After studying this chapter, you would be able to:

- understand and analyse the manner in which application for refund of import duty or interest is to be made.
- comprehend the manner of processing of refund claim.
- compute the amount of interest payable on delayed refund.
- identify the cases in which refund of import duty/ export duty is made.
- analyse and apply the principle of doctrine of unjust enrichment with respect to refund of duty.
1. INTRODUCTION

Sometimes customs duty is found to have been paid in excess of what was actually leviable on the goods. This may happen for various reasons, like error or lack of information. In such cases, refund of excess amount of duty paid can be claimed. Refund of any excess interest paid by the importer/exporter can also be claimed.

2. APPLICATION FOR REFUND OF IMPORT DUTY OR INTEREST [SECTION 27]

- **Person who can claim refund of duty / interest**: The claim for refund of duty or interest can be made by (i) the person who paid the duty or interest in excess; or (ii) the person who bore the incidence of such duty or interest.

- **Application for refund to be made in proper form and manner**: The claim for refund of any duty or interest paid or borne by the claimant must be made in such form or manner as may be prescribed. The Customs Refund Application (Form) Regulations, 1995, provides that the claim must be made in duplicate in the form appended to the said Regulations, to the Assistant / Deputy Commissioner who has jurisdiction over the customs station where the duty of customs was paid.

- **Application for refund to be filed within one year**: A claim by the importer / exporter for refund of duty / interest, must be made before the expiry of one year from the date of payment of such duty or interest [Section 27(1)].

A claim by another person, from whom duty was collected, must be made before expiry of one year from the date of purchase of the goods [Explanation to Section 27(1)].

Other situations require computation of one year as follows:

<table>
<thead>
<tr>
<th>Event</th>
<th>Limitation of one year to be computed from the</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exemption of duty by a special order issued under section 25(2)</td>
<td>Date of issue of such order [Section 27(1B)(a)]</td>
</tr>
<tr>
<td>Refund of duty arising as a consequence of any judgment,</td>
<td>Date of such judgment, decree, order</td>
</tr>
</tbody>
</table>
**No limitation in case of duty paid under protest:** The limitation of one year shall not apply where any duty or interest has been paid under protest. Hence, in case of duty/interest paid under protest, refund claim may be filed without any time-limit [Section 27(1) second proviso].

**Minimum amount of refund:** Where the amount claimed is less than ₹ 100, it will not be refunded. In other words, refund will be granted only when the duty amount involved is ₹ 100 or more [Section 27(1) third proviso].

Documentary evidence to be furnished to prove that incidence of the duty/interest for which refund claim has been filed is not passed on to any other person: Refund application must be accompanied by documentary or other evidence (including the documents, like invoice, referred to in section 28C) 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 that the incidence of such duty or interest has not been passed on by him to any other person [Section 27(1A)].

(It must be noted that section 28D creates a statutory presumption that the incidence of duty has been passed on to the buyer, unless the contrary is proved. The documents enclosed to the refund claim must refute this presumption. Please see the section on unjust enrichment, later in this chapter.)

**3. PROCESSING OF REFUND CLAIM [SECTION 27(2)]**

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

(a) if the importer has not passed on the incidence of such duty and interest to any other person;

(b) if imports were made by an individual for his personal use;

(c) if the buyer who has borne the duty and interest, has not passed on the incidence of such duty and interest to any other person;

(d) if amount found refundable relates to export duty paid on goods which has returned to exporter as specified in section 26;

(e) if amount relates to drawback of duty payable under section 74 and 75;

(f) if the duty or interest was borne by a class of applicants which has been notified for such purpose in the Official Gazette by the Central Government.

(g) **if the duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where—**

   (i) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or

   (ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.

4. **DOCTRINE OF UNJUST ENRICHMENT WITH RESPECT TO REFUND OF DUTY**

When an importer imports goods, he has to pay the customs duty on such goods. This duty is recovered from the purchasers when the goods are sold by the importer. In other words, the incidence or burden of duty is passed on to the purchaser, from whom the importer collects the customs duty. Subsequently, if the importer makes a claim for refund of duty and receives the amount from the government also, then this would be called as unjust enrichment.

