Draft Circular / / 2016-Service Tax

F. No. 137/29/2016-Service Tax
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
Service Tax Wing

Dated August 2016

To
All Principal Chief Commissioners of Central Excise
All Chief Commissioners of Central Excise/ Service Tax
Principal Directors General of Service Tax/Central Excise Intelligence/Systems
Director General of Audit
All Principal Commissioners of Central Excise/Service Tax
All Commissioners of Central Excise/Service Tax
All Principal Commissioners/Commissioners LTU

Subject: Application of principle of "unjust enrichment" in case of refund

Attention is invited to the provisions contained in Section 11B of the Central Excise Act, 1944 (CEA) which provides for grant of refund of duty of excise and interest, if any, paid on such duty. Further the incidence of duty or interest is deemed to be passed on to the buyer of goods by the person paying it in terms of Section 12B of the CEA. The provisions of Section 11B and 12B of CEA have been made applicable to service tax matters also in terms of the provisions contained in Section 83 of the Chapter V of the Finance Act, 1994. Similar provisions are also there in the Customs Act, 1962 in sections 27, 28C and 28D . The succeeding paragraphs of this circular will refer to the relevant sections in the Central Excise Act, 1944. The contents of these paragraphs will apply , mutatis mutandis , to refunds of service tax and customs duty.

2.1 In view of the provisions contained in clause (a), (b) or (c) of sub-section (2) of Section 11B of the CEA, it is provided that the principle of unjust enrichment is not applicable in following cases:

2.1.1 duty paid on exports;

2.1.2 duty paid on inputs / input services used in the manufacture of exported goods / for provision of exported services;

2.1.3 unspent balance lying in PLA.

2.2 In other words, it would be presumed that in all other cases the incidence of duty has been passed on by the person who has paid the duty. If duty is found not payable otherwise but the incidence has been passed on to some other person then excess amount of duty or interest is liable to be credited to Consumer Welfare Fund established under Section 12C of the CEA. This presumption however is a rebuttable presumption as the incidence of indirect taxes on goods and services is expected to be borne by the ultimate consumer only.

3.1 It has been observed that there has been a lot of litigation on this account. Further, varied practices are being followed by the field formations to satisfy that the principle of unjust enrichment is not applicable in various refund scenarios. In order to bring uniformity in the application of the principle of unjust enrichment , this circular will indicate the accounting and documentation requirements which are to be adhered to, in the various refund scenarios which are likely to be encountered.

3.2 The accounting requirements which are common to all the situations covered in this circular are essentially two:

3.2.1 Balance Sheet of the applicant for the financial year in which the duty amount claimed as refund has been paid or credit note has been issued, should indicate the refund amount as "Duty Receivable" under the heading "Current Assets".
(It does not matter whether the differential duty/tax amount is reflected in the "Duty Receivable" account, invoice wise or a consolidated journal entry is passed at the end of the financial year. The consolidated entry, however, must reflect the invoices in respect of which the differential amount is being transferred to "Duty Receivable" Account.)

3.2.2 Balance Sheet of the subsequent financial year(s) after the financial year in which duty/tax was reflected as "duty receivable'' till the financial year preceding the financial year in which refund is proposed to be sanctioned, should continue to show the amount as "Duty Receivable" under the heading "Current Assets".

3.2.3 Further details with respect to the recording of transactions in the books of account, will be indicated in succeeding paragraphs, wherever required.

3.3 The certificates indicated as part of the documentary requirements would be self-certified by the applicants in all cases where the duty amount being claimed as refund amount is Rs. 25 lakhs or less. In cases, however, where the duty amount being claimed as refund is more than Rs. 25 lakhs, the certificates would be required to be certified by a Chartered Accountant / Cost & Management Accountant. A suggested format of each such certificate is enclosed as **Annexures – A, B and C**, annexed to this circular.

4.0 REFUND ARISING OUT OF DIFFERENTIAL DUTY ON INPUTS AND CAPITAL GOODS.

4.1 The judgement of Hon'ble Supreme Court in the case of **Union of India Vs. Solar Pesticides Pvt. Ltd**, reported in **2000 (11) ELT 401 SC** states that the principle of "unjust enrichment" is required to be satisfied even in case of refund of duty / tax on inputs / input services that are used in the taxable activity as the test is whether the incidence of the duty / tax has been passed on or not and not whether the actual duty / tax has been passed on or not. The refund of duty / tax paid by the recipient to the manufacturer / service provider at the time of receipt of inputs / input services may arise in cases where it transpires subsequently that the duty / tax was not payable by the manufacturer / service provider. The manufacturer / service provider may not be able to claim refund of such amount if he has already recovered the duty / tax from the recipient of inputs / input services and it is the recipient who may seek refund of duty / tax

already paid by him to the manufacturer / service provider. In such a scenario, the refund sanctioning authority has to satisfy himself that the amount of duty / tax claimed as refund has neither been included in the cost nor the CENVAT CREDIT thereof has been claimed by the recipient. In other words, at the time of purchase, the purchase account would be debited with the value exclusive of duty. The recipient may transfer duty component to Input Tax Credit account if he desires to avail CENVAT CREDIT. Thereafter on submission of refund application, the Input Tax Credit account would be reversed by an amount equal to the refund amount, if he has availed CENVAT CREDIT and the said amount would be credited to "Duty Receivable" account.

