

Background Material on CUSTOMS AND FTP



The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

The possibility of GST would make the practitioners of service tax and VAT look towards continuing their practice in GST. Customs, which is an indirect tax, would also continue in the proposed GST regime. It is indeed a pleasure that Chartered Accountants have carved a niche for themselves in the field of Indirect Taxes in the last decade especially in service tax.

In order to provide an enhanced learning opportunity to its members the Indirect Taxes Committee of ICAI has launched a Course on “Customs and FTP” and has also come up with a background material for the same.

This Background Material has been specifically designed to provide an in depth knowledge of provisions pertaining to Customs Law and Foreign Trade Policies in a very practical and simplified manner to the members.

I heartily appreciate CA. Madhukar N. Hiregange, Chairman, CA. Sushil Kumar Goyal, Vice-Chairman and other members of the Indirect Taxes Committee for launching a Course on “Customs and FTP” and bringing out a well aligned and updated material. I am sure the proposed Course would facilitate our members in practice as well as in industry to acquire specialized knowledge and cope up with the challenges and complexities relating to the Customs Law and Foreign Trade Policies.

I welcome the members to a fruitful and enriching experience.

Date: 19.08.2016

Place: New Delhi

CA. M Devaraja Reddy

President

ICAI

Preface

Customs Law and Foreign Trade Policies are policies to control the global trade. Customs also is a duty which adds to the exchequer. The economic development of the nation by foreign trade policy is real. The amended provisions like period of warehousing extended to all goods used by Export Oriented Undertakings, Units under Electronic Hardware Technology Parks, Software Technology Parks, Ship Building Yards and other units manufacturing under bond, inter-warehouse transfers permitted as per procedures prescribed under the Warehoused Goods (Removal) Regulations, 2016, the Baggage (Amendment) Rules, 2016 effective from April 1, 2016 etc. are now aspects which a business advisor should know.

This course on Customs Law and Foreign Trade Policies aims to provide a detailed and thorough study. The book is designed to provide in depth practical and theoretical knowledge about levy and types of Custom duties, the taxable event, import /export procedure, provisions in respect of warehousing, duty drawback of Customs duty, the baggage rules etc., which have been duly updated with all the amendments made by the Finance Act, 2016 and notification issued till date.

I would like to express our sincere gratitude and thanks to CA M. Devaraja Reddy, President, ICAI, as well as other members of the Committee for their suggestions and support in this initiative. I must also thank indirect tax experts' viz. CA. A Jatin Christopher and CA. Shailesh Bapat for preparing this material.

I encourage you to make full use of this learning opportunity. I request you to share your feedback at tdtc@icai.in to enable us to make this course/ material more value additive and useful.

Welcome to a professionalized learning experience in Indirect Taxation.

Date: 19.08.2016

Place: New Delhi

CA. Madhukar N. Hiregange

Chairman

Indirect Taxes Committee

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Chapter 1

Constitutional and Legislative Background

The power to enact laws relating to duties of customs is vested with the Parliament. This power is derived from Entry 83 of List I of VII Schedule read with Article 246 of the Constitution of India, which reads as:

83. "Duties of Customs including export duties"

Each Entry in the Schedule is a field or topic on which the Centre or State can legislate. It is not the scope of that legislation at all.

In exercise of this power, the Parliament enacted The Customs Act, 1962 on 13th December 1962 and it became effective only from 1st February 1963 (vide notification G.S.R 155 dated 23.01.1963).

The Customs Act was enacted with an objective *"to consolidate and amend the law relating to Customs"*. The question then is which were the laws that were consolidated and amended by the enactment of the present Customs Act? The answer lies in the penultimate section of the Act i.e., Section 160, which reads as:

"The enactments specified in the schedule are hereby repealed to the extent mentioned in the fourth column thereof"

THE SCHEDULE

(See Section 160)

Year	No.	Short title	Extent of repeal
(1)	(2)	(3)	(4)
1878	8	The Sea Customs Act, 1878	The Whole
1896	8	The Inland Bonded Warehouses Act, 1896	The Whole
1924	19	The Land Customs Act, 1924	The Whole
1934	22	The Aircraft Act, 1934	Section 16

Therefore, it is clear that the Act was enacted to consolidate different legislations that were operating prior to its enactment.

Chapter 2

Levy of Customs Duty

The Levy of customs duty is contained in section 12 of the Customs Act. Before we delve into a discussion on the levy of customs duty, let us see most commonly understood connotations 'import' and 'export'. Below are some illustrative answers that were received:

SNo.	Illustrations	Common answers
1.	Indian Co. imports machinery from Germany	It is import, because it is for paid for and 'imported'
2.	Indian garment manufacturer receives a parcel by courier containing sample from a prospective customer	It is import, because it is for 'business purpose' even though payment is not required for samples
3.	On my birthday an uncle who lives in UK sends a watch as gift to India	It is not import, because the gift is 'not for sale'
4.	On holiday in New York I purchase a T-shirt which reads " I love New York" and I bring it back to India	It is not import, because it is for 'own use'
5.	And when I return to India, I find that the T-shirt has label "made in Tirupur, India"	It is not import, because it was 'made in India'
6.	What about the 'VIP' suitcase that I carried for my trip to USA, is that imported on being brought back	No not at all, because it was taken from India
7.	What about the Jet Airways flight that I boarded on my journey back to India	No, the air-craft is not 'for sale', it is only for travel
8.	What about the fuel stored on the air-craft on the Jet Airways flight	No, when the air-craft is not 'imported' than fuel cannot be 'imported'
9.	What about jewellery, spectacles, clothes or mangalsutra worn by a passenger visiting India from another country	As all are personal articles none of them are 'imported'

10.	Hershey cows brought to India by the Government to give to some cooperative dairy	DON'T KNOW
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The common misconceptions of the law of Customs seem to be that it is applicable only:

- for commercial transactions ; or
- if some form of consideration or payment is involved
- if it is not of personal nature; or
- It also does not apply to airlines or for that matter shipping companies

Under the Customs Act, all transactions illustrated above constitute import. Does it mean on all those transactions duty of customs has to be paid? What is the scope of levy? Let us examine.

Chapter 3

Taxable Event

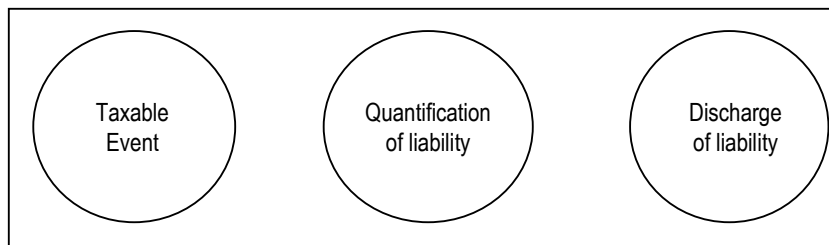
Taxability or levy of duty or tax under each taxing statute has different ingredients. The question of taxability has to be answered by examining the existence of those ingredients in particular transaction. It depends on the facts and circumstances of each transaction.

One of the crucial ingredients of taxability is what is commonly known as “taxable event”. The Supreme Court has defined “charging event as the event, the occurrence of which immediately attracts the charge”¹. The word “charge” here is synonymous with “levy”.

We need to sift through the transaction and identify the existence of these ingredients that ‘attract the levy’. Taxable event and levy of tax or duty are inextricably linked. Levy immediately follows this ‘event’. An event is said to occur when a series of actions lead to the conclusion of that activity. Without the taxable event materializing, there cannot be any levy of tax or duty.

To understand the process of levy of tax, we need to examine it in three phases, namely:

- Taxable event
- Quantification of liability and
- Discharge of liability



- Taxable event – has the taxable event occurred in the facts of the case? In answering this question, very often we rush to think it is synonymous with quantification of tax. In fact the answer to this question is ‘binary’ – YES or NO. Has the taxable event occurred – Yes or No.

¹ Goodyear India Limited v. State of Haryana & Anr. 76 STC 71 (SC)

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- Quantification of liability – is the next sequential question of computing the tax. Please note that the manner of computation of tax has no bearing on the nature of the tax. Often we find people expressing disapproval about the levy of a tax by inquiring into its quantification. The law-maker is free to employ the most expeditious manner of quantifying the tax after having established the ‘taxable event’.
 - Discharge of liability – is the easy part, where having quantified what must be paid, suitable machinery is prescribed for the person charged with the responsibility to deposit the tax with the administrative agency. And if he fails to do so, suitable measures are also prescribed to ‘ensure’ recovery.

Chapter 4

Taxability under Customs Law

What then is the taxable event under the Customs Act? To this end, Section 12 of the Act, which is also the charging section, illuminates our path. Sub section (1) of that section reads as:

*“Except as otherwise provided in this Act or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other Act for the time being in force, **on goods imported into or exported from India**”*

(emphasis supplied)

It also pertinent to understand the meaning of the terms - “import”, “export”, “India” and “goods”.

The term “Import” is defined under Section 2 (23) of the Act as:

“Import, with its grammatical variations and cognate expressions means, bringing into India from a place outside India”.

The term “Imported goods” is defined under Section 2 (25) of the Act as:

*“Imported goods means goods brought into India from a place outside India **but does not include** goods which have been cleared for home consumption”*

(emphasis supplied)

The term “export” is defined under section 2 (18) of the Act, as:

“Export, with its grammatical variations and cognate expressions means, taking out of India to a place outside India”

The term “export goods” is defined under section 2 (19) of the Act, as:

*“Export goods means goods which **are to be** taken out of India to a place outside India”*

(emphasis supplied)

India has been defined under section 2(27) of the Act as:

“India includes territorial waters of India”

According to Article 1(3) of our Constitution:

“The territory of India shall comprise:

(a) the territories of the State (as specified in the First Schedule);

- (b) *the union territories of India (as specified in the First Schedule);*
- (c) *such other territories as may be acquired."*

"Territorial Waters" according to section 3 (2) of The Territorial waters, Continental Shelf, Exclusive Economic Zones and other maritime Zones Act, 1976, means the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline."

"Goods", has been defined in the Customs Act in section 2(22) thus:

Goods includes –

- (a) *Vessels, aircrafts and vehicles;*
- (b) *Stores;*
- (c) *Baggage;*
- (d) *Currency and negotiable instruments; and*
- (e) *Any other kind of movable property.*

The Constitution of India defines goods in Article 366(12) as:

Goods include all materials, commodities and articles.

Sale of Goods Act, 1930 defines goods in section 2(7) as:

*Goods means every kind of movable property other than Actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed **to be severed before sale** of under the contract of sale*

(emphasis supplied)

'Taxable event' under Customs Act can be said to have occurred when the goods are 'imported' into India. India begins at the point of entry in the territorial waters and extends all the way upto the point when they cease to be called 'imported goods'. Section 2(25) states that when goods are cleared for 'home consumption' they cease to be 'imported goods'.

The term 'imported goods' must be understood as a noun. And as a noun, it must be given the meaning as per section 2(25). Goods brought into India become 'imported goods' no sooner than they cross the territorial waters of India but they remain so until they are 'cleared for home consumption'. Now, at what point in this spectrum does the liability to duty gets fastened to the goods is the key question.

If we read the various clauses used in the definition section and then paraphrase section 12(1) of the Customs Act what emerges is:

*"....., duties of customs shall be leviedon goods imported into
.....India"*

Therefore, the 'taxable event' under the Customs Act requires all the following ingredients:

- Goods which are in some physical form
- Must be brought by human initiative
- Resulting in their entry into India but at the customs barrier

Therefore, it is not sufficient to merely show that the goods, upon entry into the 'territorial waters' became 'imported goods' to rush into quantification of the liability. In the light of the discussion on the three phases of the process of taxation, taxable event needs to be 'complete' and it is not sufficient if it has merely 'commenced'. If during the interval of time when the goods remained 'imported goods' the levy is altered, then such alteration cannot be given a go by.

Let us examine this aspect by searching within the Customs Act for permissibility of such interpretation. Existence of an exemption is evidence of the levy. The Customs Act, Rules under section 156 and several notifications under section 25 help in this search. Some illustrations are:

- Section 13 provides that duty that is otherwise leviable will not so be payable on goods that are pilfered after unloading but before clearance for home consumption;
- Section 23 provides for duty remission on imported goods have been lost or destroyed before being cleared for home consumption;
- Section 21 provides that derelict goods brought or coming into India will be dutiable 'as if' they were imported into India;
- Section 24 provides that imported goods that have been denatured or mutilated (in transit) to be charged with duty 'as if' they were imported in such denatured or mutilated form;
- Sections 31 to 34 prohibit Imported goods from being unloaded from vessel until Entry Inwards is granted and mentioned in the Import Manifest or Import Report;
- Section 37 provides power to the proper officer to board any conveyance carrying "imported goods";
- Section 45 places restriction and custody of imported goods;
- Section 47 provides for clearance of goods for home consumption;
- Section 53 provides for transit of certain goods without payment of duty;
- Section 54 provides for trans-shipment of certain goods without payment of duty; and
- Baggage Rules provides for exemption from duty for 'personal effects'

In all these instances we find that the liability to duty arises as soon as they entered the 'territorial waters' of India else the exemption or remissions would be superfluous. And to repeat what was stated earlier 'existence of an exemption is evidence of the levy'. So, the taxable event is answered 'Yes' when goods are brought into India and at every point until they remain 'imported goods' upto the point where they are to pass for 'home consumption'.

