9.1 Refund of duty

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

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

9.2 Interest on delayed refund

The Central Excise Act also provides for payment of interest on delayed payment of refund. As per section 11BB, if any duty ordered to be refunded under section 11B(2) has not been refunded within three months from the date of receipt of the refund application in the prescribed manner and form along with the supporting documentary evidence as laid down in the relevant rules, interest at the rate notified by the Government which should not be below 5% and should not exceed 30% per annum (notified as 6% p.a. as per Notification no. 67/2003 dated 12.9.2003) shall have to be paid on such duty from the date immediately after the expiry of three months from the date of receipt of application till the date of refund of such duty. As per Explanation to Section 11BB where any order of refund is made by Commissioner (Appeals) or Tribunal or Court the said order shall be deemed to be a refund order for the purpose of section 11B (2).

From the above provisions it is evident that in case any order for refund is passed by the Commissioner (Appeals) or Tribunal or Court, the interest will have to be paid from the expiry of the three months from the date of filing of refund application. Interest is always with reference to date of application and not with reference to the date of passing of order.

However the interest cannot be claimed in case the application is not filed as per the provisions of the statute.
9.3 Theory of unjust enrichment

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

Section 11B was inserted with effect from 11.7.1980. The most important amendment took place on 20.9.91 wherein the theory of unjust enrichment was built into the statute. This theory postulates that only the person who has not passed on the incidence of duty will be eligible to claim the refund. The section today recognises that a buyer of goods can also claim refund.

The most important decision on refund is by a Nine Member Bench of the Supreme Court in Mafatlal Industries Ltd. v. U.O.I.- 1997 (89) E.L.T. 247. The salient features of this judgment can be summarised as under:

(a) The theory of unjust enrichment is valid and constitutional. However, the theory that the manufacturer would be unjustly impoverished in case of demands has not been agreed to.

(b) All pending applications as on 20-9-1991 would be governed by this theory of unjust enrichment.

(c) Sections 11B (Excise Act) and 27 (Customs Act) are self contained codes for refunds and resort to civil suits or writs is not permissible unless the taxing provision is struck down as unconstitutional. The general theory laid down in certain judgments of both the Supreme Court and High Courts that refund could be claimed within three years of discovery of mistake has been disapproved.

(d) Unless the levy is struck down as unconstitutional, all Courts must exercise jurisdiction in terms of section 11B and refuse to grant relief if the incidence of tax has been passed on.

(e) Whatever amount is collected as duty will have to be paid to the Government. If excess is collected than that payable, it would be credited to the Consumer Welfare Fund or given as refund to the person who has borne the incidence of duty.

The Supreme Court has held in Solar Pesticides case 2000 (116) ELT 401 that refunds will not be allowed on captive consumption of inputs. However, it would be possible to get the refund even in case of captive consumption provided it is proved that the incidence of duty is not passed on to the customers. But there is a necessity for the assessee to prove that the incidence of duty has not been passed on to the customers.

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.

There could be situations where the manufacturer has paid the duty and the same has been shown in the invoice issued to the buyer. The buyer failed to reimburse the duty for various reasons. In such case, it would not be proper to conclude that the incidence of the duty has not been passed on to the buyer as the CENVAT credit on inputs/capital goods can be taken
9.3 Central Excise

based on the duty component mentioned on the invoice and not depending upon the payment
to the supplier. Only acceptable evidence would be to show that the buyer has not paid the
amount to the manufacturer and has not availed the CENVAT credit of duty paid or if he has
taken, he has reversed it.

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

(a) Rebate of duty of excise on excisable goods exported out of India or on excisable
materials used in the manufacture of goods which are exported out of India;

(b) Unspent advance deposits lying in balance in the applicant’s account current maintained
with the Commissioner of Central Excise;

(c) Refund of credit of duty paid on excisable goods used as inputs in accordance with the
rules made, or any notification issued, under this Act;

(d) The duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he
had not passed on the incidence of such duty and interest to any other person;

(e) Duty of excise and interest, if any, paid on such duty borne by the buyer if he has not
passed on the incidence of such duty and interest to any other person;

(f) The duty of excise and interest, if any, paid on such duty borne by any other such class
of applicants as the Central Government may, by Notification in the Official Gazette,
specify.

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

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

(a) the amount of duty of excise as per section 11B(2) or section 11C(2) or section 11D(2);

(b) the amount of duty of customs as per section 27(2) or section 28A(2), or section 28B(2)
of the Customs Act, 1962;

(c) any income from investment of the amount credited to the Fund and any other monies
received by the Central Government for the purposes of this Fund;

(d) the surplus amount referred to in sub-section (6) of section 73A of the Finance Act, 1994.

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

It must be noted that as per rule 7(6) of the Central Excise Rules, 2002 refunds pertaining to
finalisation of provisional assessments are also governed by the law of unjust enrichment.
Other than the cases mentioned listed above, the courts have laid few circumstances for which the unjust enrichment concept does not apply. They are

(a) If the refund relates to pre-deposit of duty made under section 35F - Suvidhe Ltd. v. U.O.I. - 1996 (82) E.L.T. 177 (Bom). (Contrarily AP High Court has held in case of ITW Signode India Ltd. v. AC - 2000 (122) E.L.T. 651, pre-deposit under section 35F will also be subject to the provisions of section 11B).


