

Procedure for Refund of 4% Special CVD

Subject: Clarification on refund of 4% Additional Duty of Customs (4% CVD) in pursuance of Notification No.102/2007-Customs dated 14.09.2007.

F.No. 401/104/2007-Cus.III

16-CBEC Your kind attention is invited to the Board's Circular No.6 2008-Customs dated 13.10.2008 28.4.2008 containing instructions on the procedure to be followed by the Customs (DoR) field formations while making 4% CVD refund in terms of Notification No.102/2007-Customs dt.14.9.2007.

2. Subsequent to the issue of the above circular, the trade and industry associations have raised some more issues needing clarifications and in some cases relaxations of the procedural requirement for expeditious sanction of refund claims. Further, certain field formations have also made references on some of the issues raised by the trade. The various issues raised in the above references have been examined in the Board and the following clarifications are issued on each of points raised:

(i) Time-limit for filing of refund claim

It was already clarified by the Board that importers will be permitted to file 4% CVD claims upto a period of one year from the date of payment of duty. As stated in para 4.1 of the Circular No.6/2008-Customs, an amending notification to this effect specifically providing for one year period from the date of payment of the additional duty of customs (4% CVD) was issued vide Notification No.93/2008-Customs dated 1.8.2008 amending para 2(c) of the above-said notification. This may be taken note of and pending refund claims involving more than six months period, if any, may be disposed of accordingly.

(ii) Early processing of refund claims

There have been a number of requests from the trade that the 4% CVD refund claims should be processed within the prescribed period of three months time. This aspect has been explained in detail in para 4.3 of the Board's Circular No.6/2008-Customs. Hence, the jurisdictional Commissioners and Chief Commissioners at respective Custom Houses / zones may ensure that there is no delay in the disposal of the 4% CVD refund claims in terms of Notification No.102/2007-Customs. Further, the status of the refund claims should be placed on the website of the Commissionerate and updated periodically for monitoring of timely disposal of refund claims. Wherever refund claims are sanctioned necessary defacement of the original bill of entry may be carried out in order to ensure that in no case refund is entertained on the same grounds for same goods covered under a bill of entry again. In case of refund claim not being disposed of in three months, the matter should be reported to the Board within a fortnight mentioning the reason for delay and any area of doubt which needs to be clarified.

(iii) Sale invoices to be submitted in soft form for claiming refund

It has also been represented that number of copies of sale invoices are required to be produced in view of the Condition No.2 (e) (ii) of the Notification No.102/2007-Customs dated 14.9.2007. As these are voluminous, it is difficult for the importers as well as the Department to handle such invoices in hard copy. This issue was examined in specific reference to Section 4 of the Information Technology (I.T.) Act, 2000 which provides that any information or any other matter, which is required under any Law to be made in writing or printed form, could be submitted in an electronic form provided it is accessible for use or subsequent reference. In view of the fact that this provision applies notwithstanding anything contained in any other law, the legal requirement of submission of copies of sale invoices would be fulfilled if the same is provided in electronic form. In the I.T. Act, 2000, 'electronic form' has been defined and it includes information stored in optical or magnetic media.

Therefore, it is clarified that the importers could submit the copy of invoices in electronic form (including the form of CD) as prescribed in Information Technology Act, 2000, for the purpose of fulfillment of the condition in para 2 (e) (ii) of the Notification No.102/2007-Customs dated 14.9.2007. The electronic media containing the information about sale invoices should, however, be submitted along with a paper declaration by the applicant indicating the invoice numbers contained in the media and subscribing to their truthfulness.

(iv) Declaration for non-admission of Cenvat Credit

In terms of condition 2 (b) of the Notification No.102/2007-Customs, the importer who wishes to avail the refund of 4% CVD, is also required to make a specific declaration in the sale invoice that no Cenvatcredit would be admissible in respect of 4% CVD. This ensures that there is no double benefit on account of refund to the importer and Cenvat Credit to the purchaser. Hence, the request for dispensation of such declaration by certain importers who are not registered with Central Excise authorities and to allow 4% CVD refund to these importers on the basis of their status of registration with Central Excise, as non-registered dealer is not found to be acceptable.

(v) Payment of ST/VAT by cash or input tax credit

It has been brought to the notice of the Board that the ST/VAT credit is available with the importer due to credit of ST/VAT paid on local purchase of other products. In such cases, although the imported goods are sold and ST/VAT is being paid on such sale, instead of cash payment, the input tax credit is used. Hence, it was represented that payment of ST/VAT by input tax credit adjustment should be acceptable in lieu of ST/VAT paid challan.

