

Question 1

Write a short note on the principle of "unjust enrichment" under Central Excise Law.

Answer

The term "unjust enrichment" is used to describe a situation when a person undeservedly gets enriched. In the context of refund in Central Excise, the principle of unjust enrichment is the first and foremost principle which is kept in mind by the sanctioning authorities. If the manufacturer has charged excise duty to his buyer, it is clear that he has passed on the burden to the buyer and has already recovered duty from his customer. In such cases, refund of excess duty paid to the manufacturer will amount to excess and undeserved profit to him. It will not be equitable to refund the duty to him as he will get double benefit—first from the customer and again from the Government. This is called "unjust enrichment". Refund of duty should, therefore, be paid to the customer who has borne the burden of duty. Since it is practically not feasible to identify such customers on individual basis, the amount of refund is credited to Consumer Welfare Fund in accordance with Section 12C of the Central Excise Act 1944.

The principle of unjust enrichment has been held as valid and constitutional by the Apex Court in the famous case of ***Maftlal Industries Ltd. V U.O.I. 1997 (89) E.L.T. 247..*** In addition, it has also been held in the case of ****CCE V Allied Photgraphics 2004(166)ELT 3*** that doctrine of unjust enrichment applies even when duty is paid under protest.

*This case was affirmed in *Allied Photographics India (P) Ltd. v. Commissioner – 2004(173) E.L.T. A191(S.C.)*

Question 2

Write a note on duty payment 'Under protest' with reference to the Central Excise Act, 1944 and the rules made thereunder

Answer

Duty payment "under protest":-Section 11B of the Central Excise Act, 1944 provides that the time limit of one year for claiming refund of central excise duty shall not apply where the duty has been paid under protest.

*As per the **Supplementary Instructions** issued by Central Board of Excise and Customs, any assessee who desires to pay duty under protest, may do so by following the procedure mentioned below:*

- (i) The assessee shall inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and a dated acknowledgement shall be given to him.

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- (ii) The assessee shall mark invoices or monthly/quarterly returns indicating the goods on which duty is paid “under protest” If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty payment under protest in the Personal Ledger Account, CENVAT Account and the Daily Stock Account.
- (iii) If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, he shall not have any right to pay duty under protest.

Question 3

M/s MM & Co., a machinery manufacturer, effected clearances from its factory with effect from 1.4.2011 by payment of duty under protest and had also filed an appeal against the order for payment of duty. On 15.5.2011, one of its customers M/s BB & Co. purchased the machines from M/s MM & Co. On 23.5.2012, the appeal filed by M/s MM & Co. was decided in favour of M/s MM & Co. Pursuant to the said order in the appeal filed by M/s MM & Co., its customer M/s BB & Co. filed a refund claim on 1.6.2012 claiming refund of duty suffered by M/s BB & Co. This claim for refund of duty was rejected by the department on the ground of ‘unjust enrichment’ as well as on the ground of ‘limitation’. Explain briefly with reference to section 11B of the Central Excise Act, 1944 whether the action of the department is correct in law.

Answer

Section 11B provides that every claim of refund shall be made within 1 year from the relevant date. Though the time limit is not applicable when duty is paid under protest [Second proviso to section 11B(1)], **such benefit is available only to the manufacturer, who has paid duty under protest and not to the purchaser** as decided in the case of ***Allied Photographics India Ltd. 2004 (166) ELT 3 (SC)**. The Apex Court, in the said case, explained that the claim of refund by the manufacturer and the buyer are different. Under section 4, every payment by manufacturer, whether under protest or otherwise, is on its own account. It cannot be said that after the buyer has borne the incidence of duty, it has stepped into the shoes of manufacturer. Thus, the benefit of no limitation period in case of protest cannot be extended to the buyer.

Thus, in the given question, **since the refund claim filed by M/s. BB & Co., the purchaser, was not within a period of one year from the date of purchase, being 15.05.2011**, the same is barred by period of limitation. Thus, the Department's action is correct in law.

*This case was affirmed in Allied Photographics India (P) Ltd. v. Commissioner – 2004(173) E.L.T. A191(S.C.)

Question 4

Discuss the provisions of the Central Excise Act relating to collection of amount by a person from his buyer in excess of the duty assessed or determined and paid on any excisable goods.

Answer

Section 11D of the Central Excise Act governs the provisions relating to collection of amount

by a person from a buyer in excess of the duty assessed or determined and paid on any excisable goods in the following manner:

- (1) Every person who is liable to pay duty and has collected any amount in excess of the duty assessed or determined and paid on any excisable goods from the buyer of such goods in any manner as representing duty of excise, **shall forthwith pay the amount so collected to the credit of the Central Government**. This provision is notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the regulations made there under.
- (2) The Central Excise officer may serve on the person who is liable to pay the amount under sub-section (1) a notice if such amount has not been paid to the credit of the Central Government. The **notice requires such person to show cause** why he should not pay the amount, as specified in the notice to the credit of the Central Government.
- (3) The Central Excise officer shall, after considering the representation, if any, made by the person on whom the notice is served, **determine the amount due from such person (not being in excess of the amount specified in the notice)**. Thereupon such person shall pay the amount so determined.
- (4) The amount paid to the credit of the Central Government under sub-section (1) or sub-section (3) shall be **adjusted against the duty payable** by the person on finalisation of assessment or any other proceeding for determination of the duty of excise relating to the excisable goods referred to in sub-section (1).
- (5) Where any surplus is left after the adjustment made under sub-section (4), the amount of such surplus shall either be credited to the Fund or, as the case may be refunded to the person who has borne the incidence of such amount, in accordance with the provisions of section 11B. Such person may make an application under section 11B in such cases **within six months from the date of the public notice** to be issued by the Assistant Commissioner of Central Excise for the refund of such surplus amount.