Quantification of liability cannot be taken into the 'territorial waters'. Section 15 (and section 15 alone) has jurisdiction to specify when, goods that went past the test of 'taxable event' having attracted the levy, will be called upon for quantification of that liability. The law-maker is free to employ the most expeditious manner (including timing) of quantifying the tax after having established the 'taxable event'.

Authority for such interpretation is found in *Kiran Spinning Mills*² decision where the Supreme Court held "*.....Import being complete, when the goods entered the territorial waters is the contention which has already been rejected³ by this court....*". While the goods become 'imported goods' on entry into the territorial waters of India, they remain so until they are cleared for home consumption. Hence, taxable event would have 'occurred' (past tense) only at the point of assessment (section 17) for home consumption (section 46).

Lastly, duty collection is not the sole object of the Customs Act. By regarding goods that enter the territorial waters of India as 'imported goods' until they are assessed and cleared for home consumption, the Act provides the authority to scrutinize and not require the administration to search for goods after they get mixed in the terra firma of India.

² *Kiran Spinning Mills v. CC* 1999 (113) ELT 753 (SC)

³ *Uol & Ors. v Apar Private Ltd. & Ors.* 1999 (112) ELT 3 (SC) arising from *Apar Private Ltd. & Ors. V. Uol & Ors.* 1985 (22) ELT 644 (Bom.); please also refer *Lucas TVS, Madras v. ACC, Madras & Ors.* 1987 (28) ELT 266 (Mad.)

Chapter 5

Customs Duty

After understanding levy under Customs Act, 1962, the next area is assessment of duty.

Types of duties

- Duty under section 12 read with Customs Tariff Act (also called basic customs duty)
- Additional customs duty under section 3(1) of the Customs Tariff Act being the equivalent duty on imported goods which would be charged on goods manufactured in India as 'excise duty'
- Additional customs duty under section 3(3) of the Customs Tariff Act being the duty charged on imported goods to counter-balance the excise duty applicable on raw materials used in the manufacture of identical goods
- Special additional customs duty under section 3(5) of the Customs Tariff Act being the duty charged on imported goods to counter-balance the sales tax or VAT applicable on goods sold into India

Description	Rate	International	Domestic	Rate	Description
Value of a product		90	100		
Customs duty under section 12 read with CTA	10%	09	-		
Total value for computing additional customs duty u/s 3(1)		99	100		
Additional duty under section 3(1) of CTA	12.5%	12.38	12.50	12.5%	Excise duty
Total		111.38	112.50		
Education Cess and SHEC @ 3% on [Rs.09+12.38]		0.64	--		
Total Value for computing additional customs duty u/s 3(5)		112.02	112.50		
Special additional duty under section 3(5) of CTA	4%	4.48	4.50	4%	VAT
Landed cost		116.50	117		Landed cost

In the above illustration, international prices are assumed to be lower than domestic prices on account of economic factor in the foreign country that affect their export pricing. Import duties are charged in such a manner that it maintains parity with domestic prices.

Now, in case there is a firm in a particular foreign country which is granted a subsidy or incentive in the home country which has the effect of lowering the export price of that product, then a protective duty is levied under the Customs Act which will have the effect of countering the artificial lowering of the export price of that product by that company from that particular foreign country. See illustration below:

Description	Rate	International	Domestic	Rate	Description
Value of a product		45	100		
Countervailing duty under section 9 of CTA	100%	45	-		
Customs duty under section 12 read with CTA	10%	90	100		
Total value for computing additional customs duty u/s 3(1)		09	-		
Additional duty under section 3(1) of CTA	12.5%	99	100	12.5%	Excise duty
Total		12.38	12.50		
Education Cess and SHEC @ 3% on [Rs.9+12.38]		111.38	112.50		
Total Value for computing additional customs duty u/s 3(5)		0.64	--		
Special additional duty under section 3(5) of CTA		112.02	112.50		
Special additional duty under section 3(5) of CTA	4%	4.48	4.50	4%	VAT
Landed cost		116.50	117		Landed cost

As can be seen, even though the export price was lowered by 50 per cent, India levied countervailing duty which had the effect of undoing the subsidy or incentive in the export price. This countervailing duty is not on a particular product alone but on that particular product supplied by a specific supplier from a specific country.

Likewise, other forms of protective duties are:

- Safeguard duty
- Safeguard duty on imports from People's Republic of China
- Anti-dumping duty

A comparative outlook of these protective duties is provided hereunder:

Criteria	Safeguard duty ⁴	Countervailing duty ⁵	Anti-dumping duty ⁶
Notified	Suo moto or upon receipt of complaint / information	Suo moto or upon receipt of complaint / information	Suo moto or upon receipt of complaint / information
Relief against	Serious injury to domestic industry	Subsidy enjoyed in export pricing	Dumping in price or quantity of goods
Extent of relief	To the extent adequate to prevent or remedy	To the full extent of subsidy allowed in the export price	To the full extent of the 'margin of dumping'
Investigation	Required	Required	Required
Injury determination	To be investigated	To be investigated	To be investigated
Provisional duty	Yes, until completion of investigation	Yes, until completion of investigation	Yes, until completion of investigation
Final findings	Within 8 months from start of investigations	Within 1 year from start of investigations	Within 1 year from start of investigations
Excess duty	Refund allowed	Refund allowed	Refund allowed
Duration of duty levy	4 years	Perpetual, subject to periodic review	Perpetual, subject to periodic review

⁴ Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997 and Customs Tariff (Transitional Product Specific Safeguard Duty) Rules, 2002

⁵ Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995

⁶ Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995

Chapter 6

Classification of Goods

Before venturing into classification, a brief history of Customs Tariff Act, 1975 is necessary. Customs Tariff Act, 1975 is derived from the Harmonized commodity description and coding system (HS), which is an internationally accepted system for naming and classifying commodities. This system was developed by an independent inter-governmental organization going by the name World Customs Organization (WCO) which was formerly known as Customs Co-Operation Council (CCC).

In the Tariff Act, the import tariff is enumerated in the First Schedule, which contains XXI Sections, divided into 98 Chapters along with accompanying section and Chapter notes. Similarly, the export Tariff is enumerated in the Second Schedule, which at the present has 49 tariff items.

What is the need for appropriate classification?

Let us consider the following illustrations:

- If there is a description in a heading, in the Customs Act, 1975, as “Kitchenware” and in yet another heading as “cookware”, where do water filter, knife and spoon get classified?
- Does a heading containing the words “edible nuts” include in its ambit coconut?
- Will “Book for reading” include mathematics text books, accountancy reference books. Will it also include ‘filmfare’ magazine or other periodicals?

Classification is necessary to determine the effective rate of duty of particular goods. Exemption and benefits are extended based on the classification of goods under one or the other heading of the Customs Tariff Act or based on description of particular goods. As can be seen from the foregoing illustrations classification can be highly subjective. Correct Classification may be the difference between enjoying an exemption and ruing a show cause notice.

General Principles involved

We often rush to introduce our sense of ‘what ought to be’ even before we have properly understood ‘what is’ wrong. It must always be borne in mind that tax is an artificial exaction of private property under valid law enacted under the powers derived from Articles 246, 265 and 300A of the Constitution of India. Therefore we have to understand law makers’ intention and should desist from supplying law abiders’ expectation into the legislation. Intention of the Law maker should be derived from the language used and nothing else. Customs Tariff Act, being part of the taxing statute deserves no different treatment.

Law makers can use every term in two senses i.e. technical and common. When terms are used in their technical sense, then our understanding of those terms should also be as per the meaning attached to it in the technical sphere. We should resist to rush towards dictionaries (law or otherwise) to seek out their meaning.

In similar vein, if law makers have used a term in a sense which is understood commonly, it refers to understanding of such terms among knowledgeable user group only and not otherwise. For example: In a Ladies' shirt (correct terminology 'blouse') buttons are always on the left side and the gents' shirt, on the right side. This is a constant world over. If we analyze the difference based on cut stitch etc., we will be grossly mistaken.

Also, Supreme Court of India in the context of classification under the Central Excise Tariff Act, 1985 has said "Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein."⁷

Rules for Interpretation

Another crucial aid for classification of goods under Tariff Act is the General rules for interpretation embedded in the First Schedule of the Customs tariff Act itself. These rules are not applicable to the goods specified in Second Schedule of the tariff Act.

According to rule 1 of these rules:

1. The titles of Sections, Chapters and sub- chapters have no legal standing;
2. Classification should , as far as possible, be according to terms of heading or Section and Chapter notes;
3. These rules are applicable, only when classification is not possible under point 2 above. Therefore Section and Chapter notes over ride these rules.

Rule 2(a): Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

Example for the application of this rule would be import of Motor Car in completely knocked down (CKD) condition. Motor Cars are classified under heading 87.03 but individual parts of motor cars i.e. brakes, gear box, drive axles etc. are classifiable under the heading 87.08. By application of rule 2 (a), when imported in CKD condition, motor cars will be classified not under 87.08 as individual parts but under 87.03 as motor car as a whole as import in CKD condition is nothing but presentation of the motor car itself in unassembled or disassembled form.

⁷ Collector of Central Excise v. Wood Craft Products Limited 1995 SCC (3) 454

Rule 2(b): *Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.*

If for any reasons, goods are classifiable under 2 or more headings then to resolve such conflicts the following principles, in the order as listed, should be adhered to:

1. The heading which gives a more specific description of the goods being classified, shall be preferred over the heading giving a general description – Rule 3 (a);
2. The heading describing material or components which gives the goods under classification its essential character, should be preferred over other material or components contained in the goods under classification – Rule 3 (b);
3. The heading which occurs last in numerical order among those which equally merit consideration – Rule 3 (c);
4. When classification fails under the principles mentioned above, goods should be classified under the heading appropriate to the goods which they are most akin – Rule 4.

Rule 5 deals with classification of packing materials. The rule specifies that the goods having unique packing like Camera cases, musical instrument cases, gun cases and so on should be classified under the same heading in which the goods they hold are classified.

Rule 6 states that for the purpose of classification, relevant Section notes, Chapter notes and sub-heading notes shall also be referred to.

Classification for few goods:

#	Description	Classification
1.	Calendar	Heading 4910 – “Calendars of any kind, printed, including calendar blocks.”
2.	Pacemaker	Tariff Item 9021 50 00 – “Pacemakers for stimulating heart muscles, excluding parts and accessories.”
3.	Football shoes	Sub heading 6404 11 – “Sports footwear; tennis shoes, basketball shoes, gym shoes, training shoes, and the like”
4.	Computer, iPod, Play-station	Heading 8471 – “Automatic data processing machines and units thereof”
5.	Software	Tariff Item 8523 80 20 – “Information Technology Software”

Chapter 7

Valuation of Goods

Before venturing into valuation under Customs Act, let us understand the difference between the terms:

- Price;
- Consideration;
- Value.

Consideration is a recompense given by the party contracting to the other; it is two-way *quid pro quo*. Price is merely a consideration in money terms (in the following example it is Rs. 10), consideration is a recompense given by the party contracting to the other; it is two-way, a *quid pro quo* where one of the parties may settle in terms of money.

Let us understand these terms through the following example:

“A bottle of water costs Rs. 10, the same bottle may be sold to a desperate but willing person for Rs. 50. There is nothing wrong with this, in the sense that, the party purchasing cannot be held to be under any mental distress or undue influence merely for the fact that the need for the commodity was urgent or immediate.”⁸

Therefore, ‘value’ is consideration paid in money but the transaction being one that transpires under certain special circumstances (in the example, the value of the bottle of water between those two persons was Rs. 50). A common thread which runs between all these three terms is that they signify meeting of minds on a common quantum of consideration.

Study of these circumstances that the law supposes in a transaction of import or export, is the study of Valuation in Customs Act. Section 14 of the Customs Act, deals with the circumstances under which if a transaction of import or export were to take place, then the value will be deemed to be that arrived at by the section. Sub-section (1) of Section 14 is paraphrased as follows:

- For the purposes of the Customs Tariff Act, 1975 or any other law for the time being in force,
- the value of imported goods and export goods shall be the transaction value of such goods,
- that is to say, the price actually paid or payable for the goods,
- when sold for export to India for delivery at the time and place of importation,
- or for export from India for delivery at the time and place of exportation,

⁸ Similar conclusions in: Raghunath Pd vs Sarju Prasad 1924 FC 60, Masjidi vs Ayisha 1880 Punj Rec.

- where the buyer and seller are not related and
- price is the sole consideration for sale.

The value of the imported and export goods is the transaction value. The transaction value is defined as 'price paid or payable for the goods'. Therefore, it is evident that the value agreed by two independent contracting parties i.e. the invoice value, (subject to few other conditions and additions as discussed below) is accepted for the purpose of Customs Act, irrespective of the value of the same goods available elsewhere.