Therefore, wherever there is excess collection of duty, the refund is to be given only to the person who has borne the burden of duty and interest, if any. When the person who applies for refund is not the person who has borne the burden of duty, the refund is paid into a fund called 'Consumer Welfare Fund'.
In terms of Section 27, the importer or his agent, or the buyer who has been charged the duty by the importer, has to prove that he has not passed the burden of duty to another person, in order to be given refund of duty. Section 28D creates a statutory presumption that he did pass on the burden of duty; this presumption has to be refuted by proving the contrary. If he succeeds in this, the claimant is given the refund in terms of Section 27(2), clause (a) for the importer and clause (c) for the buyer.

**Illustration**

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

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

The landmark judgment 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, conversely, the manufacturer would be unjustly impoverished in case of demands has not been agreed to.

b. Section 27 (Customs Act) is self contained code for refunds; 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.

c. 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.

d. Whatever amount is collected as duty will have to 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 the bar of unjust enrichment will apply to refunds even in case of captive consumption of inputs by the importer, as the incidence of duty paid on the inputs are 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.

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

### Exceptions to the Doctrine of Unjust Enrichment

As seen above, clauses (a) and (c) of sub-section (2) of section 27 provide that a refund may be paid to the applicant if the said applicant proves that he did not pass on the incidence of duty to another person. Sub-section (2) also provides for certain exceptions to the doctrine of unjust enrichment. In these exceptions refund of duty and interest may be paid to the applicant if such amount is relatable to:

- drawback of duty payable under sections 74 and 75;
- export duty as specified in section 26;
- the duty and interest on imports made by an individual for his personal use;
- the duty and interest borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify. However, no notification under clause (vi) shall be issued unless in the opinion of the Central Government the incidence of duty and interest has not been passed on by the persons concerned to any other person.
- **the duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where (i)such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or (ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.**
**Illustration**

*State briefly with reference to the provisions of section 27 of the Customs Act, 1962 whether the principle of “unjust enrichment” will apply in case of refund of excess duty paid 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.

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.

**5. INTEREST ON DELAYED REFUND [SECTION 27A]**

The Customs has to finalize refund claims without delay upon receipt of the refund application in proper form along-with all the documents. In case any duty ordered to be refunded to an applicant is not refunded within 3 months from the date of receipt of application for refund, interest is to be paid to the applicant. The government is permitted to fix such interest between 5% and 30%. **Currently, the rate of interest is 6%** vide Notification No. 75/2003-Cus (NT) dated 12.09.2003.

The interest is to be paid for the period beginning from the date immediately after the expiry of 3 months from the date of receipt of such application, till the date of refund of such duty. For the purpose of payment of interest, the application is deemed to have been received on the date on which a complete application, as acknowledged by the proper officer of Customs, has been made.

Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any Court against an order of the Assistant Commissioner/Deputy Commissioner of Customs, the order passed by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or by the Court, as the case may be is deemed to be an order for the purpose of payment of interest on delayed refund. In other words, in cases where no refund claim has been made, if a refund results from an order passed by the appellate authorities mentioned above or by a court of law, refund is to be paid within 3 months of the order, and interest will be payable after that.
The interest on delayed refund is payable only in respect of delayed refunds of Customs duty and no interest is payable in respect of deposits such as deposits for project imports, security for provisional release of goods etc.

6. REFUND OF EXPORT DUTY IN CERTAIN CASES [SECTION 26]

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

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

This provision compensates the export duty in a situation where the goods which are exported are rejected and returned by the buyer.