Question 5

Deputy Commissioner of Central Excise passes an adjudication order classifying the goods manufactured by MTZ under heading 85.42 and charges duty @ 10% ad valorem. MTZ pays the duty without challenging the adjudication order. After 4 months they realise that partial exemption under a notification was available to goods manufactured by them. They file a claim for refund of duty paid in excess on the ground that benefit of exemption can be claimed at any time Are MTZ entitled to the refund of duty claimed in time?(Note : Presume that principle of unjust enrichment does not apply).

Answer

It has been held by the Supreme Court in the case of **CCE v. Flock India Ltd. 2000 (120) E.L.T. 285 (S.C)** that where an adjudicating authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing

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an appeal it is **not open to the party to question the correctness of the order of the adjudicating authority subsequently** by filing a claim for refund. If this position is accepted then the provisions for adjudication and appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant.

In the given question, the classification dispute has been decided by the Deputy Commissioner after passing an adjudication order and no appeal has been filed thereafter. Therefore, the order has attained finality. Thus, applying the ratio of the above decision, **MTZ cannot claim refund by filing a claim for the same.**

Question 6

Does the bar of unjust enrichment apply to all types of refunds? Does the refund of penalty attract such bar?

Answer

No, the bar of unjust enrichment does not apply to all types of refunds. Only when the burden of the duty has been shifted by the manufacturer to the buyer, the refund gets hit by such bar.

No, refund of penalty does not attract bar of unjust enrichment [**CCE Chandigarh v. Shivalik Agro Poly Products Ltd. 2004 (173) ELT 64 (Tri-Del.)**].

Question 7

What is Consumer Welfare Fund?

Answer

The Consumer Welfare Fund is established by the Central Government under **section 12C** of the Central Excise Act, 1944 wherein the following amounts are credited:-

- (i) the refund of duty of excise/customs, which is not to be granted to the applicant.
- (ii) 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.

Question 8

Briefly state the powers of the Central Government under section 35EE of Central Excise Act, 1944 relating to Revision of orders passed.

Answer

Against the order passed by Commissioner (Appeals) relating to loss of goods in transit, processing loss, rebate on exports/imports in bond without payment of duty (Other than Nepal and Bhutan) and CENVAT Credit, revision application can be filed in prescribed form EA-8 in duplicate to the Central Government [An officer of the rank of Joint Secretary hears the issue and passes orders on behalf of the Central Government]. According to provisions of Section 35EE(2) the revision application should be filed within 3 months from the date of the communication of the order. This period can be further extended by three months on sufficient

cause being shown. The Central Government **has the powers to annul or modify the order** against which revision application has been filed.

In addition, it is also worth highlighting that in accordance with provisions of Section 35EE(4) & (5) Central Government can, on its own motion, annul or modify the order of the Commissioner (Appeals)

Question 9

Describe whether assessee is entitled to get interest in respect of delayed refund?

Answer

Yes, assessee is entitled to get interest in respect of delayed refund in accordance with provisions of Section 11BB Central Excise Act, 1944. In order to enable the students to appreciate the finer points of this topic, following table has been constructed:

Sl. No.	Sub-Heading	Statutory Provision with practical example, if any
1.	When interest becomes due to any applicant(assessee)	According to provisions of section 11BB of Central Excise Act 1944 if any duty ordered to be refunded under section 11B (2) to any applicant is not refunded within three months from the date of receipt of application under section 11B (1) of Central Excise Act 1944, then applicant shall be paid interest in r/o of such amount for the delayed period. For example the refund application of Mr. Ram is received on 1 st April and refund is given to him on 12 th July. In this case interest for a period of 12 days (i.e. from 1 st July to 12 th July) becomes due to Mr. Ram.
2.	Rate of Interest	It shall not be below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government (by Notification in the Official Gazette) on such amount of duty. The Central Government has fixed rate of interest @ 6% p.a. w.e.f. 12-09-2003 by virtue of Notification No. 67/2003-CE (NT) .
3.	Period of Interest	Beginning from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty. For instance if the refund application of Mr. Mohan is received by the Department on 4 th August and the duty is actually refunded to the applicant on 21 st December. In this situation Interest @ 6% p.a.