Further the above section also states that the sale of goods should be, in case of import, "for delivery at the time and place of importation". According to the Supreme Court⁹, the word 'delivery' used in the phrase "necessarily mean the point of time when the goods can be physically delivered to the importer."

Rejection of Transaction Value

In case of import, the transaction value will be rejected only under the following situations:

1. When the buyer and seller are related, except when¹⁰:
 - (a) It can be proved that the relationship did not influence the price; or
 - (b) It can be proved that the declared value closely approximates to:
 - (i) Value of identical goods in sales to unrelated parties in India; or
 - (ii) Value of similar goods in sales to unrelated parties in India; or
 - (iii) Deductive value of identical or similar goods; or
 - (iv) Computed Value of identical or similar goods.
2. When there are restrictions on the buyer as to the disposition or use of goods, other than restrictions¹¹:
 - (a) Which are imposed by law or by public authorities in India; or
 - (b) Which limit the geographical area in which the goods may be resold; or
 - (c) Which do not substantially affect the value of the goods.
3. When the sale or price is subject to some condition or consideration for which a value cannot be determined.
4. When any part of the sale proceeds of any subsequent resale, disposal or use of the goods by the buyer accrues to the seller directly or indirectly.

In case of export the transaction value will be rejected only when the buyer and seller are

⁹ Garden Silk Mills Limited v. Union of India 113 ELT 358 (SC)

¹⁰ Rule 3 (3)(a) and (b) of the Customs Valuation (Determination of value of Imported goods) rules, 2007

¹¹ Proviso to Rule 3 (3) of the Customs Valuation (Determination of value of Imported goods) rules, 2007

related (unless the price is not influenced by the relationship)¹² or when price is not the sole consideration for sale (as given in section 14 above).

If the transaction value is rejected for reasons discussed above, how is the valuation done?

In the case of imports, Customs Valuation (Determination of Value of imported goods) Rules, 2007 prescribes the following five methods for the purpose of valuation of imported goods, when transaction value is not determinable or is rejected. These rules have to be applied sequentially, in the order they are listed below:

- (a) Transaction Value of Identical goods;
- (b) Transaction Value of Similar goods;
- (c) Deductive method;
- (d) Computed method;
- (e) Residual method;

Sequentially applied Rules

- (a) Transaction Value of Identical goods (Rule 4):

Under this rule *“value of imported goods shall be the transaction value of identical goods sold for export to India and imported at or about the same time as the goods being valued”*

Identical goods as per rule 2 (d) means imported goods –

- (i) *Which are same in all respects, including physical characteristics, quality and reputation as the goods being valued except for minor differences in appearance that do not affect the value of the goods;*
- (ii) *Produced in the country in which the goods being valued were produced; and*
- (iii) *Produced by the same person who produced the goods, or where no such goods are available, goods produced by a different person.*

Before adopting transaction value of identical goods, the value should be adjusted to reflect differences in commercial level and quantity.

If by application of this rule, more than one value is found, lowest of them should be adopted.

- (b) Transaction Value of Similar goods (Rule 5):

This rule is similar to rule 4, the difference being the meaning of ‘similar goods’. Similar goods as per rule 2(f) means imported goods:

- (i) *Which although not alike in all respects, have like characteristics and like*

¹² Rule 3 of the Customs Valuation (Determination of value of export goods) Rules, 2007

component materials which enable them to perform the same functions and to be commercially interchangeable with the goods being valued having regard to the quality, reputation and the existence of trade mark;

- (ii) *Produced in the country in which the goods being valued were produced; and*
 (iii) *Produced by the same person who produced the goods being valued, or where no such goods are available, goods produced by a different person.*

(c) Deductive Value (rule 7):

Under this method the transaction value will be as follows:

Particulars	Amount (Rs)
Sale price of imported goods when sold to unrelated buyers in India	****
Less:	
(a) Commission paid in India for sale	(***)
(b) Profit on such sale	(***)
General expenses incurred in connection with sale	(***)
(d) Cost of transport and insurance within India	(***)
(e) Customs duty and other taxes payable for importation	(***)
(f) Value addition made by processing	(***)
Transaction Value for the purpose of Customs	*****

If sale price of imported goods are not available then sale price of identical or similar goods can be adopted for the purposes of these rules.

(d) Computed Method (rule 8):

This rule can be adopted if the cost sheet of the imported goods of the supplier is available. Transaction value under this method will be calculated as follows:

Particulars	Amount (Rs)
Cost of materials for production of imported goods.	****
(+) Cost of fabrication and other processing charges of imported goods.	****
(+) Amount of profit	****
(+) General expenses normally incurred	****
(+) Value of expenses under rule 10 (2) i.e. cost of transport, insurance, loading, unloading and handling charges	****
Transaction value for the purpose of Customs	****

(e) Residual Method (Rule 9):

If value is not determinable under any of the aforementioned methods then this rule is to be resorted to. According to this rule the value shall be determined under any method however such method adopted should be reasonable and consistent with the already discussed rules. It should be based on data available in India.

Additions to Transaction Value

In case of imports, Customs Valuation (Determination of value of imported goods) Rules, 2007, mandates a number of additions (if not already added) to the transaction value referred to in Section 14. They are:

1. Commission or Brokerage:
All commissions and brokerage incurred by the buyer have to be added to the value determined, except buying commission¹³. – Rule 10 (1)(a).
2. Cost of packing (labour and materials) the goods is to be included in the value – Rule 10(1)(a).
3. The value of materials, components, tools, dies, design work, plans and sketches, in connection with the imported goods, if supplied by the buyer to the seller at free of cost or at reduced cost, should be added to the transaction value. If these items pertain to many goods, their value should be apportioned over all such goods by any method which is objective and quantifiable.
4. Royalties and License fee – Rule 10(1)(c):
Any royalty or license fee, related to imported goods, payable by the buyer to the seller or third party is to be included in the value, subject to the condition that such royalties are paid as a condition of the sale.

However, royalties or fees paid for the right to reproduce the imported goods in India and right to distribute or resell the goods specifically excluded from addition, if they do not form condition for sale.
5. Condition-of-sale payments – Rule 10(1)(e):
Any payment agreed as a 'condition-of-sale' or to satisfy an obligation of the seller is to be included in the value.

A well-reasoned decision has been delivered by the Supreme Court in *Essar Gujarat's* case¹⁴ where whole of the license fee (under an agreement to pay a third party-license holder) for grant of process know-how was made a pre-condition of a sale contract

¹³ "Buying Commission means fees paid by the importer to his agent for the service of representing him abroad in the purchase of the goods being valued" – interpretative notes to the Rules. Payment of buying commission does not add to the value of the product at the 'time of importation'

¹⁴ CC v. Essar Gujarat Ltd. 1996 (88) ELT 609 (SC)

between unrelated seller (Bank) of processed-steel machinery was held to be includible in the assessable value.

6. Cost of Transport – Rule 10(2)(a):

Mode of Transport	Cost Ascertainable	Cost Not Ascertainable
By Air	Actual cost or 20% of FOB value of the goods, whichever is less.	20% of FOB value of the goods.
Not by Air	Actual Cost of Transport	20% of FOB value of the goods.

7. Cost of Insurance – Rule 10(2)(c):

The Actual cost of insurance should be added to the value if the cost is ascertainable. However, if the cost is not ascertainable then, 1.125% of the FOB value of the goods is to be added.

8. Loading, Unloading and handling charges – Rule 10(2)(b):

Loading, unloading and handling charges is 1% of [FOB value of the goods + Cost of transport + cost of insurance (as determined above)]. The addition is 1% irrespective of the Actual cost incurred towards these charges.

In the case of export, no such additions as required for imports have been mandated.

Special Valuation Branch

Transactions with associated persons are scrutinized by the Customs Department by entrusting the duty to a specially set up institution called Special Valuation Branch which is specialized in investigation of transactions involving special relationships and certain special features having bearing on value of import goods. SVB is currently located in Chennai, Mumbai, Delhi, Kolkata and Bangalore. The SVB that is proximate to the head office or corporate office of the entity shall carry out the investigation.

During the investigation process, the importer has the obligation to establish that the relationship that existed between the parties did not influence the price in the import transaction. This has to be substantiated from an examination of the circumstances of import transaction. The value of the goods declared should be close to transaction value / deductive value / computed value of identical or similar goods that was ascertained at or about the same time.

Cases to the SVB for special investigation can be registered only with the specific approval of the concerned Commissioner of Customs. Application to the SVB can be made only after the first import transaction has taken place. The Importer first needs to file response to the questionnaire in Annexure A at the time of filing the first Bill of Entry to enable the Customs House to take a decision as to whether case shall be referred to SVB or can be assessed by

Appraising officer of Customs port without any reference to SVB. The Commissioner of Customs then, based on the set guidelines, decides whether to refer the case to SVB or not. If the Commissioner decides that the case shall be referred to SVB, then the Importer is required to file additional documents as mentioned in Annexure B within 60 days. If the Importer does not submit the requisite documents and information within 60 days, then the Commissioner shall require the importer to furnish security deposit at 5% of declared assessable value of imports for three months which would be refunded subsequently upon completion of the investigation. This security deposit may be paid in cash or by furnishing Bank Guarantee.

Once the case is referred to SVB, then SVB conducts its investigation and it may also call for additional documents and information from the importer. SVB is expected to complete its investigation within 2 months with additional time of 2 months in exceptional cases with prior approval of Commissioner. The outcome of this investigation by SVB is in the form of an Investigation Report either accepting or rejecting transaction value of imports. This Investigation Report is issued to referring customs house for finalization of provisional assessments of imports and/or for initiating adjudication procedure under the Customs law, where it is found that declared transaction value is not a fair value. This SVB investigation report would be applicable for all future imports unless there is any change in the circumstances of sale or terms and conditions of the agreement between the importer and his related seller.

Export valuation

Export valuation is determined by section 14(1) read with Customs Valuation (Determination of Value of Export Goods) Rules, 2007. These rules are enabling provisions now and provide a means to keep watch over inflated export pricing. The framework for export valuation continues to remain section 14(1) which recognizes the 'transaction value' as the basis.

All exports must be accompanied by export value declaration. Transaction value can be rejected on the ground of unreliability of the declared value and valuation concluded as provided in the Rules.

Chapter 8

Import Procedures

There are four different parties who are involved in completing the import clearance of goods:

Steps	Importer or Customs Broker ¹⁵	Person-in-charge of Conveyance ¹⁶	Customs	Port Authority
1			Customs obtains permission to occupy and manage the export-import activities through that port.	Government notifies a port for export-import under section 7. Without being notified, export-import cannot be done through all ports
2		Carrier applies for permission to enter port with cargo	Customs issues 'entry inward' permission to the ship/aircraft	
3		Conveyance (aircraft / vessel) and files Import General Manifest (IGM) ¹⁷ – which contains full list of all types of cargo to be unloaded or retained to be taken to next port	Takes stock of all cargo, gives permission to store cargo (unloaded) in carrier's warehouse. Goods in this warehouse cannot be taken out with customs permission	

¹⁵ Customs Broker is a (natural) person being an Indian citizen (with a financial viability of Rs. 5 lacs) who has passed a yearly exam conducted by the Director General of Inspection and is granted a ten-year license by the Commissioner of Customs to represent importers-exporters before Customs authorities and to carry out the procedures for import-export on their behalf. The exam is as specified in regulation 6 and the license is granted under regulation 7 of the Customs Brokers Licensing Regulations, 2013 on production of a security of Rs. 5 lacs.