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

Section 26A provides that the import duty paid on clearance of imported goods for home consumption shall be refunded to the person who has paid such duty subject to the fulfillment of the following conditions:

(a) Goods are defective/not as per specifications: The goods are found to be defective or otherwise not in conformity with the specifications agreed upon between the importer and the supplier of goods. However, the goods should not have been worked upon, repaired or used after importation except where such use was indispensable to discover the defects or non-conformity with the specifications;
(b) Goods identified as imported goods: The goods are identified to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the goods which were imported;
(c) No drawback claimed: The importer does not claim drawback under any other provisions of this Act; and
(d) **Importer exports the goods/relinquishes title to goods/destroys or renders them commercially valueless**

(i) the goods are exported; or

(ii) the importer relinquishes his title to the goods and abandons them to customs; or

(iii) such goods are destroyed or rendered commercially valueless in the presence of the proper officer

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

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

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

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

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Case</th>
<th>Relevant date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>In case the goods are exported out of India</td>
<td>Date on which the proper officer makes an order permitting clearance and loading of goods for exportation under section 51</td>
</tr>
<tr>
<td>2.</td>
<td>In case of relinquishment of title to the goods</td>
<td>Date of such relinquishment</td>
</tr>
<tr>
<td>3.</td>
<td>In case of goods being destroyed or rendered commercially valueless</td>
<td>Date of such destruction or rendering of goods commercially valueless</td>
</tr>
</tbody>
</table>
No refund in case of perishable goods: In respect of perishable goods and goods which have exceeded their shelf life or their recommended storage-before-use period, the refund shall not be allowed [Sub-section (3)].

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

8. REFUND CLAIM CANNOT BE A SUBSTITUTE FOR APPEAL

The Customs Act has separate provisions and timelines for filing appeal against an order passed by a customs officer. Appeal to the Commissioner (Appeals) is to be made within 60 days of receipt of the order against which the person is aggrieved. On the other hand, a refund claim can be filed within one year from the date of payment of duty or clearance of goods or such other event as specified in section 27. However a refund claim cannot be a substitute for an appeal.

In the case of Priya Blue Industries Limited, 2004 (172) ELT 145 (SC), duty was assessed on the imported item and the importer paid the duty under protest. Thereafter, the importer filed a claim for refund of the duty. In this matter the Supreme Court ruled that, “Once an Order of Assessment is 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 stands. So long as the Order of Assessment stands 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 cannot also review an assessment order.”

In view of the above ruling of the Supreme Court, refund claims based on challenge to an order of assessment are liable to be rejected.

[Note:-The provisions relating to Appeals have been discussed in detail in Chapter-11.]

Important Judgments on Refund

| If excess tax is paid, except cases involving the principles of unjust enrichment, the excess tax must be refunded | Corporation Bank v. Saraswati Abharansala 2009 (233) ELT 3 (SC) |

© The Institute of Chartered Accountants of India
<table>
<thead>
<tr>
<th>Refund claim cannot be a substitute for appeal</th>
<th>Priya Blue Industries Limited v CCus, 2004 (172) ELT 145</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refund claim cannot be filed by the CH agent in his own name, without power of attorney</td>
<td>Jaswant b. Shah v. CC 1996 (81) E.L.T. 669 (Tribunal)</td>
</tr>
<tr>
<td>Burden of proof that incidence of duty has not been passed on to consumers is on assessee.</td>
<td>Banmore Foam v. CCE 2006 (193) ELT 112</td>
</tr>
<tr>
<td>Interest on delayed refund is payable at the rates as applicable time to time and not at the rate applicable on day when refund was due.</td>
<td>CCus. v Consolidated Solvents and Chemical Corporation (2009) 243 ELT 625 (Tri.)</td>
</tr>
</tbody>
</table>
9. TEST YOUR KNOWLEDGE

1. Explain the provisions of Customs Act, 1962 relating to computation of limitation for submission of refund application.

