty or interest.

## Answer

Section 27 of Customs Act, 1962 deals with refund of duty or interest. The provisions of section 27(1) have been substituted with effect from 08.04.2011 so as to enhance the time-limit for claiming refund of duty and interest from six months to one year for all categories of importers with a view to unify the provisions with regard to raising of demands and claiming of refund. The sub-section-wise provisions of section 27 have been exhibited in the following table:

| Relevant sub-section and section | Brief Heading                                                                                                | Details                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|----------------------------------|--------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 27(1)                            | Time-limit for making application of refund                                                                  | <b>Any person</b> claiming refund of any duty or interest either paid or borne by him may make an application in prescribed form and manner to the Assistant Commissioner/Deputy Commissioner <b>before the expiry of one year</b> from the date of payment of such duty/interest. However, foregoing limit of one year shall not apply where any duty or interest has been paid <b>under protest</b> .<br>Further, for the purposes of this sub-section the meaning of term “the date of payment of duty or interest in relation to a person other than the importer shall be mean as the “the date of purchase of goods” by such person. |
| 27(1A)                           | Documentary or other evidence to establish that incidence of duty has not been passed on to any other person | Above application shall be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty or interest in relation to which such refund is claimed was collected from or paid by him and the incidence of such duty or interest has                                                                                                                                                                                                                                                                                                                                                    |

|        |                                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                       |
|--------|-----------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|        |                                                           | not been passed on by him to any other person.                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                       |
| 27(1B) | Manner of computation of period of limitation of one year | In case of goods which are exempt from payment of duty by a special order issued u/s 25(2)                                                                                                                                                                                                                                                                                                                                                              | The limitation of one year shall be computed from the date of issue of such order.                                                                                                    |
|        |                                                           | Where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court                                                                                                                                                                                                                                                                                              | The limitation of one year shall be computed from the date of such judgment, decree, order or direction                                                                               |
|        |                                                           | Where any duty is paid provisionally under section 18                                                                                                                                                                                                                                                                                                                                                                                                   | The limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment. |
| 27(2)  | Issue of Refund Order                                     | If on receipt of above refund application, the AC/DC of Customs is satisfied that either the whole or any part of the duty and interest, if any, paid on such duty by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund. However, in certain specified situations the amount of duty and interest, if any, shall be paid to the applicant instead of being credited to the Fund. |                                                                                                                                                                                       |

#### Question 2

*The assessee had imported capital goods under a licence with a condition to fulfill an export obligation within a certain time limit. The assessee failed to discharge the export obligation within the said time limit. Consequently, the Department invoked the bank guarantee and realized the amount. However, subsequently the assessee was able to fulfill the export obligation and the Department cancelled the bank guarantee. The assessee thereafter filed a refund claim for the amount realized by invocation of the bank guarantee by the Department. The Department rejected the refund claim on the ground that it was barred in terms of section 27 of the Customs Act, 1962 as the assessee had not been able to establish that the incidence of duty had not been passed on by him to any other person. Examine briefly, with the help of any decided case law, whether the stand taken by the Department is correct in law.*

#### Answer

In **CCus. (Exports) v. Jraj Exports (P) Ltd. 2007 (217) ELT 504 (Mad.)**, the High Court observed that when the Department had accepted the fulfillment of export obligation, there was no need to invoke the bank guarantee and retain the amount. The High Court opined that the Department's claim that refund had been time barred was not sustainable as **furnishing of bank guarantee** in order to fulfil the export obligation **could not be regarded as payment of duty**.

The High Court relied on the Supreme Court's ruling in the case of **Oswal Agro Mills Ltd. and Another v. Asstt. Collector of Central Excise 1994 (70) ELT 48 (SC)**, wherein it was held that furnishing of bank guarantee pursuant to an order of the Court would not be equivalent to payment of excise duty. The furnishing of bank guarantee is only a security to safeguard the interest of the Revenue. Applying the principle laid down in this case, the Court stated that the requirement to establish that the duty incidence had not been passed on by the assessee to any other person would also not get attracted since section 27 has no application to this case. Therefore, the stand of the Revenue is not correct in law.

#### Question 3

*M/s. XYZ Ltd. were liable for the duty assessed and payable on certain import which, it **paid under protest** and filed a claim for refund of duty on the ground that duty had been wrongly levied. On rejection of claim for refunds, the assessee filed an appeal before Tribunal which was also dismissed on the ground that as no appeal had been filed against the assessment order, the refund claim was not maintainable. Assessee seeks your advice for remedy. Discuss whether the stand taken by the Tribunal is correct.*

#### Answer

The facts of the case are similar to the case of **Priya Blue Industries Ltd. v. CCus., 2004 (172) ELT 145 (SC)**. The Supreme Court has held in this case that refund claim under section 27 of the Customs Act, 1962 can be made by any person who has paid duty in pursuance of an assessment order. However, such a claim for refund cannot be made without challenging the order of assessment in appeal. It cannot be inferred that if the assessment is not correct,

a party can file a claim for refund and the correctness of the assessment order can be examined while considering the claim for refund.

