

# e-Background Material on Customs and FTP

## January 2019



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## **Foreword**

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Customs duty would be in vogue for the foreseeable future as it has been there for centuries. This duty is to regulate the trade by barring and monitoring the import of goods into India. The levy includes Basic Customs duty, Anti-dumping duty, Safeguard duty and the like. However, the Additional duties of Customs, which are in common parlance referred to as Countervailing Duty (CVD) and Special Additional duty of Customs (SAD) which was equivalent to Central excise and VAT respectively, has been replaced with the levy of Integrated Goods and Services Tax (IGST), barring a few exceptions. On the exports side, export would be treated as zero-rated supply. Under zero-rated supply IGST paid on export goods or the input tax credit proportionate to the goods and services consumed in goods exported under bond / LUT would be refunded. There are certain exceptions on imports of petroleum products and pan masala that attract levy of countervailing duties even after the GST regime.

Foreign Trade Policy is of interest to those who import and export goods. Merchandise Exports from India Scheme (MEIS) and Service Exports from India Scheme (SEIS) are two promotional schemes for exports of merchandise and services introduced in the Foreign Trade Policy 2015-20. Many of the exporters are unaware of the benefits available which is upto 7% of the export value for certain goods/services. The knowledge could lead to effective procurement at lower cost also.

To provide an enhanced learning opportunity to the members and other stakeholders, the Indirect Taxes Committee of ICAI has revised “*e-Background Material on Customs and FTP*” and has also come up with an updated 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 appreciate CA. Madhukar N. Hiregange, Chairman, CA. Sushil Kumar Goyal, Vice Chairman and other members of the Indirect Taxes Committee for bringing out a well aligned and updated material. I am sure this e-publication 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: 01.02.2019

**CA. Naveen N. D. Gupta**

Place: New Delhi

President



## Preface

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Each country has its own laws and regulations for the import and export of goods into and out of a Country, which its Customs Authority enforces. The import or export of some goods may be restricted or forbidden. A customs duty is a tariff or tax on the importation (usually) or exportation (unusually) of goods. The rates of customs duties are either specific or on ad valorem basis, that is, it is based on the value of goods. Introduction of GST have changed the way of doing business in India due to substantial impact on the international transactions. Even, imposition of additional customs duties under Customs Tariff Act, 1975, has some significant changes. However, it does not disturb the provisions of Customs Act, 1962.

India's Foreign Trade Policy (FTP) also known as Export Import Policy (EXIM) in general, aims at developing export potential, improving export performance, encouraging foreign trade and creating favorable balance of payments position. It is a set of guidelines or instructions issued by the Central Government in matters related to import and export of goods in India viz., foreign trade. In the era of globalization, foreign trade has become the lifeline of any economy. Its primary purpose is not merely to earn foreign exchange, but also to stimulate greater economic activity.

Considering paramount importance of Customs and Foreign Trade Policy for economic growth and impact of GST on it, Indirect Taxes Committee has revised "*e-Background Material on Customs and FTP*". This material 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, impact of GST on various FTP provisions including schemes etc.

We would like to express our sincere gratitude and thanks to CA. Naveen N. D. Gupta, President, ICAI, as well as other members of the Committee for their suggestions and support in this initiative. We must also thank indirect tax experts' viz. CA. A Jatin Christopher, CA Jayesh Gogri and Adv. Abhay Desai and for updating this material in 2019.

We are sure that our members and other professionals in the field will find this publication immensely useful. We request you to share your feedback at [idtc@icai.in](mailto:idtc@icai.in) to enable us to make this material more value additive and useful.

**CA. Madhukar Narayan Hiregange**  
Chairman  
Indirect Taxes Committee

**CA. Sushil Kumar Goyal**  
Vice Chairman  
Indirect Taxes Committee

Date: 01.02.2019  
Place: New Delhi

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# Chapter 1

## Constitutional and Legislative Background

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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”

In exercise of this power, the Parliament enacted The Customs Act, 1962 on 13 December 1962 and it became effective only from 1 February 1963 (vide notification G.S.R 155 dated 23 January 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.

The introduction of GST does not disturb the provisions of Customs Act, 1962. However, with regard to the imposition of additional customs duties under Customs Tariff Act, 1975, some very significant changes have been made and the same are discussed at appropriate places in the ensuing Chapters.