2. The assessee furnished bank guarantee to the department as required, and imported capital goods at concessional rate of duty under an authorisation with export obligation, but failed to complete the export obligation within the prescribed time. Consequently, the Department invoked the bank guarantee and realized the amount of duty foregone. Subsequently the assessee fulfilled the export obligation and the same was also accepted by the Department. The assessee filed a refund claim for the amount realized by the Department under the bank guarantee. The Department rejected the refund claim on the ground that it was time barred in terms of section 27 of the Customs Act, 1962.

Was the stand taken by the Department correct in law? Examine with the support of case law on the issue.

3. 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 as agreed in the contract between the buyer and seller, the assessments are finalized on the basis of the price in such invoices.

M/s HIL has filed a refund claim arising out of the finalization of the bill of entry by the authorities. The Department, however, has rejected the refund claim on the grounds of unjust enrichment. Discuss whether the action of the department is correct in law?

4. XYZ Ltd imported capital goods and used them in its factory to produce goods for sale. Upon discovery of an error by which excess import duty had been paid on the said capital goods, it filed a claim for refund. As regards unjust enrichment, it contended -

- that the capital goods were not sold and hence the principle of unjust enrichment will not apply to the refund of import duty paid on capital goods; and
- that in any case the price of the finished goods manufactured in the factory remained the same before and after the import and installation of the capital goods, which is sufficient proof to establish that duty burden has not been passed on.
Examine the merits of these contentions, with the support of case law, if any.

5. 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.

6. What is the minimum monetary limit prescribed in the Customs law below which no refund shall be granted?

7. Explain the doctrine of unjust enrichment with respect to refund of duty.

8. Acme Sales’ imports were being provisionally assessed pending a verification that the department was carrying out. Upon completion of the verification, the assessments were finalized, and Acme Sales was asked to pay ₹12 lakhs, which it paid. After six months, upon detailed scrutiny of the verification report and taking legal opinion on it, Acme Sales filed a claim for refund of ₹8 lakhs on the ground that the differential amount should be ₹4 lakhs only and that there were factual errors in the verification report. Was this the correct mode of redressal for Acme Sales? What will be likely outcome of the claim? Discuss on the basis of case law on the subject.

9. Mr. N has, over three consignments of 200, 400 and 400 units, imported a total of 1000 units of an article “ZEP”, which has been valued at ₹1,150 per unit. The customs duty on this article has been assessed ₹250 per unit. He adds his profit margin ₹350 per unit and sells the article for ₹1,750 per unit.

After one month of selling the entire consignment of article “ZEP”, Mr. N found that there had been an error in payment of amount of duty, in which duty for the consignment of 200 units was paid as if it was 400 units, resulting in excess payment of duty. Mr. N files an application for refund for ₹50,000 (200 X 250). Is the bar of unjust enrichment attracted?

10. Explain the relevant dates as provided in section 26(2) of the Customs Act, 1962 for purpose of refund of duty under specified circumstances, namely:

   (i) goods exported out of India
   (ii) relinquishment of title to goods
   (iii) goods destroyed or rendered valueless.
10. ANSWERS/ HINTS

1. According to section 27(1) of the Customs Act, 1962, a refund claim should be lodged before the expiry of one year from the date of payment of such duty or interest. The period of limitation of one year should 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 of goods.

(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 or in case of re-assessment, from the date of such re-assessment.

(e) Where the refund arises as a result of any judgement/decree/order/direction of the Appellate Authority/Appellate Tribunal/Court, the time limit should be calculated from the date of such judgement/decree/order/direction.

The time limit of one year is not applicable if duty is paid under protest. 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.

2. In this case the bank guarantee was for the purpose of security for fulfilment of export obligation. It cannot be construed as payment of ‘duty’. As section 27 applies only to refund of duty and not to refund of other amounts, the time bar under the said section cannot be invoked to deny the refund.

The facts of given case are similar to the facts of CCus. (Exports) v. Jraj Exports (P) Ltd. 2007 (217) ELT 504 (Mad.). The High Court, in the instant case, held that furnishing of bank guarantee for export obligation could not be regarded as payment of duty; therefore time-bar was not applicable for its return.