¹⁶ as defined in Section 2(31)

¹⁷ Import Manifest (Aircraft) Regulations, 1976 or Import Manifest (Vessels) Regulations, 1971; Import Report (Form) Regulations, 1976 – for imports by land routes

4	Importer or through CHA files import clearance documents with customs (See note 1)		Customs inspects the shipment and assesses the bill of entry. Customs issue demand note for duty amount (See note 2)	
5	Importer pays the duty and returns with proof of payment		Customs issues 'delivery order' (DO) to warehouse where goods are kept	
6	Importer takes DO and collects goods from warehouse	Carrier's warehouse will release goods only against DO issued by customs		
7			Customs issues 'out of customs charge' order. With this, responsibility of cargo is no longer with customs	
8	Delay in customs clearing by more than 3 days (all above steps), demurrage charges are charged		Customs collects demurrage charges for delay by importer in completing procedures	
9		Carrier applies for 'entry outward' permission to leave the port (this step can take place after step 3 also)	Customs gives this permission after all cargo verified and ship can be allowed to leave	

Note 1 – Documents for import clearance to be filed by importer are:

- Commercial import invoice and import contract – to review the nature of the contract and terms
- Product brochure – to know the correct classification of the product and the rate of import duty
- Packing list – to inspect the shipment and verify contents
- Bill of entry¹⁸ – to assess and write all particulars to compute import duties. There are three types of bill of entry:
 - Bill of entry for home consumption – for consumption within India is called 'home consumption'. Customs assessment for duty payment for use of the goods within India is done through this type of bill of entry
 - Into bond bill of entry (Bill of entry for warehouse under Section 46) – where the imported goods are stored in a duty-free warehouse also called 'bonded' warehouse is done through this type of bill of entry. No duty is calculated on this type of bill of entry
 - Ex-bond bill of entry (Bill of entry for home consumption under Section 68) – where the goods kept in a bonded warehouse are taken out for 'home consumption' this bill of entry is prepared. Duty is calculated on this bill of entry
- Certificate of origin – to know which country the goods were actually manufactured and to see if any special import duty rates apply
- Import license, if any – to give the exemption/concession to be given as per import license issued to importer. Or if the goods are restricted – to permit import of such goods after verifying if the special permission to import such type of goods is issued to the importer
- Bill of lading / airway bill – to know the landed value of the goods because invoice may be FOB or CIF. Duty is to be calculated on landed price as per section 14 of Customs Act
- Rate of duty – is known from the date of bill of entry. In case the bill of entry is filed in advance (before ship arrives), the date for the rate of duty is the date of entry inward given to vessel as per step 2 in table above

Note 2 – The import value assessment is called valuation: price charged by the foreign supplier is one aspect but if there are any costs incurred to bring the goods to the import port, all those costs also to be added to arrive at final landed cost of goods. These additional costs may be (a) between export-importer like any the cost of designs given free or moulds supplied free (b) between importer and third parties like freight (actual or 20% of FOB price), insurance

¹⁸ Bill of Entry (Forms) Regulations, 1976 or Bill of Entry (Electronic Declaration) Regulations, 2011

(1.125% of price), packing (actual), commission (actual), loading/unloading charges (1% of FOB + freight + insurance) to be added to arrive at landed price

Provisional Assessment

If for any reason, imported goods cannot be assessed and cleared after duty payment, the Customs authority may direct that the imported goods be 'provisionally assessed' under section 18 of the Customs Act and released for usage. Security of suitable value will be required of the importer for the difference in amount between the amount of duty agreed and the duty likely to be assessed finally.

Upon finalization of the assessment, if any differential duty is payable interest is applicable. And if on final assessment duty paid is refundable the refund along with prescribed interest is paid.

Imports by Courier

Imports (and exports) are permitted to be undertaken by the Courier Imports and Exports (Clearance) Regulations, 1998, and courier clearances under electronic mode are governed by Courier Imports and Exports (Electronic Declaration and Processing) Regulations, 2010.

Here, the underlying law remaining the same, the procedure is for a person designated as the 'authorized courier' to accompany the courier-package in their international journey and submit a Courier-bill of entry¹⁹ for assessment. Courier imports and exports are permitted only through Mumbai, Delhi, Chennai, Calcutta, Bangalore, Hyderabad, Ahmedabad, Jaipur, Trivandrum, Cochin, Coimbatore and Land Customs Stations at Petrapole and Gojadanga.

'Authorized courier', in relation to imported or export goods, means a person engaged in the international transportation of time-sensitive documents or goods on door-to-door delivery basis and is registered in this behalf by a Commissioner of Customs in charge of a Customs airport;

All goods are allowed to be imported through the courier mode except:

- (a) Precious and semi-precious cargo
- (b) Animals and plants
- (c) Perishables
- (d) Printed material with maps of India showing incorrect boundaries
- (e) Precious and semi-precious stones, gold or silver in any form
- (f) Goods under Export Promotion Schemes including EOU scheme
- (g) Goods exceeding weight limit of 70 kgs

Similarly, all goods are allowed to be exported though courier except :

¹⁹ There are 5 types of courier bills of entry

- (a) Goods attracting any duty on exports
- (b) Goods exported under export promotion schemes
- (c) Goods where the value of the consignment is above Rs.25,000/- in foreign exchange

The Authorized Courier files Courier Shipping Bills with the proper officer of Customs at the airport or Land Custom Station (LCS) before departure of flight or other mode of transport, as the case may be. Different Forms have been prescribed for export of documents and other goods. The Authorized Courier is required to present the export goods to the proper officer for inspection, examination and assessment.

In certain cases, regular bill of entry or shipping bill may be insisted upon by the customs authority. The Authorized Courier or his agent empowered to deal with the imported/export goods shall be required to pass the examination referred to in regulation 6 or 17 of the Custom Brokers Licensing Regulations, 2013.

Import through Post

The facility of import and export of goods by Post Parcels is provided by the Postal Department at its Foreign Post Offices and sub-Foreign Post Offices. Customs facilities for examination, assessment, clearance etc. are available at these Post Offices. Limited facility for export clearances is also available at Export Extension Counters opened by the Postal Department where parcels for export are accepted and cleared by the Customs. Goods imported through post are classified under Chapter Heading 9804 of the Customs Tariff Act, 1975 and a single rate of duty is applicable.

In respect of imports and exports through post, any label or declaration accompanying the packet or parcel containing details like description, quantity and value of the goods is treated as entry for import or export of the goods and no separate manifest for such goods is required to be filed.

Goods which are not prohibited or restricted for export as per Foreign Trade Policy can be exported by post through specified Foreign Post Offices or Sub-Foreign Post Offices or Export Extension Counters. The goods under claim of Drawback can also be exported through post but not under other export promotion schemes like DEPB, Advance Licence, DFRC, EPCG etc. Commercial samples, prototypes of goods and free gifts may also be exported by the post.

Export by post of Indian and foreign currency, bank drafts, cheques, etc., are not allowed unless accompanied by a valid permit issued by the RBI, except in cases where such negotiable instruments are issued by an authorized dealer in foreign exchange in India.

Chapter 9

Export Procedures

The procedure for clearing export consignments is tabulated sequentially below:

Steps	Exporter or Customs Broker	Person-in-charge of Conveyance	Customs	Port Authority
1			Customs applies for permission to occupy and manage the export-import activities through that port.	Government notifies this as a port for export-import under section 7. Without being notified, export-import cannot be done through all ports
2		Carrier applies for permission to enter port with cargo	Customs issues 'entry inward' permission to the ship/aircraft	
3	Importer directly or through CHA files export documents with customs (See note 1)		Customs inspects the shipment and assesses the shipping bill	
4	Importer pays the duty, if applicable, and returns with proof of payment		Customs issues assessed Shipping Bill	
5		Carrier collects cargo and prepares for departure		
7		Carrier prepares Export Manifest ²⁰ – which contains full	Customs issues 'let export' order. With this, responsibility	

²⁰ Export Manifest (Aircraft) Regulations, 1976, Export Manifest (Vessels) Regulations, 1976 and Export Report (Form) Regulations, 1976

		list of all types of cargo to be unloaded or retained to be taken to next port	of cargo is no longer with customs	
8	Delay in customs clearing by more than 3 days (all above steps), demurrage charges are charged		Customs collects demurrage charges for delay by exporter in completing procedures	
9		Carrier applies for 'entry outward' permission to leave the port	Customs gives this permission after all cargo verified and ship can be allowed to leave	

Note 1 – Documentation for export procedures

- Excise formalities:
 - Apply for export packing as per procedure in Rule 18 or 19
 - Execute Letter of Undertaking (LUT) for excise duty amount (not paid due to export)
 - File ARE-1 for export
 - Prepare excise invoice
 - Send cargo to port
- Customs formalities:
 - Submit commercial invoice (foreign currency) and packing list
 - Excise documents (above)
 - GR form
 - Export license, if any
 - ARE-1 form (for approval of actual export completion)
 - Shipping bill which are of 5 types:
 - Shipping bill for duty-free goods
 - Shipping bill for dutiable goods
 - Shipping bill for advance license exports

- Shipping bill for duty drawback exports
- Shipping bill for ex-bond exports
- Export contract
- Technical brochure about goods for description
- Letter of credit
- Copy of bill of lading/airway bill

Chapter 10

Warehousing

All imports and exports are required to be undertaken only from a Custom Station notified under section 7. In case of difficulty in accurately determining the duty payable or pay the duty, goods may be stored in a warehouse appointed under section 57 called a 'public bonded warehouse.

If the storage needs of the product are such that specialized conditions are required, then the importer may establish its own warehouse by obtaining the approval under section 58.

Now, goods stored in a bonded warehouse have not yet had the duty liability determined as per section 15. Hence, great care is required to be exercised in their use and disposal. Imported goods are stored in a bonded warehouse without payment of duties and duty assessment is postponed until they are being removed from the warehouse for home-consumptions.

As the customs duty is not levied on goods to be deposited in a warehouse, their transport from customs station to the warehouse shall be under one-time-lock (OTL) serially numbered which is affixed by the proper officer of customs. OTL number along with the date / time of its affixation will be invariably endorsed on the bill of entry and the transport document.

A warehouse keeper is also required to be appointed who has sufficient experience in warehousing operations and customs procedures. Further, to protect the interest of the exchequer, owner of the goods also needs to take an all risk insurance policy, that includes natural calamities, riots, fire, theft, skillful pilferage and commercial crime, in favour of the President of India, for a sum equivalent to the amount of duty involved on the dutiable goods proposed to be stored in the private warehouse at any point of time. A monthly return of the receipt, storage, operations and removal of the goods in the warehouse, is also required to be filed by the licensee.

This manner of storage of goods without payment of import duties is either due to business emergencies or as a manner of regular operations while dealing with goods meant for duty-free end use or export such as EOUs, storage of spares for fitment on ships/aircrafts, goods meant for sale in duty free shops, etc.

Private bonded warehouse license is granted to persons who are financially sound and based on the sensitive / non-sensitive nature of goods proposed to be warehoused, requisite value of security is to be provided while executing a bond. Section 61 specifies that goods may remain in a bonded warehouse for the initial warehousing period:

- Capital goods intended for use in any EOU, may be kept for five years;

- Goods other than the capital goods intended for use in any EOU, may be kept for three years;
- Any other goods may be kept for one year. However, if the goods are likely to deteriorate, the period of one year may be reduced by the Commissioner of Customs to such shorter period as he may deem fit. Interest is applicable on these goods after 90 days of warehousing.

Goods stored in a bonded warehouse may be dealt with in the following ways:

- inspect the goods;
- separate damaged or deteriorated goods from the rest;
- sort the goods or change their containers for the purpose of preservation, sale, export or disposal of the goods;
- deal with the goods and their containers in such manner as may be necessary to prevent loss or deterioration or damage to the goods;
- show the goods for sale;
- take samples of goods without entry for home consumption, and if permitted, without payment of duty on such samples.

Further, section 65 permits that goods stored in a bonded warehouse may be utilized in carrying out manufacturing and other operations inside the bonded warehouse. This facility is used by:

- EOUs/EHTP/STP units for manufacture and export of finished products manufactured from duty free imported goods within the bonded warehouse;
- Other units for re-packing, cutting (without losses), repair/reconditioning, etc. before sale (export/domestic).

This activity is referred to as manufacturing and other operations in Bonded Warehouses and the procedure for such manufacturing operations is prescribed by the "Manufacture and Other Operations in Warehouse Regulations, 1966". This permission is granted by the Department after satisfying themselves about the applicant, nature and purpose of manufacturing operations, warehouse infrastructure and plan, volume and regularity of transaction and execution of requisite value of bond. The importer is required to comply with all Regulations, maintain documentation of all transactions entered into and promptly seek all prior-permissions required under these Regulations.

Finished product manufactured under these Regulations in a bonded warehouse may be exported without any duty incidence arising on imported goods or finished goods. But, domestic sales of:

- imported goods – will be assessed based on the ex-bond bill of entry that is filed;

- scrap / waste of imported goods – will be assessed as ex-bond clearance of 'effective quantity of imported goods present in such scrap / waste';
- finished goods – will be assessed as if the finished goods themselves were imported.

Duty payable is not applicable or waived in case the articles are exported or destroyed. While accounting for warehoused goods, due allowance may be made for volatile articles towards normal storage losses.

Inter-warehouse transfers are permitted as per procedures prescribed under the Warehoused Goods (Removal) Regulations, 2016. Transport of goods from one warehouse to another warehouse shall be under the one-time-lock, affixed by the departmental officer or by the licensee. Consignor-warehouse is required to receive back confirmation from the Consignee-warehouse by a 'certificate of re-warehousing' within 1 month. This method is often followed in case of supply of duty free goods to an EOU by a supplier who has already imported and warehoused them.

Every warehouse will be periodically audited for compliance with the Regulations. And upon sale / export of all warehoused goods, cancellation of warehouse license and the warehouse bond may be granted.

Chapter 11

Baggage Rules

The Baggage Rules, 2016 provide for duty free clearance, up to a certain limit, of articles such as used personal effects, travel souvenirs and other articles when carried on the person or in the accompanying baggage of the passenger arriving in India. Passenger arriving in India may include an Indian resident, a foreigner residing in India, a tourist of Indian origin and a tourist of foreign origin.

