

Procedure for Refund of 4% Spl CVD – Undue Enrichment Certificate Required

Subject: Procedure to be adopted for refund of 4% Additional Duty of Customs in pursuance of Notification No.102/2007-Customs dated 14.9.2007

06-CBEC I am directed to state that various representations from importers, exporters, trade and industry associations and
28.04.2008 references from some of the Customs field formations have been received in the Board seeking clarification
(DoR) regarding refund of 4% Additional Duty of Customs leviable under sub-section (5) of Section 3 of the Customs Tariff
Act, 1975 in pursuance of Notification No.102/2007-Customs dated 14.9.2007.

2. The Board has examined this matter in consultation with the Customs field formations. The following procedure may be adopted by the field formations in order to settle expeditiously the refund claims arising out of the exemption provided vide Notification No.102/2007-Customs dated 14.9.2007.

3. Manner of refund and its receipt

Your attention is invited to the instructions communicated vide F.No.354/129/2007-TRU dated 14.9.2007 at the time of issue of the Notification No.102/2007-Customs dated 14.9.2007. It is reiterated that the scheme of refund of 4% Additional Duty of Customs has been notified through an exemption notification, and hence, the conditions as prescribed only in the said notification will apply. All refund applications under the aforesaid notification shall be received by the concerned field formations in their Centralized Refund Section, and the applicants would be given proper acknowledgement. The status of these refund claims shall also be displayed in the online database of customs duty refunds maintained by the respective Commissionerates.

4. Time – Limit

4.1. In the Notification No.102/2007-Customs dated 14.9.2007, no specific time limit has been prescribed for filing a refund application. Under the circumstances, a doubt has been expressed that whether the normal time-limit of six months prescribed in section 27 of the Customs Act, would apply. In the absence of specific provision of section 27 being made applicable in the said notification, the time limit prescribed in this section would not be automatically applicable to refunds under the notification. Further, it was also represented that the goods imported may have to be ispatched for sale to different parts of the country and that the importer may find it difficult to dispose of the imported goods and complete the requisite documentation within the normal period of six months. Taking into account various factors, it has been decided to permit importers to file claims under the above exemption upto a period of one year from the date of payment of duty. Necessary change in the notification is being made so as to incorporate a specific provision prescribing maximum time limit of one year from the date of payment of duty, within which the refund could be filed by any person. It is also clarified that the importers would be entitled to refund of duties only in respect of quantities for which the prescribed documents are made available and the claims submitted within the maximum prescribed time of one year. Unsold stocks would not be eligible for refunds.

4.2. It is also clarified that only a single claim against a particular Bill of Entry should be permitted to be filed within the maximum time period of one year. Filing of refund claim for a part quantity in a bill of entry shall not be allowed except when this is necessary at the end of the one year period. Further, since the Sales Tax (ST) / Value Added Tax (VAT) is being paid on periodical or monthly basis, even in case of bills of entry where the entire quantity of goods are sold within a month, all such cases shall be consolidated in a single refund claim and filed with the Customs authorities on a monthly basis. In other words, there would be a single refund claim in respect of one importer in a month irrespective of the number of Bills of Entry (B/Es) processed by the respective Commissionerate.

4.3. With the extension of time limit and the requirement to file claims on a monthly basis, Board feels that the number of refund claims should be manageable for disposal within the normal period of three months. Further, in the absence of specific provision for payment of interest being made applicable under the said notification, the payment of interest does not arise for these claims. However, Board directs that the field formations shall ensure disposal of all such refund claims under the said notification within the normal period not exceeding three months from the date of receipt.

5. Documents to be enclosed with refund claim

5.1. Notification No.102/2007-Customs dated 14.9.2007 prescribes the documents that shall be enclosed along with the refund claim. In order to ensure sanction of refund properly, it is clarified that the document evidencing payment of ST/VAT (in original) duly issued by or acknowledged by the concerned ST/VAT authorities shall be submitted by the importer. A certificate from a Chartered Accountant or any other independent authority certifying payment of ST/VAT would not be acceptable in lieu of the original documents. However, a certificate from the statutory auditor / Chartered Accountant, who certifies the importer's annual financial accounts under the Companies Act or any statute, correlating the payment of ST/VAT on the imported goods (in respect of which refund is claimed) with the invoices of sale, would be required along with the original tax / duty payment documents as proof of payment of appropriate ST/VAT for the purpose of para 2(d) & (e) of the said notification.