**So long as the order of assessment stands the duty would be payable as per that order.** Unless that order is modified in appeal or has been reviewed, the order of assessment stands and thus, a claim for refund contrary to such an order cannot be maintained.

**A refund claim is not an appeal proceeding. The officer considering refund claim cannot sit in appeal over an assessment made by a competent officer.**

Thus, in view of the abovementioned decision the stand taken by the Tribunal is correct.

#### Question 4

*State briefly with reference to the provisions of section 27 of the Customs Act, 1962 whether the principle of "unjust enrichment" will apply in the following cases:*

- (i) *refund of wrongly encashed bank guarantee*
- (ii) *refund of excess interest paid by the assessee*
- (iii) *refund of duty on car imported for personal use.*

#### Answer

The bar of unjust enrichment applies in case of refund of customs duty under **section 27(2)** of the Customs Act, 1962. In the given cases, the applicability of the doctrine has been examined as under –

- (i) The provisions of section 27(2) apply when an assessee claims refund of *duty*, hence, **bar of unjust enrichment will not apply to refund of wrongly encashed bank guarantee.** An amount secured by bank guarantee cannot be held to be paid to the Revenue as duty. Hence, the Revenue will have to pay back the amount of bank guarantee (encashed wrongly), if the case is finally decided in favour of assessee – ***Oswal Agro Mills Ltd. v. ACCE (1994) 70 ELT 48 (SC).***
- (ii) The bar of unjust enrichment **will apply in case of excess interest paid** by the assessee as the words used under section 27(1) and 27(2) are "duty and interest, if any, paid on such duty". The payment of interest is inextricably laced with payment of duty. Thus, the excess amount of interest paid by the assessee will be refunded to him only if he does not pass on the incidence of such interest to any other person.
- (iii) The principle of unjust enrichment **will not apply to refund of duty on car imported for personal use**, as clause (b) of the proviso to sub-section (2) of section 27 of the Customs Act, 1962 stipulates that in case of imports made by an **individual for his personal use**, the refund should not be credited to consumer welfare fund, but shall be paid to the applicant.

#### Question 5

*Explain the Doctrine of unjust enrichment with respect to refund of duty. Are there any exceptions to it and if so enumerate them*

### Answer

When an importer imports goods, he has to pay the customs duty on such goods. This duty is recovered from the purchaser 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 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.

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

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 this clause 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.

### Question 6

*Write detailed note on "Relevant dates for submission of refund application" with reference to the provisions of the Customs Act, 1962*

### Answer

According to substituted **section 27(1)** of the Customs Act, 1962, with effect from **08.04.2011** a refund claim should be lodged before the expiry of **one year from the date of payment of**

**such duty or interest.** Further, according to **section 27(1A)** the period of limitation of one year shall be computed in the following manner:

- (a) If the refund claim is lodged by the importer, the time limit should be calculated from the date of payment of duty.
- (b) If the refund claim is lodged by the buyer of imported goods, the time limit should be calculated from the date of purchase.
- (c) In case of goods which are exempt from payment of duty by an ad-hoc exemption, the limitation of one year should be computed from the date of issue of such exemption order.
- (d) Where any duty is paid provisionally, the time limit should be computed from the date of adjustment of duty after the final assessment thereof.

The time limit of one year would not be applicable if **duty is paid under protest** as per proviso to section 27(1). Finally, it is worth mentioning that above provisions regarding time limit are mandatory and customs authorities cannot grant a refund which is filed beyond the maximum permissible period.

### Question 7

M/s. HIL imports copper concentrate from different suppliers. At the time of import, the seller issues a provisional invoice and the goods are provisionally assessed under section 18 of the Customs Act, 1962 based on the invoice. When the final invoice is raised, based on the price prevalent in the London Metal Exchange on a predetermined date based on the covenant in the contract between the buyer and seller, the assessments are finalized on such invoices. M/s HIL had filed a refund claim arising out of the **finalization of the bill of entry by the authorities on 01.10.2011**. The department, however, rejected the refund claim. Discuss whether the action of the department is correct in law?

### Answer

**Section 18** (dealing with provisional assessment) **incorporates the principle of unjust enrichment in case of refund arising out of finalization of provisional assessment.** In the instant case, the assessee M/s HIL is required to adduce proof that in respect of the bills of entry finalized on 01-10-2011 it has not passed on the incidence of such duty to their customers. Accordingly, in the instant case the department has rightly rejected the refund claim of HIL.

## Self-Examination Questions

### Question 1

With reference to the Customs Act, 1962, explain the circumstances under which refunds will not be credited to the Consumer Welfare Fund.

**Question 2**

Discuss the provisions in respect of interest on delayed refunds.

**Question 3:**

List the document to be attached with the refund claim.

**Question 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.

**Answer**

The Supreme Court in the case of *Priya Blue Industries Ltd. v. Commissioner of Customs (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.

**Question 5**

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

**Answer**

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.