Duty free baggage allowance is explained in table below:

Eligible Passenger	Origin Country	Duty free allowance
Passenger of Indian origin and foreigners residing in India, excluding infants	Other than Nepal, Bhutan, Myanmar	Rs. 50,000
Tourists of foreign origin, excluding infants	Other than Nepal, Bhutan, Myanmar	Rs. 15,000
Passenger of Indian origin, foreigners residing in India and foreign tourists, excluding infants	Nepal, Bhutan, Myanmar	- Rs. 15,000 (by air) - If the passenger is arriving by land, only used personal effects shall be allowed duty free
Indian passenger who has been residing abroad for over one year	Anywhere	Gold jewellery: Gentlemen – 20 grams with a value cap of Rs. 50,000 Lady – 40 grams with a value cap of Rs. 1 lac
All passengers	Anywhere	Alcohol liquor or wine: 2 litres
All passengers	Anywhere	Cigarettes: up to 100 sticks or Cigars up to 25 or Tobacco 125 grams
Passenger of 18 years and above	Anywhere	One laptop computer (note book computer)

Customs duty is leviable at the rate of 36.05% (Basic Customs duty at 35% + Education Cess at 3%) on the value of dutiable goods in Baggage that is in excess of the Duty Free Allowance.

A person, who is engaged in a profession abroad or is transferring his residence to India, on return, is also eligible for additional duty free allowance based on his duration of stay abroad.

Chapter 12

Drawback of Duty

Let us consider an example. A machine, worth Rs.10 Crores was imported into India with payment of customs duty of Rs.2.3 crores. Upon receipt of the machine into the factory it was realized that the machine was only suitable for working in cold temperature and such conditions did not exist in the factory in which it was to be installed.

In this situation, what is to be done? Does the factory have to bear a loss of Rs.2.3 crores of Customs duty? The answer lies in application of Section 74 (1) of the Customs Act, which enables an importer to claim 98% of the duty as drawback (or refund) provided that:

1. Goods are re – exported;
2. Identity of the goods are established – imported goods are re-exported;
3. Not more than 2 years has elapsed from the date of payment of duty on import

In case, the machinery was installed and trial production was being carried when it was discovered that the machine is not suited for use in Indian factory conditions. What can be done now? As per section 74(2), goods that have been 'used' after their import will still be entitled to duty drawback but to a restricted extent as notified. The reducing scale at which drawback will be allowed is as follows²¹:

Sl. No.	Time Period	Extent of drawback
1.	Not more than 3 months	95%
2.	More than 3 months but not more than 6 months	85%
3.	More than 6 months but not more than 9 months	75%
4.	More than 9 months but not more than 12 months	70%
5.	More than 12 months but not more than 15 months	65%
6.	More than 15 months but not more than 18 months	60%
7.	More than 18 months	NIL

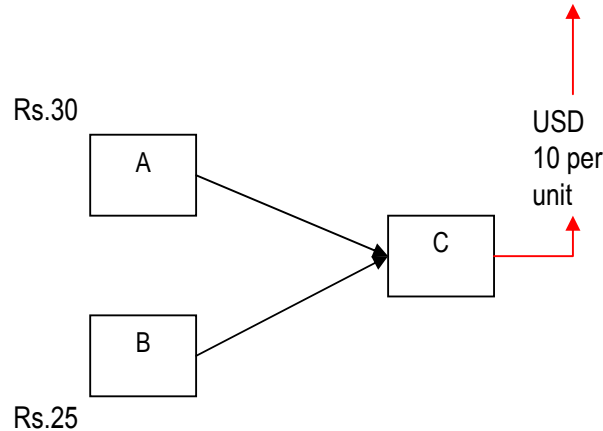
Provisions of Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995 become applicable to such drawback claims.

Similarly, it is possible that raw materials imported may be found deficient that necessitates returning to the supplier. In such cases, as long as the identity of the exported goods can be matched with the imported goods section 74 will address the situation. But, if the imported materials have been processed into (partly or completely) finished products which are being

²¹ MF (DR) Notification No. 19- Cus dated 06.02.1965

exported, clearly section 74 is unable to offer any drawback facility. For this reason, section 75 provides for grant of drawback in respect of duties paid on imported materials used in the manufacture or processing of export goods.

In order to discuss further on the application of section 75, we will employ an illustration:



The illustration is as follows:

- A and B are used to produce C
- Rs.30 and Rs.25 are the import duties applicable on A and B respectively
- USD 10 is the per unit rate at which C is exported
- Exporter has secured an export order for exporting 1 million units of C and has been allowed 4 months time to produce and supply. The time permitted under the contract is adequate to procure A and B, produce C and export it to the foreign customer

Now, the exporter would pay a duty of Rs.55 on the raw materials imported and export 1 million units of C as per the contract. Upon completion of the export, exporter would need to be granted drawback of Rs.55 per unit of C that is exported. Of course, the export consideration would be realized by the exporter within the time permitted.

In this case, the Central Government would notify a 10 per cent duty drawback on the export product. At this rate, the exporter would earn USD 1 per unit, that is, Rs.55²². With that, the duty drawback would effectively recompense the exporter for the duty paid on A and B.

The Central Government has notified Rules in this respect and this manner of notifying duty drawback is referred to as All Industry Drawback Rate (rule 3). The illustration over simplifies the real transactions for the following reasons:

²² at exchange rate of 1 USD = 55 INR

- All firms in the industry do not operate at the same level of efficiency such that all firms enjoy duty neutralization to the same degree;
- All firms in the industry do not produce with identical input-output ratio;
- No allowance is made for normal wastage or yield variance;
- Exchange rate may vary leading to lower or higher realization.

While many firms may be able to operate based on All Industry Rates, if due allowance were to be made for input mix or yield difference at least, then we find that there would be wide disparity in realization through drawback. In such cases, exporters are permitted to apply for fixation of Brand Rates – rates of drawback that are approved specifically based on actual data supplied by such exporters (rule 6).

If for any reason, the actual duties paid and the amount realized by following the AIR, results in a difference of more than 4/5^{ths} then, the exporter can apply for re-fixation of duty drawback rates by production of relevant data and evidence in support of the application (rule 7).

This process of grant of duty drawback having been found to be very efficient, the scope of these Rules have been expanded to not only include customs duties but also central excise duties and service tax and the Rules are now called Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

Chapter 13

Prohibitions and Restrictions

“Prohibited Goods” are defined in Section 2(33) of the Customs Act, as meaning “any goods the import or export of which is subject to any prohibition under the Customs Act or any other law for the time being in force”. Thus, a prohibition under any other law can be enforced under the Customs Act.

For instance, under Sections 3 and 5 of the Foreign Trade (Development and Regulation) Act, 1992, the Central Government can make provisions for prohibiting, restricting or otherwise regulating the import or export of those goods. Under the FT(DR) Act:

- Prohibited goods – cannot be imported/exported at all;
- Restricted goods – can be imported/exported but against a specific license or through a channelizing agency designated by the Central Government;
- Open General List – goods that can freely be imported/exported.

Another instance could be goods that are governed by Legal Metrology Act wherein goods sold in packed condition need to contain certain information on the package for the buyer’s reference. Yet another example could be products that are required to meet quality standards under Indian law. All these examples, are a form of restriction placed by ‘any other law for the time being in force’

Further, Section 11 of the Customs Act empowers the Central Government to notify goods as ‘prohibited’ for import / export. The purpose could be national security or wildlife protection, etc.

Our understanding of these prohibitions is important because offences involving such articles are viewed as more grave than others.

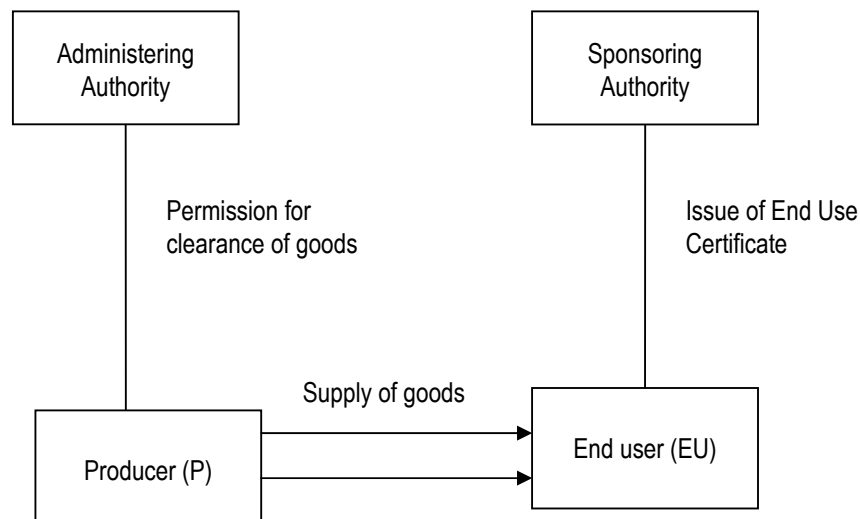
Customs authorities not only administer the Customs Act but are assigned responsibilities under other enactments that need enforcement / monitoring at the gateways of India like Environment Protection Act, Wild Life Act, Indian Trade and Merchandise Marks Act, Arm’s Act, etc.

Chapter 14

Concessional Procurement Process

Under the Customs Act, the Government of India has extended imported duty benefits (either in the form of total exemption or abatement of duty) to various categories of end users. To avail these benefits, the end user has to follow certain procedures which are similar to one another. Therefore we shall study these procedures as a Standard Operating Procedure (SOP). This SOP is prescribed and used in many contexts as explained below.

Standard Operating procedure



As illustrated above, the procedure is as follows:

- The End User, desirous of obtaining duty concession, applies for end use certification with the Sponsoring Authority;
- The Sponsoring Authority, after verifying that the goods proposed to be procured are necessary for the business of End User, issues End use Certification or Certificate for Procurement (duty-free);
- The End User then, on the strength of that certificate obtains goods duty free or at concessional rate from the Producer;
- The Producer clears the goods on the strength of the certificate received from EU after obtaining permission from the Administering Authority.

In the context of the Customs Act, as the producer or supplier is outside the jurisdiction of Customs Authority i.e. outside India, the end user themselves are required to approach the Administering Authority for clearance of the goods from the Customs Area.

This SOP has application in many contexts. Some of them are mentioned below:

Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 1996:

These rules prescribe the procedure to be followed by a manufacturer for availing benefits under an exemption notification. The pre-requisite is that the notification specifically prescribes the observance of these rules. The procedure is similar to the SOP enumerated above.

Here the Sponsoring Authority is the Assistant/Deputy Commissioner of Central Excise having jurisdiction over the factory of the manufacturer and the permitting authority is the Assistant/Deputy Commissioner of Customs having jurisdiction over the Customs port or airport through which the imported goods are cleared.

Project Imports

Importers who are required to import various goods in large quantities over a period of time, instead of classifying the goods each and every time they are imported, have the option of opting for Project import scheme. In this scheme, all the goods, whatever may be their Actual tariff classification, are classified under one tariff heading i.e. 98.01. Once classified under this heading import duty is payable at a single rate of 10%.

Goods imported under this heading should be for the purpose of eligible projects. Eligible projects are Initial setting up or substantial expansion of specified:

- Industrial Plant;
- Irrigation Project;
- Power Project;
- Mining Project;
- Oil and other minerals exploration project;
- Other projects notified by the Central Government.

For this purpose the Government of India has framed the Project imports Regulation, 1986, under which a procedure is prescribed. The procedure is similar to the SOP illustrated above. The Sponsoring Authority for the purpose of this regulation is mentioned in the table appended to the regulation, For example:

- For Projects under SSI units – SA is Director of Industries of the concerned state;
- For exploration of oil – Ministry of Petroleum and Natural Gas., etc.

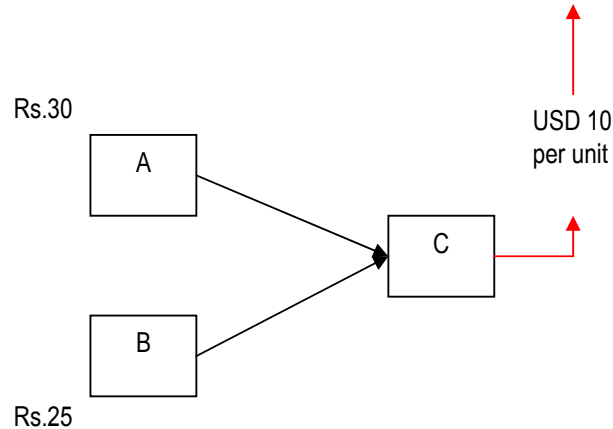
The permitting authority for clearance is the proper officer at the customs port or airport at which the goods are imported. One additional requirement under this regulation is that under regulation 7, once the last consignment under the project is cleared, within three months a statement indicating the details of the goods imported together with necessary documents should be submitted to the permitting authority.

Chapter 15

Survey of Duty-free Licensing to Exporters

Promoting exports is an initiative of the Ministry of Industry and they administer the Foreign Trade (Development and Regulation) Act, 1992. Under this Act, a 5-year policy statement of the Government called 'Foreign Trade Policy' is announced

Neutralizing effect of Indian trade taxes / duties is one of the ways of promoting exports without causing price disparity domestically for those products. We will employ the same illustration used earlier to discuss these schemes.