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		will be given to Mr. Mohan for 48 days (i.e. from 4 th November to 21 st December).
4.	Deeming Effect of any Refund Order made by Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any Court.	As per Explanation to section 11BB 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 Central Excise under section 11B (2), then such order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any Court shall be deemed to be an order passed u/s 11B (2). In simple words , this explanation applies in case the refund application is rejected by Assistant/Deputy Commissioner., but later on at the appellate stage, the application is decided in favour of the assessee, and consequently he becomes entitled to refund of duty. According to this explanation if there is a gap of more than three months between the date of receipt of refund application and concerned Appellate Order, then interest has to be paid to the assessee in respect of delayed period. For instance if refund application of Mr. Deepak is received by the Department on 1 st January 2010 and Court passes a refund order in favour of Mr. Deepak on 30 th September 2011, then interest for a period of 18 months (i.e. from 1 st April 2010(three months after the date of receipt of application) to 30 th September 2011) will be given to Mr. Deepak in accordance with this explanation.

Question 10

State briefly the circumstances under which a refund claim could be admitted under the proviso to section 11B(2) of the Central Excise Act, 1944.

Answer

Under proviso to section 11B(2), a refund claim of excise duty made by a buyer/assessee can be admitted only in the following cases:

- (i) Rebate of excise duty on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (ii) Unspent advance deposits lying in applicant's account current;

- (iii) Refund of credit of duty paid on inputs, provided it is payable according to any rule or notification;
- (iv) Refund of duty to manufacturer, if he has not passed on the incidence of duty to another person;
- (v) Refund of duty to buyers, provided he has borne the duty and if he has not passed on the incidence of the duty to any other person;
- (vi) To any other class of applicant, if borne by any such class of applicants, as may be specified by the Government of India, if the incidence of duty has not been passed on to any other person.

Question 11

Duty demand of ₹ 10 lakh was made in terms of an order in original dated 25.02.2012 against XYZ Ltd. with interest as applicable on the ground of clandestine removal of the products manufactured by the assessee in the month of June, 2011. Penalty equal to duty demanded was also imposed. On an appeal filed by XYZ Ltd., the Commissioner (Appeals) required it to deposit an amount of ₹ 5 lakh as pre-deposit which was duly deposited on 03.06.2012. The case against XYZ Ltd. was finally decided and duty demand of ₹ 3,20,000 was confirmed and penalty was set aside on 30.06.2012. XYZ Ltd. filed a refund claim on 15.09.2012. Refund was sanctioned on 10.12.2012. Calculate the amount of refund admissible.

Answer

As the Commissioner (Appeals) has confirmed the duty demand of ₹ 3,20,000 and set aside the penalty, only ₹ 1,80,000 will be payable as refund to XYZ Ltd. Interest would also be payable as per the provisions of section 35FF as the pre-deposit is not refunded within three months from the date of communication of such order to the adjudicating authority. Interest would be payable @ 6% on such refund after the expiry of three months from the date of the communication of the order of the appellate authority (01.10.2012) to the adjudicating authority till the date of refund of such amount (10.12.2012) i.e., for 71 days in total. It has been assumed that the order was communicated to the adjudicating authority on the same day (30.06.2012).

$$\begin{aligned}\text{Interest payable} &= \frac{6}{100} \times \frac{71}{366} \times 1,80,000 \\ &= ₹ 2,095\end{aligned}$$

$$\begin{aligned}\text{Total refund admissible} &= ₹ 1,80,000 + ₹ 2,095 \\ &= ₹ 1,82,095\end{aligned}$$

Question 12

Examine, with the help of a decided case law, whether for the purpose of computing interest on delayed refunds under section 11BB of the Central Excise Act, 1944, the period

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commences with the date of receipt of application for refund or date on which the order of refund is made?

Answer

The question whether for the purpose of computing interest on delayed refunds under section 11BB, the period commences with the date of receipt of application for refund or date on which the order of refund is made was examined by the Apex Court in the case of **Ranbaxy Laboratories Ltd. v. UOI 2011 (273) E.L.T. 3 (SC)**. The Apex Court observed that interest under section 11BB becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded.

The Apex Court further noted that Explanation appearing below the proviso to section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner/Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under section 11B(2). It is apparent that the explanation does not have any bearing or connection with the date from which interest under section 11BB becomes payable and does not postpone the said date.

In the light of the aforesaid discussion, the Supreme Court elucidated that section 11BB of the Central Excise Act, 1944 comes into play only after an order for refund has been made under section 11B. However, the liability of the revenue to pay interest under section 11BB commences from the date of expiry of three months from the date of receipt of application for refund under section 11B(1) and not on the expiry of the said period from the date on which order of refund is made.

Exercise

1. *What are the relevant dates as set out in explanation (B) to Section 11B of Central Excise Act, 1994?*
2. *What is the time limit for making the application for refund of duty?*
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.*

Answer/Hints: 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.

The applicant filed the rebate claim beyond the time limit of one year on the ground that the export promotion copy shipping of shipping bill was provided by the Customs Authorities belatedly. The Department rejected the claim as time barred under Section 11B of the Central Excise Act, 1944. Discuss whether the contention of the Department is valid.