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. Since section 27 governs the refund of ‘duty’, and the bank guarantee is not ‘duty’, the limitation prescribed therein for refund of duty would not apply to refund of a bank guarantee.

Applying the principle laid down in the abovesaid case, the High 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 Department is not correct in law.

3. Section 18 (dealing with provisional assessment) incorporates the principle of unjust enrichment in case of refund arising out of finalization of provisional assessment. Sub-section (5) of section 18 of Customs Act, 1962 provides that if any amount is found to be refundable after finalisation of provisional assessment, such refund will be subject to doctrine of unjust enrichment.

Further, section 28D places the onus on the person who has paid duty to prove that he has not passed on the incidence of such duty. In the absence of any proof from such person, section 28D deems that the burden of duty has been passed on to the buyer.

Therefore, in the given case, the Department’s action will be correct if M/s HIL does not produce any evidence of bearing the burden of duty.

4. The incidence of duty can be passed directly or indirectly. Where the capital goods are used for manufacture, the duty paid on their import will go into the costing of the goods manufactured and sold, and can thus be passed on to the buyers. 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. As regards the relevance of the fact that price remained the same before and after the capital goods were imported, the Larger Bench also clarified that uniformity in price before and after assessment does not lead to inevitable conclusion that duty burden has not been passed, as such uniformity may be due to various reasons. In view of this, the contentions of XYZ Ltd are liable to be rejected.

5. Often, goods imported are found to be defective or not according to specifications. In such cases, earlier, the refund of customs duty paid at the time of import could be obtained only if the imported goods were physically
returned to foreign supplier. Generally, cost of return of the rejected goods is heavy and it is economical to dispose of the goods in India itself. Realising this practical difficulty, section 26A of Customs Act makes provision for refund of import duty paid if goods are found defective or not as per specifications. The refund is admissible if goods are re-exported or relinquished and abandoned to the customs authorities or destroyed. Thus, refund is possible even if goods are destroyed or relinquished in India without re-exporting the same.

The section stipulates the following conditions for the refund:

(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) Imported goods should not be such regarding which an offence appears to have been committed under this Act or any other law.

(viii) Imported goods should not be perishable goods and goods which have exceeded their shelf life or their recommended storage before use period.

6. As per third proviso to section 27(1) of the Customs Act, 1962, the minimum monetary limit below which refund cannot be granted is ₹ 100.

7. 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 is refunded the duty by the government, this double benefit would be called as unjust enrichment, because he recovers the duty from customer and again gets the said amount from Government as refund. The same applies to a buyer who again passes on the incidence of duty to another person.

Therefore, wherever there is excess payment or collection of duty, the refund is given only to the person who bears the burden of duty and interest, if any. If the person who claims the refund is not the person who bore the burden, the refund is paid into a fund called Consumer Welfare Fund. Therefore, even if the duty / interest is refundable on merits, it is important for the applicant for a refund to prove that he has not passed the burden of duty, in order to succeed in getting 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; hence the applicant for refund has to refute the presumption of passing on the incidence of duty.

8. Acme Sales received an order finalizing provisional assessment on the basis of a verification report, and requiring payment of ₹ 12 Lakhs. They did not contest this order, but made the payment, and allowed the appeal period of sixty days to lapse. After appeal became time-barred they filed a claim for refund in which they challenged the order. This was a backdoor method of seeking relief against the order; it also asked an officer of the same rank to review the order passed; and it sought to bypass the time limitation for appeal by presenting the appeal as a claim for refund. The Supreme Court has held, in the case of Priya Blue Industries Limited, 2004 (172) ELT 145 (SC), that such a refund claim is not permissible for all these reasons. A person who is aggrieved with an assessment order cannot seek refund without filing an appeal against the assessment order.