The illustration is as follows:

- A and B are used to produce C
- Rs.30 and Rs.25 are the import duties applicable on A and B respectively
- USD 10 is the per unit rate at which C is exported

Additional data:

- If duties are paid on A and B, price competitiveness of C is less by Rs.55 per unit of export product
- Exporter has secured an export order for exporting 1 million units of C and has been allowed 4 months time to produce and supply. The time permitted under the contract is adequate to procure A and B, produce C and export it to the foreign customer

Instead of paying duties on A and B, the exporter can apply for a license that allows him to (a) import A and B duty free and (b) export C within a certain time period and realize the foreign exchange

This may be allowed in the form of a pre-export duty free procurement license. This type of license ought to have following further conditions:

- Export order must be a 'firm contract'
- Value of foreign exchange to be earned from exports to be higher than import payments
- Undertaking to be provided that export will be completed within a specified duration
- Undertaking to be provided that export proceeds will be received into India within a specified duration
- Variation in import prices not to adversely affect the overall 'net' forex earnings
- Limit prescribed on the quantity of A and B permitted to be imported duty-free
- No CENVAT credit to be availed if full duty exemption availed

This kind of pre-export license is essentially the features of an Advance Authorization. This license is issued based on annual export forecast.

Now, if the export order is non-recurring, then the exporter may not desire to import A and B so, he may be permitted to sell the license without any export obligation or sell A and B after importing them. This is the feature of Duty Free Import Authorization scheme which is both a pre-export as well as a post-export license.

Further, the export order has to be fulfilled immediately and sufficient inventory of C is available with the exporter, then applying and obtaining Advance Authorization may not be possible. For this purpose, a post-export license may be allowed with the following further conditions:

- Input-output ratio is clearly known and notified
- Inventory of C not attached with any export obligations already

This kind of post-export license is also a feature of Duty Free Import Authorization scheme. Key aspects of these licenses are:

Criteria	Advance Authorization	Duty Free Import Authorization
Pre-export	Yes	Yes
Post-export	No	Yes
Input-output ratio needed	No	Yes
Issued to manufacturer-exporter	Yes	Yes
Issued to merchant-exporter	Yes	No
For direct exports	Yes	Yes
For deemed exports	Yes	No

Against actual export orders	No	Yes
Against export projections	Yes	No
Minimum Value Addition condition	Yes (15%)	Yes (20%)
License transferable (post-exports)	No	Yes
Imported goods transferable (post-exports)	No	Yes

Chapter 16

Survey of Duty-free Licensing to Supporting Units

Indigenous suppliers of articles required by Duty Exemption license-holders are also allowed the facility to import inputs required to manufacture these import-substitutes. Such indigenous manufacturers do not have any exports. But, the Duty Exemption license-holders to whom the supplies are made will export and realize foreign exchange.

Based on this inter-relationship, indigenous suppliers are issued a domestic-sourcing- license by invalidation of inputs from within the SION of the Duty Exemption license-holders as these indigenous suppliers are supplying import-substitutes.

Various forms of this license issued to indigenous suppliers are:

- Advance Authorization or DFIA for intermediate supplies – permits indigenous suppliers to import their inputs on duty free basis to manufacture and supply to actual exporters (holding Duty Exemption license)
- Advance Release Order – permits indigenous suppliers to supply on duty-free basis the import-substitutes to actual exporters (holding Duty Exemption license)
- Back to back inland Letter of Credit – permits LCs to be issued by banks based on export contract of actual exporters (holding Duty Exemption license)

Other key aspects to consider:

- ARO may be issued along with respective Duty Exemption license or separately.
- SION and other conditions *mutatis mutandis* apply in respect of Advance Authorization or DFIA for intermediate supplies
- No foreign exchange earning required
- Time limit allowed to be co-terminus with actual exporters (holding Duty Exemption license)

Chapter 17

Survey of EPCG Licensing Scheme

Capital goods required for manufacture of export goods is also eligible to be procured at 'zero' duty. Under this scheme, imports of capital goods are permitted at 'zero' rate of duty for the manufacture of resultant export product specified in the EPCG Authorization. The export obligation (EO) is the equivalent value of 6 times of the duty saved to be fulfilled in 6 years.

Zero duty EPCG Authorization is valid for 18 months. Imports are permitted with actual user condition attached. Performance monitoring is done closely and periodically to ensure there are no delinquencies which will attract demand of duty foregone with interest and penalty for such delinquency.

The Scheme applies to manufacture-exporters, merchant-exporters with supporting manufacturers attached and service-exporters certified by DGFT as Common Service Provider.

EO can be fulfilled by export of goods / services of license-holder and exports under other duty free licenses will also be counted towards fulfilment of EO against EPCG license. EO can be reduced if additional customs duty is paid in cash and CENVAT credit is not availed. If more than 75 per cent of EO is fulfilled in half the time permitted, then remaining EO will be condoned. Where there is shortfall in EO fulfilment, upto 5 per cent shortfall can be waived.

EPCG license-holder can source capital goods from indigenous sources and EO will be reduced by 25 per cent. Suppliers to EPCG license-holders will also be entitled to deemed export benefits. Advance Release Order will be issued in favour of local supplier.

EOUs converting to DTA unit or SEZs relocating outside the zone may apply for such conversion with EPCG benefit so that no duties need be paid on the WDV of capital goods provided exports are expected to continue after such conversion / relocation.

Other key aspects:

- EPCG license to be registered at single port for import endorsement. Exports can be from any port
- Exports to be against realization in freely convertible foreign exchange
- Names of supporting-manufacturer and merchant-exporter to indicated on export documents
- Proof of export will be admitted based on agreement for export, invoice, ARE-1 and GR/equivalent
- EO may be fulfilled block-wise – 50% within first four years and balance in next two

years. Block-wise EO fulfilment entails 2 per cent composition fee on duty relatable to shortfall in each block

- EO extension will be allowed on payment of 2 per cent composition fee on duty relatable to shortfall
- Suo moto exit from EPCG allowed on payment of proportionate duty and interest
- In case of more than one EPCG authorization, clubbing is permitted for ease of monitoring

Post export EPCG duty credit scrips are also available to exporters who import capital goods on payment of full duty. Incentive being allowed as duty credit (freely transferable) of the basic customs duty paid on the capital goods. EO would be 15 per cent of lesser than under duty-free EPCG license.

Specified Green Technology products are allowed EPCG authorization with 75 per cent of EO.

Chapter 18

Survey of Deemed Export Licensing Scheme

Transactions where the goods do not leave the country, payment is received in Indian Rupees or in foreign exchange and are regarded for limited purposes of FTP to be similar to exports. This is a fiction that cannot be extended beyond the purview of FTP.

Specified supplies are treated as 'deemed' exports and are eligible for certain benefits:

Supply by Manufacturer	Supply by Contractor / Sub-contractor
Sale of excisable goods to license holders (Advance Authorization or DFIA)	Supply to projects funded by notified Agencies / Funds (i) on duty-free supply terms of tender (ii) involving imported goods on duty-paid tender terms (iii) under international competitive bidding basis (iv) to specified agencies in App.7A
Sale of excisable goods to EOUs (all types)	Supply to projects (i) eligible to zero-duty supply u/n 12/2012-Cus. (ii) mega power projects u/n 12/2012-Cus. (iii) mega power projects on tariff based competitive bidding
Sale of capital goods to EPCG license holders	Supply to UN organization u/n 108/95-CE
Sale by freight container manufacturers	Supply to nuclear power projects (i) as per list 33/511 for setting-up u/n 12/2012 (ii) of >440 MW capacity (iii) certified by DoAE (iv) under national or international competitive bidding process

Benefits available are as follows:

- Advance authorization or DFIA
- Deemed export drawback variable based on status of CENVAT availment
- Terminal excise duty refund without CENVAT benefit to the recipient.

Chapter 19

Survey of Incentive Scheme (SEIS/ MEIS)

Exporters are granted a 'reward' to offset infrastructural inefficiencies and associated costs involved, under two schemes. Nature of this reward is grant of 'duty credit scrips' that may be used for payment of Customs Duty, Central Excise Duty or Service Tax on freely transferable basis.

Merchandise Exports from India Scheme (MEIS) is a reward computed on the FOB value of exports realized in free foreign exchange and the percentage of this reward is specified in Appendix 3B.

Service Exports from India Scheme (SEIS) is a reward computed based on the 'net' free foreign exchange realized and the percentage of this reward is specified in Appendix 3D.

Criteria	MEIS	SEIS
Eligible exports	Notified products to notified countries as per Appx. 3B	Notified services as per Appx. 3D above \$ 15,000
Ineligible exports	Supplies to EOU, SEZ, deemed exports, products with minimum export price or export duty and other excluded exports	Foreign exchange received for other purposes like equity, debt, donation, loan repayment, etc. are excluded

Other key aspects to consider are:

- Duty paid by utilization of Duty Credit Scrips eligible for duty drawback and / or CENVAT credit.
- Duty Credit Scrips are valid for 18 months and revalidation will not be permitted.

Chapter 20

Export Oriented Unit

Export Oriented Units (EOU) is a scheme introduced more than 30 years ago in Chapter 6 of the Foreign Trade Policy (FTP) issued from time to time under the aegis of the Foreign Trade (Development & Regulation) Act, 1992.

Background discussion on Project Imports and Concessional Procurement Rules will help gain some understanding about the operational method of EOU. In case of an EOU, there is an oversight authority that will review and approve the unit and all its imports-exports. Customs authorities examine compliance with Customs Act in matters associated with imports-exports of such EOUs based on the 'in principle' approval granted by the oversight-authority. Development Commissioner is the oversight-authority for EOUs, Software Technology Parks of India is for IT/ITES units and so on.

EOUs are permitted to undertake various kinds of activities including making of gold/silver/platinum jewellery and articles thereof, agriculture including agro-processing, aquaculture, animal husbandry, bio- technology, floriculture, horticulture, pisciculture, viticulture, poultry, sericulture and granites. EOUs are permitted to procure (import / domestic) goods required for the export product without payment of duties provided minimum foreign exchange earnings from exports is satisfied.

EOUs set-up a private bonded warehouse under section 58 and obtain the sanction to carry on in-bond manufacturing operations under section 65. Goods imported (capital goods and raw materials) are taken into this bonded warehouse without payment of import duties and used in manufacture / conversion into export-product inside this bonded warehouse. These export-products are exported directly from this bonded warehouse. Hence, there is no duty incidence on the export-product during the entire process from procurement-to-conversion-to-export. This is a highly efficient manner of operations. The only administrative activity is the 'two-tier approach' of approval and documentation – one, from the oversight-authority and the other from Customs.

EOUs are permitted to get some part of their operations sub-contracted through units that are not EOUs themselves or DTA units (units in Domestic Tariff Area). Strict control is required to be exercised in documentation of removal from EOU, processing in DTA and return of processed material with wastage.

EOUs are also permitted to sell their finished product in DTA provided overall export earnings position meets the minimum norms for the given industry. As per section 65, finished goods sold in DTA will be liable to import duties as if they were imported as finished goods and if the finished goods are not dutiable, then the equivalent units of raw material will be deemed to have been cleared from the bonded warehouse and applicable import duties will be charged.

Capital goods are permitted to be supplied by the customer of the EOU as required for their projects. Capital goods can be sent to sub-contractors also for use in processing materials for the EOU. All goods can be sent out of the EOU for test, repair, calibration, etc., with necessary approval (two-tier approach). And surplus goods (capital goods or raw materials) may be exported to supplier, sold to other EOUs or de-bonded and removed from EOU. Local sale of capital goods as being put to use will be on payment of import duties that were earlier foregone but based on (a) current duty rate as per section 15 and 46 and (b) depreciated value of the goods at specified rates of depreciation.

Industry specific provisions are also in place; for example, Gem/Jewellery units, Service units, etc. Goods procured from DTA are regarded as 'deemed export' under the FTP (not in Customs Act) for those DTA suppliers who will qualify for various duty-neutralisation benefits on their production and supply.

Periodic reporting requirements are involved to monitor imports, extent of duty free facility availed, exports, foreign exchange earned, employment generated, etc. Any unit found deficit will be closely monitored or mentored out of the EOU scheme.

With permission of the oversight-authority and the customs department, EOUs can close down their operations after accounting and dealing with the goods (capital goods, raw material and finished goods) in the manner permitted.

Chapter 21

Special Economic Zone

As could be observed from a study of the scheme of EOUs, the inherent limitations of the EOU scheme are apparent, namely:

- two-tier approval process to be obtained 'in advance'
- extensive reporting of day-to-day transactions for review and monitoring
- concentration of industrial activity within close proximity of large cities

Indian industry has come of age over the past 30 years of EOU operations and extending benefits of such industrialization to other parts of the country is essential. In view of this, Special Economic Zones Act, 2005 was introduced to:

- facilitate development of zones in areas deficient in industrial growth
- attract industries with minimal oversight of regulator and additional tax incentives
- continue to provide operational flexibility to transactions in DTA

The Board of Approvals approves proposals for setting-up SEZs. Minimum acreage for each industry-type of zone and extent of development into producing and non-producing areas in the zone are specified. With this, development and maintenance of attractions in the zone based on infrastructural facilities is left with the developer of the zone. Land in the zone cannot be sold to units occupying the zone so that the developer continues to be responsible for the maintenance and growth of the zone.