In terms of the requirement under para 2(d) of the said notification, it is stated that appropriate ST/ VAT is to be paid by the importer on sale of goods. The importer can then claim the refund of 4% CVD paid at the time of import. It is noticed that most of the

ST/VAT legislations provide for payment of ST/VAT by utilizing the input tax credit. If the Sales Tax Authorities accept payment of ST/VAT through cash or adjustment of input tax credit, the same shall be treated as effective discharge of ST/VAT payment on imported goods. Further, Board had provided in its earlier Circular that a certificate from statutory auditor/Chartered Accountant correlating the payment of ST/VAT on the imported goods with the invoices of sale, along with supporting documents of proof of payment of appropriate ST/VAT is acceptable for the purpose of 4% CVD refund. Hence, it is clarified that discharge of ST/VAT liability by the importer, through cash or other authorised form of payment to the concerned ST/VAT authority or input tax credit adjustment, could be accepted by Customs field formations for the purpose of fulfillment of the condition in para 2 (d) considering sanction of refund of 4% CVD.

(vi) Submission of original copy of ST/VAT Challan

The difficulties expressed by the importers in submission of original Tax paid challans for evidencing payment of ST/VAT at more than one port was examined. Importers pay the appropriate ST/VAT to the concerned State Government where the sale of imported goods is effected. There is a genuine difficulty in case of importers selling the goods through various States or those importing goods at various ports and subsequently, selling in different States to obtain the original copy of ST/VAT challan evidencing payment of appropriate ST/VAT for the purpose of claiming 4% CVD refund with various Customs Commissionerates at different ports. Further, payment of ST/VAT after adjusting input tax credit is made through different forms such as deposit of cash, cheque, demand draft or other authorised mode of payment through banking channel or payment directly to the ST/VAT Department. In some States, even e-payment is also accepted.

The aforesaid request of the trade has been considered and keeping in view the difficulties faced in submitting original challans, it has been decided that alternatively, the importers may submit copies of ST/VAT challan or copies of ST/VAT payment document in different forms evidencing payment made to the bank or ST/VAT Department towards ST/VAT along with a certificate from the Chartered Accountant, who either certifies the importer's financial records under the Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961, confirming the payment against the aforesaid documents. This would be considered sufficient to fulfill the requirement in terms of para 2(e)(iii) of the Notification No.102/2007-Customs dated 14.9.2007. Hence, the Customs field formations shall accept the copies of ST/VAT challans/documents along with the certificate of the said Chartered Accountant, while receiving the 4% CVD refund claim. However, the importers may be required to submit the original ST/VAT payment challans or other similar documents, in doubtful cases for verification by Customs authorities, which shall be returned to the importer after verification.

(vii) Unjust enrichment and its Certification by Chartered Accountants

It is represented by the trade that for the purpose of satisfying the condition that burden of 4% CVD has not been passed on by the importer to any other person, a certification from an independent Chartered Accountant may be accepted by the Customs authorities.

In this regard, it is stated that the intention of the Government is not to allow the importer to recover 4% CVD from the buyer and to claim the refund from Customs as well. The only method to ensure this is to make it conditional to satisfy the principle of unjust enrichment. In this regard, in the earlier circular, it has been provided that the importer may produce a certificate from the statutory auditor/CA who certifies that Annual Accounts of the importer (under the Companies Act, 1956 or any statute) to the effect that the burden of 4% CVD has not been passed on by the importer to the buyer. The provisions contained in the various Sales Tax Laws prevailing in various States provide for Audit of the books and accounts for the purpose of ascertaining the correctness of ST/VAT payment / Input Tax Credit. Further, Section 44AB of the Income Tax Act, 1961 provides that certain persons carrying on business or profession exceeding the prescribed limit are required to get their accounts audited by "an Accountant" explained therein.

Considering these provisions, it is clarified by the Board that the 'statutory auditor / Chartered Accountant' mentioned in para 6 of the earlier Board's circular refers to "Chartered Accountant" within the meaning of section 2(1)(b) of the Chartered Accountants Act, 1949. However, it is clarified that the Customs field formations shall accept the certificate given only by such a Chartered Accountant who either certifies the importer's financial records under the Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961, in order to fulfill the requirement of the condition that the incidence of duty burden has not been passed on by the importer to any other person for the purpose of refund of 4% CVD. A certificate by any other independent Chartered Accountant would not be acceptable for this purpose.