9. Mr. N’s invoices show that he collected duty of ₹ 250 per unit on 1,000 items. However he paid duty on 200 items more. This payment, in the normal course, was made before the order permitting the clearance of the goods. It would be evident from the bill of entry that the amount paid was more than the amount of duty assessed. Thus Mr N’s case falls within the exception to unjust enrichment listed at clause (g) of the first proviso to section 27(2). He will be able to refute the charge of unjust enrichment. Furthermore, clause (a) of the
same sub-section provides that the doctrine of unjust enrichment will not apply to the refund of duty and interest, if any, paid on such duty if such amount is relatable to the duty and interest paid by the importer/exporter, if he had not passed on the incidence of such duty and interest to any other person. Mr N’s invoices will show how much duty he collected from his customers, hence he may be covered by this clause also to escape the bar of unjust enrichment.

10. The relevant dates provided under Explanation to section 26A(2) of the Customs Act, 1962 for purpose of refund of duty under specified circumstances are as follows:

<table>
<thead>
<tr>
<th>Case</th>
<th>Relevant date</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Goods exported out of India</td>
<td>Date on which the proper officer makes an order permitting clearance and loading of goods for exportation</td>
</tr>
<tr>
<td>(ii) Relinquishment of title to the goods</td>
<td>Date of such relinquishment</td>
</tr>
<tr>
<td>(iii) Goods being destroyed or rendered valueless</td>
<td>Date of such destruction or rendering of goods commercially valueless</td>
</tr>
</tbody>
</table>
SIGNIFICANT SELECT CASES

1. Whether interest is liable to be paid on delayed refund of special CVD arising in pursuance of the exemption granted vide Notification No. 102/2007 Cus dated 14.09.2007?

KSJ Metal Impex (P) Ltd. v. Under Secretary (Cus.) M.F. (D.R.) 2013 (294) ELT 211 (Mad.)

Facts of the Case: Section 3(5) of the Customs Tariff Act, 1975 (CETA) provides for levy of special additional duty (special CVD) in addition to duty leviable under section 3(1) of the CETA to counterbalance sales tax, value added tax, local tax or any other charges. Notification No. 102/2007 Cus dated 14.09.2007, issued under section 25(1) of the Customs Act, 1962, grants exemption in respect of such special CVD subject to certain conditions. The exemption under the said notification is being granted by way of refund of the special CVD. In other words, exemption is not given ab initio but duty has to be paid first and thereafter, refund for the same needs to be claimed.

The assessee paid the special CVD and applied for the refund of the same under section 27 of the Customs Act, 1962 along with interest in pursuance of the above-mentioned notification. The Department, however, rejected the assessee’s claim for the interest in view of paragraph 4.3 of CBEC Circular No. 6/2008 Cus. dated 28.04.2008 which stipulated that interest could not be granted as Notification No. 102/2007-Cus. did not have any specific provision for payment of the same on refund of duty. The Department was of the view that since such refund of special CVD was an automatic refund by virtue of Notification No. 102/2007 Cus, it could not be considered as a refund under section 27 of the Customs Act, 1962 so as to claim interest under section 27A of the Customs Act, 1962.

High Court’s Observations: The High Court was of the view that paragraph 4.3 of Circular No. 6/2008 Cus was totally inconsistent with the provisions of the Customs Act, 1962 and the CETA. The High Court observed that grant of exemption under section 25(1) of the Customs Act, 1962 is an independent exercise of power by the Central Government. Notification No. 102/2007 Cus., issued in exercise of such powers, provides exemption by way of refund of special CVD and imposes certain conditions for seeking refund. However, the procedure for such refund will be governed in terms of section 3(8) of the CETA. Therefore, provisions of section 27 of the Customs Act, 1962 in relation to refund of duty [made applicable to refund of special CVD vide section 3(8) of
CETA] would be applicable to such refund of special CVD also.

The High Court further stated that a conjoint reading of section 25(1) and section 27 of the Customs Act makes it clear that the refund application of special CVD should only be filed in accordance with the procedure specified under section 27 of the Customs Act, 1962 and that there is no method prescribed under section 25 of the Customs Act, 1962 to file an application for refund of duty or interest.

