

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	Any person 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 before the expiry of one year 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 under protest. 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

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		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.
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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 01.10.2012**. 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 01-10-2012 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.

Question 8

Write a brief note on sanctioning of refund of customs duty under section 27(2) of the Customs Act, 1962 under which refunds will not be credited to the consumer welfare fund.

Answer

In view of the provisions of unjust enrichment in the Customs Act, 1962, the amount found refundable has to be transferred to the Consumer Welfare Fund.

However, the amount of duty and interest found refundable, instead of being credited to the Fund, is to be paid to the applicant if the amount is relatable to:-

- (a) 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, if any, paid on such duty to any other person;
- (b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;
- (c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (d) the export duty as specified in section 26;
- (e) drawback of duty payable under sections 74 and 75;
- (f) the duty 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

Question 9

PQR Ltd. imported certain machine parts and filed a Bill of Entry in the usual course. The said machine parts are entitled for concessional rate in terms of a notification. The assessee PQR Ltd. omitted to claim the benefit of the aforesaid notification at the time of filing and assessment of the Bill of Entry. Later when PQR Ltd., discovered about the benefit under the notification as aforesaid they filed a refund claim for the excess amount paid as customs duty under section 27 of the Customs Act, 1962. There was no assessment order since the duty was paid on the basis of the Bill of Entry filed in the usual course. The refund claim was rejected on the ground that section 27 of the Customs Act, 1962 could be invoked only if an assessment order has been passed and duty payment made pursuant thereto. Discuss with a brief note and decided case law if any whether the stand of the department is correct in law.

Answer

Section 27(1) of the Customs Act, 1962, *inter alia* provides that any person claiming refund of any duty and interest:

- (i) paid by him in pursuance of an order of assessment; **or**
- (ii) borne by him,

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may make an application for refund of such duty and interest.

Since clauses (i) and (ii) of sub-section (1) of section 27 have the expression 'or' in between them, it is clear that application for refund cannot only be made in pursuance of an assessment order but also when the duty is borne by the applicant. In fact, section 27(1)(ii) aims to cover those very cases where the duty is paid by a person without an order of assessment.

The above conclusion has also been confirmed by the High Court in the case of *Aman Medical Products v. CCus.* 2010 (250) E.L.T. 30 (Del.) wherein the High Court has held that it is not necessary that a refund can be claimed only when the duty paid by the importer is in pursuance to an order of assessment. The refund can also be claimed when the duty paid by the importer is 'borne by him'.

In view of the above discussion, the stand taken by the Department is not correct in law.

Note: This case has been appealed to Supreme Court and appeal is pending in 2010(256)ELT A57(Supreme Court).

Question 10

Discuss briefly the provisions relating to manner of computation of limitation period of one year in three situations contemplated under Section 27(1B) of the Customs Act, 1962 for purpose of refund of duty.

Answer

The three situations and the manner of computation of limitation period of one year in such situations as contemplated under section 27(1B) of the Customs Act, 1962 are:

- (i) Where goods are exempt from payment of duty by a special order issued under section 25(2) of the Customs Act, 1962, the limitation of one year is computed from the date of issue of such order.
- (ii) Where the duty becomes refundable on account of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any Court, the limitation of one year is computed from the date of such judgment, decree, order or direction.
- (iii) Where any duty is paid provisionally under section 18, the limitation of one year is 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.

Question 11

Section 26A of Customs Act, 1962 provides for refund of import duty paid if goods are found defective or not as per specifications. Discuss the conditions governing such refund in brief.