Unit Approval Committee approves applications for setting-up units within the SEZ. As the zone area, for purposes of statutes listed in Schedule I to the SEZ Act, are regarded as being a foreign territory, for purposes of Customs Act we may view SEZ area as being equivalent to some foreign country. In other words, all supplies to the zone will be equal to 'export' and the supplier will file a shipping bill and carry out all export procedures discussed earlier. Similarly, all procurement from the zone will constitute to 'import' and the procurer will file a bill of entry and carry out all import procedures discussed earlier.

SEZ units are permitted to sub-contract processing activities to DTA units as well as sell their finished products in DTA subject, of course, to export performance criteria. Goods removed from SEZ unit to DTA will be assessed as imports as per provisions discussed earlier.

SEZ units are required to be 'positive forex' earners and they are extended complete neutralization from taxes and duties. Sparse monitoring is involved with only annual reporting of performance. This oversight and monitoring is with Development Commissioner of the concerned SEZ and physical movement of goods into/out of zone is monitored by Customs (like in the case of any other normal port operations).

Chapter 22

Adjudication

Duty may be owed to the Government in the following instances:

- duty leviable has been omitted to be levied on the goods
- duty has not be levied to the full extent to which it is leviable
- duty that has been fully levied has not be paid at all
- duty that has been fully levied has not be paid to that extent
- duty that has been refunded has been found to be erroneous

Section 28 provides for recovery of duty in these circumstances by following a 'due process' of law. While, it may be that duty is owed to the Government but that cannot be enforced without notifying the assessee about such liability and allowing an opportunity to understand and defend the position.

This notice must be issued within 2 years from the date when the duty ought to have been levied or paid. In case of collusion, willful misstatement or suppression of facts, the notice could be issued within 5 years. It must be established which of the circumstances exist that necessitate issuance of notice for 5 years.

The notice to show cause (show cause notice) must clearly contain the following aspects:

- facts of the assessee – a fact is something which a Court believes to exist beyond reasonable doubt and merely when its existence is established by a preponderance of probability
- act or abstinence in contravention of Customs Act that necessitated this notice – very specific action or inaction must be known and substantiated that is not just wrong but legally wrong
- evidence to substantiate the said contravention – that which substantiates the violation and is relied upon by the Department
- cause of action under the Customs Act – the different provisions of law that are triggered by the given contravention. All such causes-of-action must be specified in the notice that is proposed to be exercised against the assessee.
- named-authority who will adjudicate – so that a specific person is identified to hear the defense with requisite understanding and authority under the Act and to adjudicate

This notice sets the framework of future litigation. If any cause of action has been omitted, it cannot be added as an addendum subsequently. The Department must make up its mind about what is its grievance against the assessee.

Process of adjudication involves:

- *Audi alteram partem* – this means ‘hear the other party’ is a principle of fundamental justice which requires the person entrusted with power of adjudicate also has the duty to hear the defense with an open mind and consider all submissions. In the course of hearing the other party, reasonable adjournment is also to be granted. Often requests for adjournment are made on medical grounds only. Requests for adjournment, will be entertained as long as it is reasonable and does not appear to be delaying the disposal of the matter deliberately
- Representation – this refers to the right of the assessee to seek representation on the matter from a competent person. Section 146 specifies persons who can be authorized representatives for an assessee. The adjudicating authority is duty bound to examine if the representative is competent to offer representation and bind the assessee to statements made on the matter
- Reasoned order – this is the result of the proceedings where the adjudicating authority records in writing the action proposed and evidence, defense by the assessee, findings by the authority that are relevant and relied upon in adjudication and decision of the authority on each action proposed in the notice with reasons for each. This order is appealable

Chapter 23

Refund

The Constitution of India declares in Article 265 that *"No tax shall be levied or collected except by authority of law"*. For collection of tax, the law that levies it must be legitimate. Any tax collected in excess of can be refunded as a matter incidental to levy and collection of tax.

Restitution refers to repayment or more generally, to put back the person in the condition he was before the transaction as best as possible under the circumstances. 'Refund' as a verb which means *give back (money), return, reimburse, pay back, repay, recompense, make compensation for* Refund is very important matter more so in taxation because in such cases, clearly, there is collection of tax by the Government beyond what is legally due. And retaining such excess would not have the sanction of the Constitution.

Grant of refund requires examination of few aspects:

- refunds must follow a process of inquiry and adjudication
- identifying who has 'paid' the tax and who has 'paid for' the tax
- the rightful person entitled to restitution is identified
- there is a limitation as to how far back one can go to make a claim for excesses
- jurisdiction of every other authority is precluded

Section 27 of the Customs Act deals with refunds and provides that person who has paid or borne any duty or interest may make an application for refund to the Customs officer within 1 year from the date of such payment. It further states that the application must substantiate the entitlement to refund. On verification of the refund application, the officer, if satisfied that the amount is, in fact, refundable, an order granting refund will be passed. The amount of unclaimed refund will be deposited into a fund – Consumer Welfare Fund. Further, sub-section (3) declares the exclusive jurisdiction to the Customs officer to attend to refunds under the Customs Act.

Section 28D states that, unless proved to the contrary, it will be presumed that the full incidence of the duty paid is passed on to the buyer. So, in order to receive the refund, the applicant needs to prove his claim as regards the incidence not being passed on to buyer.

The Indian Constitution has set before itself "JUSTICE, Social, Economic and Political" in its preamble. Therefore, the goal of our society is set out in Part-IV of the Constitution and, in particular, in Articles 38 and 39. Indeed, the aforesaid words in the Preamble constitute the motto of our Constitution, if we can call it so. Article 38 directs:

(1) The State shall strive to promote the welfare of the people by securing and

protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

Article 39 lays down the principles of policy to be followed by the State. It says:

The State shall, in particular, direct its policy towards securing—

- (a)*
- (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;*
- (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;*
- (d)*

Refunding the duty paid by an assessee in situations where he himself has not suffered any loss or prejudice is no economic justice; it is the very negation of economic justice. By doing so, the State would be conferring an unearned and unjustifiable windfall upon the assessee-community thereby contributing to concentration of wealth in a small class of persons which may not be consistent with the common good. The preamble and the aforesaid Articles do demand that where a duty cannot be refunded to the real persons who have bore the burden, for one or the other reason, it is but appropriate that the said amounts are retained by the State for being used for public good.

When duty is collected in excess, can it be said that that law (Customs Act) which does not confer the power to retain such excess can vest in the authority a power to deal with the grant of refund or should one approach the High Court / Supreme Court for relief.

If these are the principles to be followed for grant of refund, then the specific law (Customs Act) which also has exclusive jurisdiction will alone apply in regard to all forms of refund except if the refund arises due to annulment of the taxing provision as being *ultra vires*. In this case, the levy being found *ultra vires*, the specific law is ousted and the general law of restitution will apply.

Authority for this can be found in *Mafatlal Industries Ltd. v. UOI & Others* 1997 (89) ELT 247 (SC)

Chapter 24

Appeals and Review

The Constitutional framework in India provides for three organs of the State, namely:

- Legislature – which enacts laws
- Executive – which implements those laws
- Judiciary – which interprets the laws

As regards the role and authority of judicial review of matters within the confines of the Customs Act detailed provisions are embodied including appeals and review.

Our discussion here on appellate remedies is a continuation of the discussion in an earlier Chapter on 'Demands'. We will proceed with this discussion separately in respect of appeals by assessee and those by the department.

Commissioner (Appeals)

Criteria	Appeal by Assessee	Appeal by Department
Orders for appeal	Adjudication orders passed by any Customs officer lower in rank than a 'Commissioner'	Such orders if found (within 3 months) by the Commissioner of Customs to be wanting on 'legality or propriety' (sec 129D(2))
Appellant	Assessee if 'aggrieved' only	Officer directed to file the appeal by the Commissioner of Customs
Time limit	60 days from date of 'service' of adjudication order and can condone a delay of upto 30 days if 'sufficient cause' is shown	Within 1 month from the date of 'service' of the order of Commissioner of Customs to so file the appeal
Interim compliance	Mandatory pre-deposit of 7.5% of duty demanded (where duty and penalty is in dispute) or penalty imposed (where only penalty is in dispute)	Not applicable
Interim relief	'Stay' from recovery of amounts in excess of 7.5% deposited as mandatory pre-deposit	Not applicable
Proceeding	Appeal to be filed in the manner prescribed and verified	
Adjournment	No more than 3 adjournments may be granted 'during hearing' of the appeal	

Relief allowable	'Confirm', 'modify' or 'annul' the order appealed against
Scope	To address only those issues raised in appeal as 'grounds'
Inquiry	Empowered to make further inquiry or entertain new grounds if such omission is not willful or negligent
Orders	Written order to be passed stating the (a) points for determination (b) decision thereon and (c) reasons therefor

Customs, Excise and Service Tax Appellate Tribunal

Criteria	Appeal by Assessee	Appeal by Department
Orders for appeal	Adjudication orders passed by Commissioner of Customs or Commissioner (Appeals)	Such orders of Commissioner of Customs are found (within 3 months) by the Committee of Chief Commissioners of Customs to be wanting on 'legality or propriety' (sec 129D(2))
Orders not appealable to Tribunal	Orders relating to (a) import/export of baggage (b) import of goods not landed or short landed and (c) drawback. Appeal in these cases lie before the Revision Authority instead of Tribunal	
Orders that may be refused on appeal	When amount involved in the adjudication order is less than Rs. 2 lacs unless it relates to an interpretation involving classification or valuation	
Appellant	Assessee if 'aggrieved' only	Officer directed to file the appeal by the Commissioner of Customs
Time limit	3 months from the date of 'service' of adjudication order and can condone any extent of delay if 'sufficient cause' is shown	Within 1 month from the date of 'service' of the order of Commissioner of Customs to so file the appeal
'Notice' of filing appeal to respondent	Upon receipt of such notice, file cross-objections within 45 days which would be treated as appeal itself	
Interim compliance	Mandatory pre-deposit of 7.5% at first stage or 10% at second stage of duty demanded (where duty and penalty is in dispute) or penalty imposed (where only penalty is in dispute)	Not applicable
Interim relief	'Stay' from recovery of amounts in excess of 7.5% / 10% deposited as mandatory pre-deposit	Not applicable

Proceeding	Appeal to be filed in the manner prescribed and verified
Adjournment	No more than 3 adjournments may be granted 'during hearing' of the appeal
Relief allowable	'Confirm', 'modify' or 'annul' the order appealed against or 'remand' the matter back to the original authority with suitable directions for fresh adjudication
Scope	To address only those issues raised in appeal as 'grounds'
Inquiry	Empowered to make further inquiry or entertain new grounds if such omission is not willful or negligent
Orders	Written order to be passed stating the (a) points for determination (b) decision thereon and (c) reasons therefor
Rectification of mistake in order	Within 6 months from date of order pass another 'order' to so rectify

Appeal to High Court

An aggrieved party to an order of the Tribunal (except on a matter involving rate of duty or valuation) may prefer an appeal to the High Court within 180 days from the date of 'service' of the Tribunal's order. The High Court will attend to matters involving a substantial question of law. And after formulating this question and pass suitable orders thereon. If any statements in a case are insufficient to answer the question formulated, the same can be sent back to the Tribunal to provide the same.

Appeal to Supreme Court

An aggrieved party to an order of the High Court (certified to be fit for appeal) or of the Tribunal on a matter involving rate of duty or valuation may prefer an appeal to the Supreme Court within 60 days (90 days for Special Leave Petition).

Orders of the High Court or Supreme Court will provide interpretation to the question of law that was formulated earlier. Upon receipt of a certified copy of this order providing the interpretation to the question of law formulated, the Tribunal will pass operative orders (sec 130D).

Chapter 25

Settlement Commission

In order to provide for speedy resolution of disputes, the Settlement Commission has been constituted under the Customs Act (Sections 127A to 127N). The following Table gives the provisions at a glance.