(viii) Consignment Agents

It is represented by certain importers who operate through consignment agents / stockists, that the imported goods are held by these agents / stockists in the capacity of bailee. The goods are sold by them on behalf of the importer and the payment for the sale is made to the importer. These agents also pay the appropriate ST/VAT on behalf of the importer and get the same reimbursed from the principal i.e. importer. Unlike in other transactions, while the bill of entry for imported goods under consignment sale is filed by the importer and the bill of entry will be in the name of the importer, the sale invoices are issued by the said consignment agents / stockists in their own names. Hence, it has been requested by these importers that refund of 4% CVD in such cases should be allowed to them based on the correlating documents evidencing payment of ST/VAT by their agents / stockists.

It is observed that in 'consignment sale' transaction, goods are dispatched to Consignment agents by importer as Principal; and the imported goods remain the property of the importer. Similarly, the responsibility of Stockist is confined to stocking of goods and forwarding such goods to persons and places as instructed by the importer. Hence Consignment agent/stockist sells goods on

behalf of the importer. The said agent collects sales proceeds and remits the same to importer; however he may recover his commission, godown charges, insurance charges etc., from the importer. In terms of the various State ST/VAT laws, 'sale' is defined to mean transfer of property in goods for a valuable consideration. For the purpose of ST/VAT, transfer of property involved in the sale of imported goods, through an agent, by whatever name called, whether for cash or for deferred payment or other valuable consideration, shall be deemed to be a sale, by such agent.

Further, consignment agent/stockist who has the authority to sell the goods belonging to the importer/ principal on their behalf is also included in the scope of the term 'dealer' under the ST/VAT Act, and the said agent/stockist are required to pay appropriate ST/VAT on sale of such goods. In these transactions, normally, an Agreement is entered into between the importer and agent, which provides for the terms and conditions of sale and offers a commission for the work done by the agent / stockist. Payment of ST/VAT on behalf of the importer may also be specified as one of the arrangement as per such agreement. Since such sale is an accepted form of commercial transaction, payment of ST/VAT made by such agents and submission of ST/VAT challan by the agents on behalf of principal (Importer) is permitted by ST/VAT authorities.

In view of the above, it is clarified that in case of sale of imported goods by importer through consignment agent/stockist, refund of 4% CVD shall be granted by Customs field formations, subject to the condition that the Consignment agent/ stockist has been authorised to sell the imported goods in terms of the agreement entered into between the importer and consignment agent/stockist and that each of the sale invoices issued by the consignment agent/stockist indicates that the sale is made by him on behalf of the importer in the capacity of consignment agent/stockist. These conditions shall be verified by the Customs officers before sanction of 4% CVD refund claims in these cases. Further, in such cases, it is also required that the applicant submits a certificate from a Chartered Accountant appointed by the importer, who either certifies the importer's financial records under the Companies Act, 1956 or any ST/VAT Act of the State Government or the Income Tax Act, 1961, to the effect that appropriate ST/VAT has been paid by consignment agent/stockist on behalf of importer and that the importer, in turn, has paid or reimbursed the ST/VAT to his consignment agent/stockist along with the correlation of ST/VAT payment with 4% CVD paid on imported goods.

(ix) Submission of refund claim for part of goods in a consignment

Several importers have represented that the refund claim should be sanctioned even prior to the said one year period in cases of part sale where a significant part is already sold and an undertaking is furnished by the importer that no more refund claim would be filed for the remaining part. Moreover, in some cases, there may be short landing or part of the consignment is unlikely to be sold due to some defects, damage etc. In such cases too, the importers may prefer to claim refund for such part of consignment that were actually sold. In the earlier circular issued, it was clarified that 4% CVD refund claims shall be filed on a monthly basis. Further, it was stated that filing of refund claim for part quantity covered in a bill of entry shall not be allowed except when this is necessary at the end of the one year period prescribed.

It is needless to specifically mention that where certain quantity of goods were lost or short-landed or damaged resulting in sale of part quantity and the importer submitting a refund claim for the quantity that was sold along with the declaration that for the remaining quantity they would not claim refund, the claims shall be entertained even for part quantity by the Customs. However, since some Customs field formations have raised this doubt, it is hereby clarified that in such cases as stated above, the filing of refund claim for part quantity shall be accepted by the Customs field formations during the same month and such cases need not await till the end of the one year period.

3. In view of the above clarifications, you are required to take further necessary action in the matter without any delay. All pending 4% CVD refund claims must be attended to and the refund claims sanctioned within the prescribed time limit. In view of the resentment in the trade on this matter, the Chief Commissioners should ensure that prompt action is taken to dispose of the claims. A status report about the disposal of claims filed till 30.06.2008 may please be sent to the Board by 15.11.2008.

4. A suitable Public Notice and Standing Order may be issued for the guidance of the staff and trade. Difficulties faced, if any, in implementation of the Circular may please be brought to the notice of the Board at the earliest.