5.2. For the purpose of refund under this notification, it is reiterated that appropriate Sales Tax or VAT means Sales Tax or VAT in case of Intra-State sales and Central Sales Tax (CST) in case of Inter-State sales.

5.3. The exemption contained in the said notification envisages that the importer shall file a refund claim for 4% CVD ("said additional duty of Customs") paid on imported goods and shall pay on sale of the said goods "appropriate Sales Tax or VAT as the

case may be". Hence, it is clear that there is no stipulation in the notification that the exemption is available only if the rate of ST/VAT is equal to or higher than the rate of additional duty of Customs; nor is there a condition that if the rate of ST/VAT happens to be lower than 4%, the refund would be restricted to the lower amount. As such, it is clarified that it will not be appropriate to reduce the refund amount in such a situation and the entire 4% CVD, if otherwise found eligible, shall be refunded.

6. Unjust enrichment

6.1. The 4% CVD exemption under the said notification is operated through a refund mechanism, wherein the importer would have to first pay the said 4% CVD at the time of importation and, thereafter, can claim refund of 4% CVD on production of documents showing that the appropriate ST/VAT has been paid. Hence, the purpose of granting this exemption is to ensure that the importer pays either 4% CVD or the appropriate ST/VAT and not both. It is not the intention of the Government to allow the importer to recover the 4% CVD from the buyer as well as to claim refund of this amount from Customs. Hence, the principle of unjust enrichment needs to be examined in each case before sanction of refund under this notification. However, considering the voluminous transactions and the documents involved in the cycle, from import to sale, it was felt that it would be expedient to allow the importer to submit a certificate from the statutory auditor / Chartered Accountant who certifies the annual accounts of the importer, that the burden of 4% CVD has not been passed on by the importer to the buyer and to fulfill the requirement of unjust enrichment.

6.2. In view of the above, it is clarified that the doctrine of unjust enrichment will apply to 4% CVD refunds Scheme under the said exemption notification issued in terms of Section 25(1) of the Customs Act, 1962. However, importers may produce a certificate from the statutory auditor/Chartered Accountant who certifies the importer's annual financial accounts under the Companies Act or any statute, explaining how the burden of 4% CVD has not been passed on by the importer and to fulfill the requirement of unjust enrichment. In addition to the aforesaid the importer shall also make a self-declaration along with the refund claim to the effect that he has not passed on the incidence of 4% CVD to any other person.

7. Other miscellaneous issues

7.1. As regards the other doubt expressed by certain field formations on the effective date of the operation of refund scheme, it is stated that the said notification No.102/2007-Customs was issued on 14.9.2007. Accordingly, it is clarified that only those cases where 4% CVD was paid on or subsequent to 14.9.2007, will qualify for refunds under this scheme subject to fulfillment of prescribed conditions.

7.2. In respect of the doubt that whether the stamping or hand-writing of declaration in the invoice would be acceptable for the purpose of fulfilling the condition as mentioned in para 2(b) of the said notification, it is clarified that a stamp on the invoice (to state that no CENVAT Credit is admissible) should suffice for the purpose of para 2 (b) of the said notification.

7.3. On the issue that in case of 4% CVD having been paid through DEPB Scrip, whether refund could be paid by cash, it is clarified that instead of refunding the duty in cash, the amount eligible for refund should be re-credited on the relevant DEPB Scrip.

8. In view of the above clarifications, you are requested to kindly take further necessary action in the matter. The above instructions are being issued so that necessary administrative arrangements are made to deal with 4% CVD refund claims and the refund claims are sanctioned properly. Accordingly, all the concerned Commissioners of Customs / Central Excise may kindly ensure for proper implementation of these instructions of the Board.

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