Parameter	Settlement Commission
Key Aspect	“Case” is any proceeding pending for ‘levy’, ‘assessment’ or ‘collection’ of customs duty before an adjudicating authority (excluding in a de novo proceeding)
Disqualification	Case pending in appeal before the Appellate Tribunal or any court
Applicant	Any importer or exporter or any other person
Relief	Immunity from prosecution, penalty (not initiated) and fine
Admission	(a) Admission of wrong-doing with full and true disclosure (b) admitted liability more than Rs.3 lacs (c) admitted liability paid with applicable interest
Additional conditions	In case of seizure, 180 has lapsed from date of seizure
Processing	(a) Within 7 days issue notice to applicant (b) Within 14 days from notice pass order allowing the application
Type of inquiry	Without circulating the application, call upon the Commissioner of Customs to furnish his report within 30 days based on facts
Interim orders	Authorised to (a) order provisional attachment of property to protect interest of revenue (b) reopen concluded proceedings that have a bearing on the application and pass suitable on the reopened proceedings
Final orders on application	Final orders as deemed fit to be passed within 9 months (extendable by further 3 months) from last day of the month in which the application was made
Effect	Final Orders passed will be conclusive and the matters covered by the orders will not be reopened
Settlement dues	To be paid within 30 days of order
Annulment	Immunity granted will be withdrawn if (a) conditions of settlement are not fulfilled (b) settlement was obtained by concealment or furnishing false evidence and all ‘cases’ will be reopened and time lapse before Settlement Commission will be excluded

Rejection of application	Application that is allowed may be rejected for reasons to be recorded in the Final Order
Effect of rejection	Rejection of application will render application 'void' and revive the adjudication proceedings previously underway and required to be concluded within 2 years from date of communication that settlement became void
Bar from future applications	(a) applicant found to have concealed full duty liability (b) after settlement, applicant convicted of offence (pending before application) (c) case of non-cooperation by applicant

Chapter 26

Advance Ruling

In order to obtain a binding interpretation to the provisions of law as it would be administered, an applicant is permitted to approach the Authority for Advance Rulings before entering into any transaction under the Customs Act (Sections 28E to 28M). The following Table gives the provisions at a glance:

Parameter	Advance Ruling
Key Aspect	<p>“Applicant” means (i)(a) a non-resident setting-up a JV in India with another non-resident or a resident (b) a resident in JV with a non-resident (c) wholly owned subsidiary in India of a foreign company</p> <p>(ii) a JV in India or</p> <p>(iii) a notified class of resident persons which includes any public sector company and resident private limited company</p>
Disqualification	<p>(a) resident Indian who does not fit in the definition of “Applicant”</p> <p>(b) questions that are hypothetical in nature</p> <p>(c) question is already pending in applicant’s case before an officer of Customs / Tribunal</p> <p>(d) identical matter decided by Tribunal or Court</p>
Authority	To issue a ‘binding’ interpretation on Customs matters
Scope of application	<p>(a) classification of goods</p> <p>(b) applicability of exemption notification</p> <p>(c) applicability of valuation principles</p> <p>(d) applicability of notification levying duty under Customs Act or any other law</p> <p>(e) determination of ‘origin’ of goods</p>
Admission of application	Examine nature of application to conform to the scope of AAR and order to allow / reject will be passed
Type of inquiry	Send copy of application to Commissioner of Customs to furnish records
Final orders	Final orders are binding on applicant and Department provided the facts or law does not undergo a change at the time of implementation of the transaction covered by the Ruling

Effect	Final Orders passed will be conclusive and binding on the applicant, the questions covered in the Ruling, Commissioner of Customs and all his subordinate officers
Annulment	If Ruling is found to have been obtained by misrepresentation of facts by applicant, order declaring the said Ruling to be void <i>ab initio</i> will be passed

Chapter 27

Offences and Penalties

“Wrong or legally wrong” is to be thought about and understood. Duties that a valid law places upon those to whom it applies would be illusory if that law is lacking in enforcement. *Ubi jus ibi remedium* – is a principle which states that ‘where there is a right, there is a remedy’.

Damnum means harm, loss or damage. *Injuria* means infringement of a right conferred by law. *Damnum sine injuria* means damage that does not cause infringement in the eyes of law. *Injuria sine damnum* means even though there is no damage the law already recognizes it to be an injury because these rights or interests are so important that waiting till damage is caused may result irreparable alteration of those rights or interest and render the law unable to adequately recompense.

Every act and abstinence that causes such ‘injury’ or is ‘legally wrong’ is called Offence under Customs Act. And the consequence of such legal wrong-doing is dealt with in different ways. Such actions under law are:

- *Jus in rem* – action against property
- *jus in personam* – action against persons

Offending actions are:

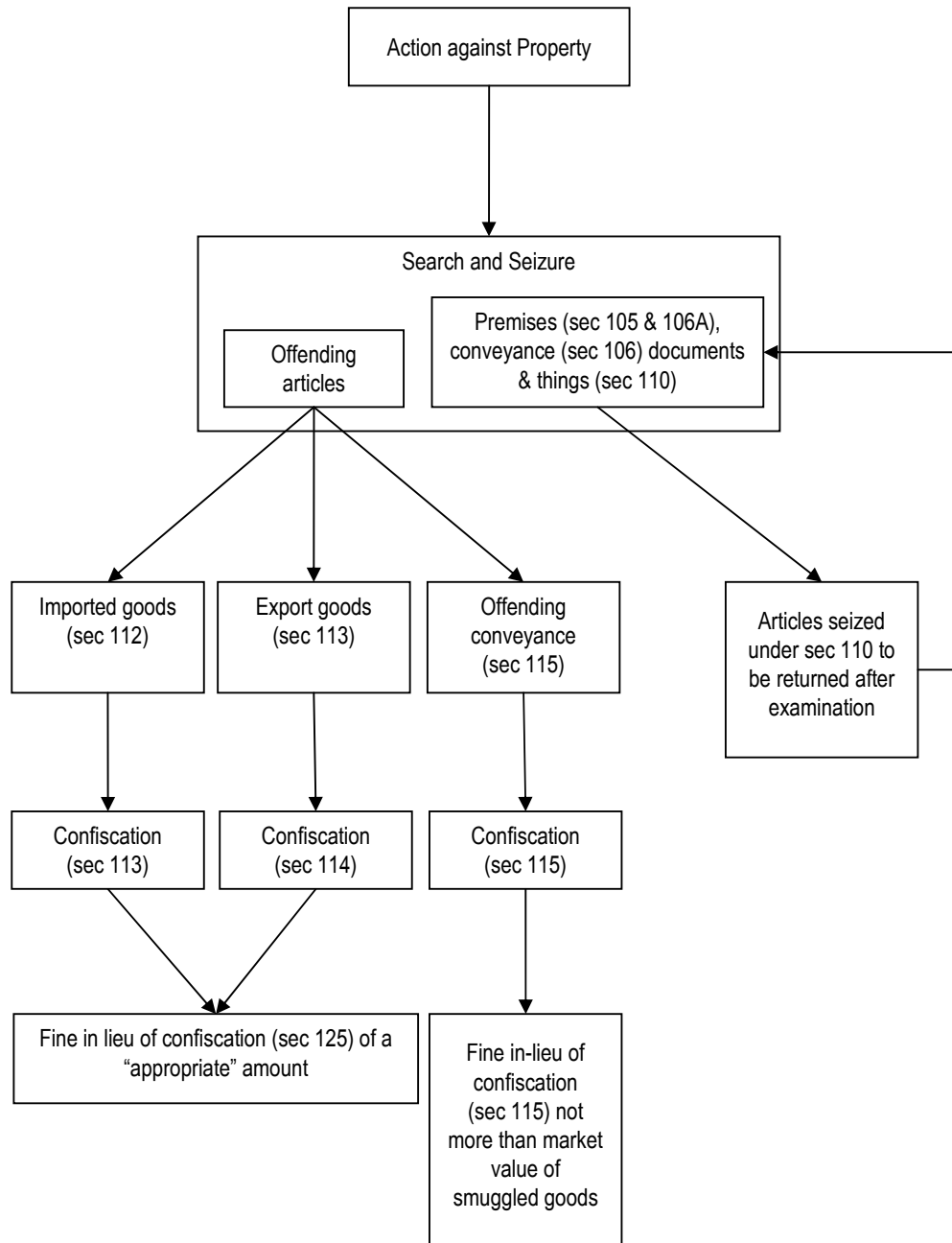
- goods that have been imported in a way that is illegal
- goods concerned with an ‘attempt’ to export in a way that is illegal
- conveyance used knowingly in such illegal import or (attempt to) export

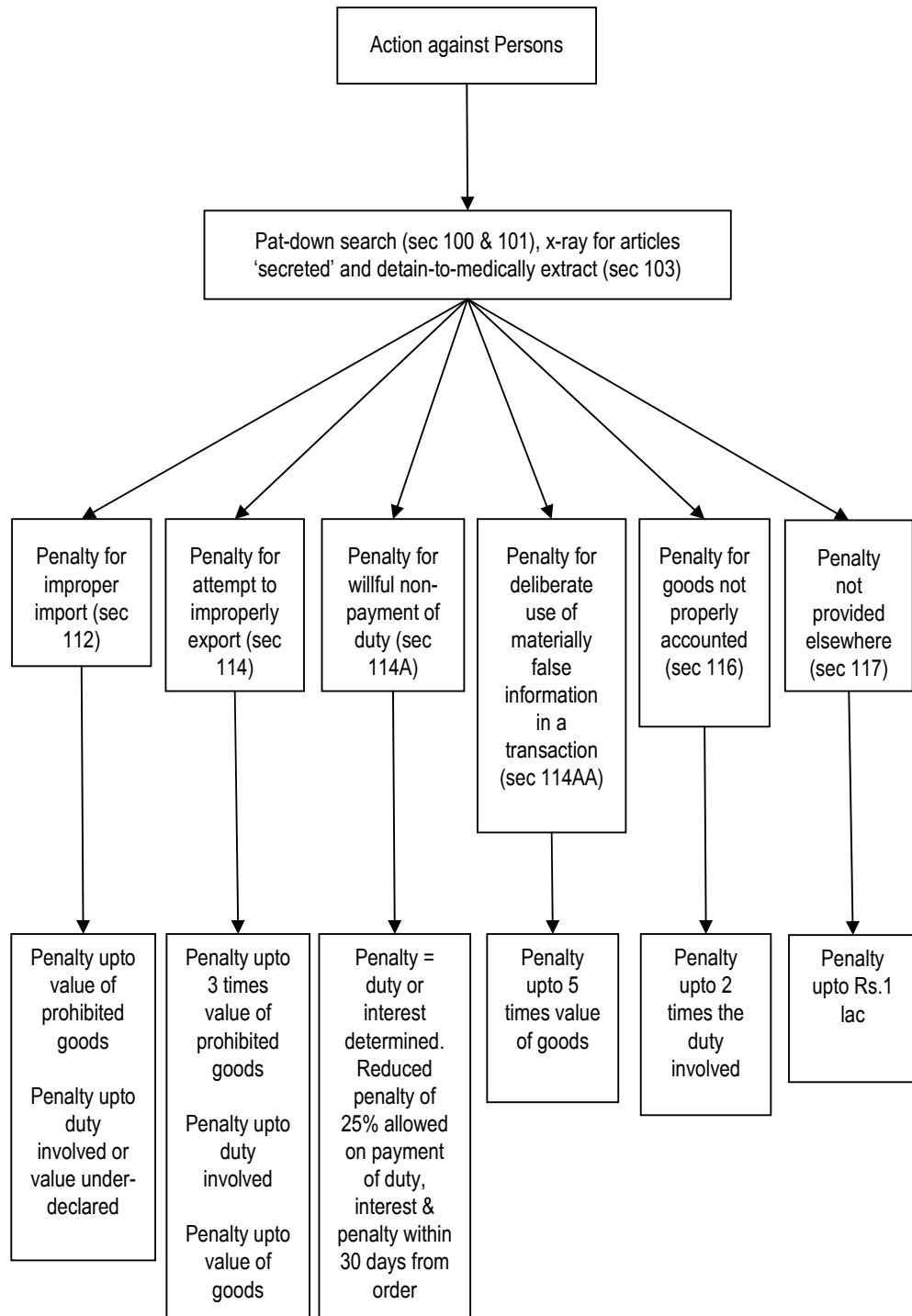
Goods that are imported or attempted for export are of two kinds:

- those that have a prohibition under Chapter IV-A of the Customs Act
- all other goods not having a prohibition

Offences involving such ‘prohibited goods’ have a more severe consequences than others.

Penalty is a monetary burden imposed and by nature it is intended to be punitive. It needs to be so large that it weighs heavily on the wrong-doer and serve as a deterrent to others. A detailed matrix of these consequences is detailed the following two tables:





Criteria	Seizure	Confiscation
Applicability	Any goods, documents and things	Only offending goods
Manner	Actual custody or constructive custody	Actual custody
Authority	Held in trust, no change of ownership	Held in trust, no change of ownership unless adjudication completed
Duration of holding	6 months, extended for further 6 months by Commissioner of Customs to issue notice for adjudication	Until issue of notice for adjudication
Conclusion	Return articles that are not 'offending articles'	Title to pass and vest with Central Government as per order of adjudication

All cases involving confiscation must be adjudicated by issuance of a notice to show cause under section 124 and following principles of natural justice.

Persons offending by falsifying documents (sec 132), intentionally obstructing officer of customs (sec 133), evasion of duty or prohibitions (sec 135), preparation to commit offence (sec 135A) and offences by officers of customs (sec 136) can be arrested by a special order of the Commissioner of Customs. Upon establishing these offences, sentencing by imprisonment may be ordered by a Court of competent jurisdiction.

Offences involving prohibited goods or duty of more than Rs.50 lacs will be cognizable and all others will be non-cognizable. A detailed matrix of these consequences is given below.