4.2 The accounting requirements as indicated in paragraph 3.2 will suffice. As mentioned therein, the differential duty should be reflected as "duty receivable" in the Balance Sheet. This is because of the fact that in such situations the applicant seeking refund will only come to know that he is eligible for refund once the supplier has failed to get the refund. There would be very rare cases in which the applicant is well aware of the refund eligibility at the time of purchase of inputs/capital goods. The duty should be recorded as "Duty Receivable" invoice wise for each purchase otherwise it would create complications as the recording of the purchase value inclusive of duty would mean that the said duty has become part of cost and, therefore, indirectly the incidence of duty has been passed on. Alternatively, the applicant may credit the purchase account at the end of the year with the amount of duty proposed to be claimed as refund and debit the same in the "Duty Receivable" account.

4.3 The documentary requirements are as follows:

4.3.1 Documents evidencing payment of duty by the manufacturer / service provider

4.3.2 **Annexure- A** for the applicant's certification that CENVAT Credit was either not availed or if availed earlier has been reversed and that the duty paid has not been included in the cost;

4.3.3 **Annexure-C** for the supplier's certification that either he has not filed any refund application for the duty amount being claimed as refund or the refund application filed by him has been rejected on the ground of "unjust enrichment".

4.4 In the case of refund of duty relating to capital goods, in addition to the requirements indicated in paragraphs 4.1 to 4.3 above, the issue relating to depreciation will also require examination. The amount of duty paid on capital goods should not be availed as CENVAT Credit. Further in terms of sub-rule (4) of rule 4 of the CENVAT Credit Rules, 2004, the amount of duty paid on capital goods should not be claimed as depreciation under the provisions of Income Tax Act, 1961. In other words, the amount of duty should not be capitalised, i.e. only the ex-duty value of capital goods should be capitalised. The amount of duty on capital goods has to be transferred to "Duty Receivable" account. Submission of **Annexure-A** will take care of this aspect.

4.5 A common point with respect to inputs, input services and capital goods is that the applicant might have availed the CENVAT CREDIT in the financial year in which the duty/tax amount was paid at the time of receipt of the inputs/input services/ capital goods. Therefore as per the accounting principles the purchases would have been expensed out in the profit & loss account of the same financial year and it would be assumed that the incidence of duty has been

passed on. But in such scenarios if the recipient reverses the CENVAT CREDIT in the financial year in which he claims the duty/tax amount as refund **,** this will satisfy the test of the principle of "unjust enrichment". This is based on an application of the Supreme Court judgement in the case of Chandrapur Magnet-Wires vs Collector of Central Excise reported in **1996 (81) ELT 3 SC** .

5.0 REFUND ARISING OUT OF DIFFERENTIAL DUTY ON FINAL PRODUCTS IN SOME SITUATIONS

5.1 Discounts

5.1.1 Certain type of discounts (year ending discounts / quantity discounts, etc.) are known at the time of removal of goods / provision of service but can be quantified only after removal of goods/ provision of services, normally at the year end and the accounts are settled accordingly. Invoices are issued for full value and duty / tax is paid on the same accordingly. It is only at the end of the financial year that the amount of discount/incentives is adjusted according to the terms of contract. Normally, such transactions are settled through the mechanism of credit/ debit note whereby the supplier credits the account of the buyer in his books of account with the amount of discount/incentives given while the purchaser debits the account of supplier in his books of accounts with the amount of discount/ incentives received.

5.1.2 The accounting requirements as indicated in paragraph 3.2 will suffice.

5.1.3 The documentary requirements are as follows:

- Document evidencing payment of duty by the applicant;
- Contract, wherein terms of the contract should clearly specify the terms of discount/ incentive.

  Note: Date of such contract should be on or before the date of first removal;
- Certificate for calculation of discount on the base quantity supplied;

  Certificate from the recipient that he has reduced his CENVAT CREDIT on account of differential amount;(**Annexure-B**)
- Details of Credit/ Debit note issued clearly indicating the differential duty amount; (**Annexure- D**)

5.2 Finalisation of provisional assessment

5.2.1 The assessee may be eligible for refund on finalisation of provisional assessment under the provisions of Rule 7 of the Central Excise Rules 2002.