**High Court’s Decision:** The High Court, therefore, held that:

(i) It would be a misconception of the provisions of the Customs Act, 1962 to state that notification issued under section 25 of the Customs Act, 1962 does not have any specific provision for interest on delayed payment of refund.

(ii) When section 27 of the Customs Act, 1962 provides for refund of duty and section 27A of the Customs Act, 1962 provides for interest on delayed refunds, the Department cannot override the said provisions by a Circular and deny the right which is granted by the provisions of the Customs Act, 1962 and CETA.

(iii) Paragraph 4.3 of the Circular No. 6/2008 Cus. dated 28.04.2008 being contrary to the statute has to be struck down as bad.

**Notes:**

1. This case clarifies that refund of special CVD arising as a result of exemption granted by way of exemption notification is governed under section 27 of the Customs Act, 1962 and thus, the provisions relating to payment of interest on delayed refund of duty as contained in section 27A of the Customs Act also become applicable in respect of delayed refunds of special CVD which is granted to give effect to the exemption contained in an exemption notification. Thus, it appears that the provisions applicable to normal refunds of duty/tax may apply to refunds of duty/tax arising as a result of exemption granted by way of exemption notifications as well.

2. Appeal was filed against the aforesaid judgment before Division Bench wherein the stay was granted.

2. Is limitation period of one year applicable for claiming the refund of amount paid on account of wrong classification of the imported goods?

*Parimal Ray v. CCus. 2015 (318) ELT 379 (Cal.)*

**Facts of the Case:** The petitioners imported tunnel boring machines which were otherwise fully exempt from customs duty. However, owing to erroneous classification of such machines, they paid large amount of customs duty.

After expiry of more than 3 years, the petitioners filed a writ petition claiming the refund of the amount so paid. The said refund claim was rejected on the ground that the petitioners failed to make a proper application of refund under section 27 of the Customs Act, 1962 within the stipulated period of 1 year of payment of duty.

**High Court’s Observations and Decision:** The High Court observed that the provisions of section 27 apply only when there is over payment of duty or interest under the Customs Act, 1962. When the petitioners’ case is that tunnel boring machines imported by it were not exigible to any duty, any sum paid into the exchequer by them was not duty or excess duty but simply money paid into the Government account. The Government could not have claimed or appropriated any part of this as duty or interest. **Therefore, there was no question of refund of any duty by the Government.** The money received by Government could more appropriately be called money paid by mistake by one person to another, which the other person is under obligation to repay under section 72 of the Indian Contract Act, 1872.

A person to whom money has been paid by mistake by another person becomes at common law a trustee for that other person with an obligation to repay the sum received. This is the equitable principle on which section 72 of the Contract Act, 1872 has been enacted. Therefore, the person who is entitled to the money is the beneficiary or *cesti qui trust*. **When the said amount was paid by mistake by the petitioner to the Government of India, the latter instantly became a trustee to repay that amount to the petitioner.** The obligation was a continuing obligation. When a wrong is continuing there is no limitation for instituting a suit complaining about it.

The High Court, therefore, allowed the writ application and directed the respondents (Department) to refund the said sum to the petitioner.
Notes:

(i) The principle enunciated in this case is that law of limitation under Customs Act is applicable to duty or interest paid under that Act. However, any sum paid to the exchequer by mistake is not duty or excess duty but is simply money paid to the account of Government. Therefore, limitation of one year applicable to refunds of customs duty will not apply to refunds of amount paid to the Government by mistake. The High Court elaborated that under the Limitation Act, 1963, money paid by mistake can be recovered up to three years from the time the plaintiff discovers the mistake or could have discovered the same with reasonable diligence.

(ii) A cestui que trust is a person for whose benefit a trust is created; a beneficiary. Although legal title of the trust is vested in the trustee, the cestui que trust is the beneficiary who is entitled to all benefits from a trust.