Answer

Section 26A of the Customs Act, 1962 makes provision for refund of import duty paid on clearance of imported goods capable of being easily identified as such imported goods, if

following conditions are fulfilled:

- (i) the goods are found to be defective or otherwise not in conformity with the specification agreed upon between the importer and the supplier of goods;
- (ii) the goods have not been worked, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;
- (iii) the goods are identified to the satisfaction of Assistant/Deputy Commissioner of Customs as the goods which were imported;
- (iv) the importer does not claim drawback under any other provision of this Act; and
- (v) the goods are exported or the importer relinquishes his title to the goods and abandons them to customs or such goods are destroyed/rendered commercially valueless in the presence of proper officer in prescribed manner within 30 days from the date on which the order of clearance of imported goods for home consumption is made by the proper officer. This period of 30 days can be extended up to 3 months.
- (vi) An application for refund of duty shall be made before the expiry of 6 months from the relevant date in prescribed form and manner.
- (vii) This section shall not apply to the goods regarding which an offence appears to have been committed under this Act or any other law.
- (viii) No refund shall be allowed in respect of perishable goods and goods which have exceeded their shelf life or their recommended storage before use period.

Question 12

Baidnath Medicals filed a Bill of Entry and paid the higher duty in ignorance of a notification which allowed him the payment of duty at a concessional rate. No assessment order was passed because the assessee simply filed Bill of entry and paid the duty.

Baidnath Medicals filed a refund claim under section 27, of the excess duty paid by it. The Revenue contended that a refund in appeal could be asked for under section 27 of the Customs Act, 1962 only if the payment of duty had been made pursuant to an assessment order which was not so in the instant case.

Do you think that Revenue's contention is valid in law?

Answer

No, Revenue's contention is not valid. The refund claim filed by Baidnath Medicals is valid in law. The facts of the given case are similar to the case of *Aman Medical Products Ltd. v. CCus. Delhi 2010 (250) ELT 30 (Del.)*. The High Court, referring to the language of section 27, interpreted that it is not necessary that the duty paid by the importer must be pursuant to an order of assessment. The duty paid by the importer can also be 'borne by him'. Clauses (i) and (ii) of sub-section (1) of section 27 are clearly in the alternative because the expression 'or' is found in between clauses (i) and (ii). The object of section 27(ii) is to cover those classes of case where the duty is paid by a person without an order of assessment.

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The High Court held that the refund claim of the appellant was maintainable under section 27 and the non-filing of the appeal against the assessed bill of entry did not deprive the appellant to file its claim for refund under section 27 of the Customs Act, 1962. The refund claim, in the case on hand, would fall under clause (ii) of sub-section (1) of section 27.

Note: The aforesaid judgment has been appealed to Supreme Court and appeal is pending in case of Commissioner v. Aman Medicals Products Ltd. 2010 (257) ELT A57 (SC).

Question 13

Malhotra Ltd. imported certain parts of a machine and filed a Bill of Entry. Malhotra Ltd. paid the higher duty in ignorance of a notification which allowed him the payment of duty at a concessional rate.

Later Malhotra Ltd filed a refund claim under Section 27 of the Customs Act, 1962 by producing the certificate issued by the Chartered Accountant (CA) to establish that the amount of duty in relation to which such refund is claimed, has not been passed on by him to any other person. The refund claim was rejected by the department as there was no other evidence other than the certificate issued by CA.

Discuss with reference to decided case law if any whether the stand taken by the Department is correct in law.

Answer

Yes, the Department's plea is justified in law. The facts of the given case are similar to the case of **CCus., Chennai v. BPL Ltd. 2010 (259) E.L.T. 526 (Mad.)** The High Court noted that section 27 of the Customs Act mandates on the importer to produce such documents or other evidence, while seeking refund, to establish that the amount of duty in relation to which such refund is claimed, has not been passed on by him to any other person.

However, in the given case, the assessee had not produced any document other than the certificate issued by the Chartered Accountant to substantiate its refund claim. The certificate issued by the Chartered Accountant was merely a piece of evidence acknowledging certain facts. It would not automatically entitle a person to refund in the absence of any other evidence. Hence, the assessee could not be granted refund merely on the basis of the said certificate. Therefore, Chartered Accountant's certificate alone is not sufficient evidence to rule out the unjust enrichment under customs.

In the light of the above discussion, it can be inferred that Malhotra Ltd. is not entitled for refund claim.

Exercise

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.

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 does 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.

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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.