5.2.2 The accounting requirements as indicated in paragraph 3.2 will suffice.

5.2.3 The documentary requirements are as follows:

- Document evidencing payment of duty by the applicant; -
- Certificate that the differential duty amount has not been recovered from the recipient;(**Annexure-A**)

- Certificate from the recipient that he has not availed CENVAT CREDIT of differential duty amount;(**Annexure-B**)
- Details of Credit/ Debit note issued clearly indicating the differential duty amount; (**Annexure-D**)

5.3 Favourable order by the Appellate Authority

5.3.1 There may be instances where the tax liability as determined by the department is contested by the assessee (tax liability so determined being higher than the tax liability as self-assessed) but duty was paid at higher rate in accordance with such determination. The assessee may issue invoices for future transactions, if issue is recurring, in such a way that departmental assessment is followed and thus recovers higher amount from its customers; or he may continue to bear the extra burden himself and continue to issue invoices as before. If the contentious issue was one-off or has no impact on future transactions, the taxpayer may pay duty himself without recovering from his customers or he may issue supplementary invoices. The refund may arise once the assessee receives a favourable order from the Appellate Authority.

5.3.2 The accounting requirements as indicated in paragraph 3.2 will suffice.

5.3.3 The documentary requirements are the same as indicated for finalisation of provisional assessment in paragraph 5.2 above. The certificates regarding non recovery of the differential duty amount as shown in the invoices and non availment of Cenvat credit will be necessary only if the invoice / supplementary invoices reflects the differential duty amount.

6.0 REFUND OF PRE DEPOSIT

6.1 Section 35F of the CEA provides for the pre-deposit of a certain amount of duty before the filing of an appeal before the appellate authority by the assessee. In the eventuality of an order or judgement in favour of the assessee, he becomes eligible for refund of pre-deposit. In terms of Circular No. 984/08/2014-CX dated 16th September, 2014 issued from F. No. 390/Budget/1/2012-JC, the said amount is required to be refunded under the provisions of Section 35FF of the CEA and that the said amount is not a duty. It is accordingly clarified that the provisions of Section 11B of CEA are not applicable in case of refund of pre-deposit amount and, therefore, the principle of unjust enrichment is not applicable in such cases.

7.1 Chief Commissioners are requested to inform assessees and departmental officers about the contents of this circular

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Annexure –A(for manufacturer/service provider)

Certificate for non-passing of incidence of duty/tax

M/s.....(name of the applicant) /We* has / have* claimed an amount of Central Excise duty/Service Tax of Rs. .....as refund vide application dated..... We have verified the books of accounts and it is certified that / it is certified that *:

(i) incidence of Central Excise duty/Service tax claimed has not been passed on directly or indirectly to any other person *;
(ii) duty / tax paid has not been included in the cost
(iii) the CENVAT CREDIT of amount of Central Excise duty/Service tax paid to manufacturer/service provider has not been availed *;
(iv) duty paid on capital goods has not been capitalised and that depreciation under section 32 of Income Tax Act, 1961 has not been claimed on the duty portion of the value of capital goods *;
(v) the CENVAT CREDIT of amount of Central Excise duty/Service tax paid to manufacturer/service provider on inputs / input services / capital goods was availed but has been reversed at the time of filing the claim for refund *.
(vi) the amount of duty/tax amount claimed as refund has been shown as "Duty Receivable" under the heading "Current Assets" in the Balance Sheets for the financial year (s) ----to----.
(vii) the amount of duty / tax claimed as refund was actually paid by the applicant / manufacturer / service provider *.

that the * Conditions which are not applicable may be struck out

Applicant

Signature of the Chartered Accountant / Cost & Management Accountant/
Manufacturer or service provider or his authorized person/

Annexure-B(for recipient of goods/services)

Certificate for non-availment of Central Excise duty/ Service tax as CENVAT Credit (CENVAT CREDIT) by the recipient of goods or services

M/s.....(name of the applicant) / we * has / have * claimed an amount of Central Excise duty/Service Tax of Rs. .....as refund vide application dated..... We have verified our books of accounts/ books of accounts of the recipient of goods/services and it is certified that:

(i) we have not/recipient has not availed CENVAT Credit of Central Excise duty/ Service tax on the goods/services to the extent claimed by counterpart claimant *;
(ii) we have/recipient has reduced CENVAT Credit of Central Excise duty/Service Tax to the extent claimed by counterparty claimant *.

* Conditions which are not applicable may be struck out

Signature of the Chartered Accountant / Cost & Management Accountant/
Manufacturer or service provider or his authorized person

Annexure-C
(for supplier of goods/service, in the case of refund of duty on inputs/capital goods)

Certificate for non filing of refund application for the duty/tax amount being claimed as refund / the refund application filed by him has been rejected on the ground of "unjust enrichment".

M/s.....(name of the applicant) / we * has / have * claimed an amount of Central Excise duty/Service Tax of Rs. .....as refund vide application dated..... We have verified our books of accounts/ books of accounts of the recipient of goods/services and it is certified that:
We have not filed any refund application for the duty/tax amount being claimed as refund* / the refund application filed by us has been rejected on the ground of "unjust enrichment"*.

* Conditions which are not applicable may be struck out

Signature of the Chartered Accountant / Cost & Management Accountant/
Manufacturer or service provider or his authorized person/

Annexure-D
(Details of Credit/Debit notes)

S. No	Details of Debit/Credit Notes			Details of Original Invoice			Remarks
	Number	Date	Amount	Number	Date	Amount	