9.4 Assessment documents to show duty payment particulars

1. Section 12A makes it obligatory on the person liable to pay duty to indicate on the invoice or like documents, the amount of duty which will form part of the price at which such goods are sold.

2. Section 12B casts a presumption that duty has been passed on to the buyer. This presumption is rebuttable.

3. The amount of excise duty to be mentioned is not the actual duty paid or payable on the goods but only the actual duty being passed on to the buyer as part of the price of goods sold.

4. The document relating to assessment are:
   (a) Invoices/AR1
   (b) Monthly ER-1 return
   (c) Receipted treasury challans on which deposits were being made.
   (d) Original and duplicate copies of the account-current and also of account in Cenvat credit records as the case may be.
   (e) The obligation under this section is applicable only to persons who are liable to pay excise duty – viz. manufacturers, curers etc. It does not apply to wholesale dealers, traders etc.

9.5 Time-limit for making the application for refund of duty

1. Under Section 11B, the application for refund has to be made within one year from the relevant date.

2. The meaning of the term “relevant date” is set out in the Explanation (B) to section 11B.

3. The relevant date in the various cases is as follows:
   (a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,
   (i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or,
(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in the case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(f) in case of goods which are exempt from payment of duty by a special order under section 5A(2), the date of issue of such order;

(g) in case of provisional assessment, the date of adjustment of duty after final assessment;

(h) in case where the duty becomes refundable as a consequence of judgement, decree, order or direction of appellate authority, Appellate Tribunal or any Court, the date of such judgement, decree, order or direction;

(i) in any other case, the date of payment of duty.

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

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

However, the limitation period contained in section 11B is not applicable in case of refund pre-deposit made during the course of investigation.

9.6 Presentation of refund claim

Any person, who deems himself entitled to a refund of any duties of excise or other dues, or has been informed by the department that a refund is due to him shall present a claim in
Refund  9.6

proper Form, along with all the relevant documents supporting his claim and also the copies of
documents/records supporting his declaration that he has not passed on the duty incidence.

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

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

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

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

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

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

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

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

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

In case of *UOI v Slovak India Trading Co. 2008(10) STR 101 (Kar HC)*, the court held that refund of cenvat credit has to be made in cash when the company is closed or goes out of cenvat credit scheme. There is no prohibition under the cenvat credit provisions when there is no manufacture due to closure of the factory.

9.8 Post audit

All refund claim papers should be sent by the Divisional Deputy/Assistant Commissioner to the Commissionerate Headquarters (to the Additional/Joint Commissioner–Audit) within a week after the payment thereof irrespective of the amount involved. At the Commissionerate Headquarters, a special cell comprising Deputy/Assistant Commissioner (Audit) – for immediate supervision – one superintendent, one Inspector and two Deputy Office Superintendents - may be created out of the sanctioned strength of the audit staff in the Commissionerate for post-audit of these claims.

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

9.9 Monitoring and control for timely disposal of refunds

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

9.10 Provisions Relating to Interest on Delayed Refunds [Section 11BB]

Statutory provisions:

1. Interest is payable to the assessee if the amount claimed as refund is not paid within three months of receipt of refund claim. The interest shall be paid at such rate not below 5% and not exceeding 30% p.a.

2. The interest rate has been fixed by the CBEC as 6% per annum  

3. The person must take the following safeguards:
   (a) the application must be in the proper form (Form R or C)
(b) the application must be filed before the Assistant Commissioner only.

(c) A checklist of the documents must be enclosed with the application.

[CBEC Circular 130/41/95 CX dated 30.5.95]

4. The Department must take the following measures:

(a) The application should be scrutinised within 48 hours of receipt of application and the acknowledgement must be given forthwith.

(b) If the application is deficient, a letter must be issued forthwith to the assessee pointing out the deficiencies.

(c) Only when the deficiencies are made good, will the application be acknowledged.

Explanation—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 of Central Excise or Deputy Commissioner of Central Excise], under sub-section (2) of section 11B, the order passed by the Commissioner (Appeals), Appellate Tribunal [National Tax Tribunal] or, as the case may be, by the court shall be deemed to be an order passed under the said sub-section (2) for the purposes of this section.

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

In case of CCE v Kirloskar Ferrous Inds Ltd 2010-TIOL-204-CESTAT-MUM it has been held that the interest under section 11BB of the Central Excise Act, 1944 is to be paid immediately after expiry of 3 months from the date of receipt of refund application. However, this is subject to condition that there is no bar on claiming the interest due to subsequent litigation.

9.11 Important judgments with respect to refund

<table>
<thead>
<tr>
<th>In case of refund in terms of Rule 5 itself there is no requirement of one to one co-relation between the input services and the final products being manufactured and cleared.</th>
<th>Capiq Engineering Pvt Ltd v CCE 2009 (245) E.L.T. 186 (Tri. - Ahmd.)</th>
</tr>
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<tr>
<td>There can not be two different yardstick, one for permitting credit and another eligibility for granting rebate/refund.</td>
<td>CST v Convergys India Private Limited 2009 (16) S.T.R 198(Tri -Del)</td>
</tr>
<tr>
<td>Accumulated Cenvat credit can be claimed as refund even if the exempted goods are manufactured.</td>
<td>Repro India Ltd v UOI 2009 (235) E.L.T. 614 (Bom.)</td>
</tr>
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Note: The credits were allowed in relation to goods exported and not cleared locally.