## Chapter 2

# **Levy of Customs Duty**

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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 popularly understood connotations of 'import' and 'export':

#	Illustrations	Common answers
1.	Indian Co. imports machinery from Germany	It is import, because there is some 'payment' involved
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.	When on a holiday in New York I purchase a T-shirt, which reads "I love New York" and brought it back to India	It is not import, because it is for 'own use' and it was purchased 'outside India'
5.	And when I return to India, I find that the T-shirt had a label "made in Tirupur, India"	It is still not import, because it was, and it was purchased 'outside India' though 'made in India'
6.	What about the suitcase that I carried for my trip to USA, is that imported when it is brought back	No not at all, because it was originally 'taken from' India
7.	What about the aircraft that I boarded on my journey back to India	No, the aircraft is not 'for sale', it is only for travel
8.	What about the fuel stored on the aircraft on the aircraft	No, when the aircraft is not 'imported' then the also fuel cannot be 'imported'
9.	What about jewellery, spectacles, clothes or even mangalsutra worn by a passenger visiting India from another country	As all these are personal articles none of them are 'imported'
10.	Hershey cows brought to India by the Government to breed in a cooperative dairy	DON'T KNOW the answer to this one

The common misconceptions of the law of Customs seem to be that it is applicable only if goods are brought into India:

- 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 the transactions listed 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**

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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 presence of those taxing ingredients in a transaction. It depends on the facts and circumstances of each transaction. The ambiguity is not in the levy of tax but in the identification of the presence of taxing ingredients in that transaction. Transactions are entered into not for tax purposes or according to tax requirements. They are entered into for commercial purposes and from within this commercial arrangement, the presence of taxing ingredients must be identified. And if it is found to exist, then levy stands attracted and resides as an ‘encumbrance’ on the subject of tax under that law. That subject of tax must be liberated from this encumbrance to be freely dealt with as the parties desire.

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

We need to sift through the transaction and identify the existence of these ingredients to identify if they ‘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. And once the event occurs, it is irreversible or obliterated and must be discharged.

Before going into the ‘process’ of levy of tax, it is important to quickly touch upon ‘liability’ to tax. Although it is popularly understood that direct tax is paid ‘directly’ by the tax payer and indirect tax is paid ‘indirectly’ when goods/services are consumed. But this is an economists’ view of direct tax and indirect tax.

Tax is payable by the person ‘named’ in the law as being the one enjoined with the duty to discharge the encumbrance attached to the subject of tax under that law. That person is usually the manufacturer, seller or service provider. But there is no such obligation on the lawmaker to levy only from such person. The law is free to choose any person associated with a transaction and place this obligation. And such person is liable to discharge the tax. Further, such person is free to retain the incidence or pass-on the incidence to consumer. But that’s a matter of contract and not tax law. While there is a statutory duty to pay tax is on the ‘named’ person, the liberty to recoup this incidence is contractual (not statutory). Though there’s a presumption that the incidence has been passed on, there is no right to pass on and be compensated. As such, the economists’ view is just an economists’ view and ought not to be

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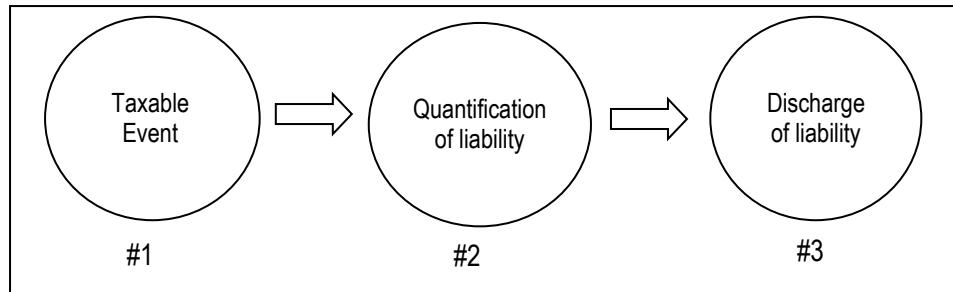
<sup>1</sup> Goodyear India Limited v. State of Haryana & Anr. 76 STC 71 (SC)

expected to be a statutory right to recover tax from the customer. Right to recover tax incidence is, therefore, a contractual right and not a statutory right. But the duty to pay the tax to the Government is a statutory duty<sup>2</sup>.

Custom duties, as can be seen, are not paid by the manufacturer or supplier. It is paid by the customer of such (overseas) manufacturer or supplier. Importer is 'named' as person liable to discharge the incidence without any recourse to recoup the same though there is a presumption of recoupment in case the imported goods are resold.

Now, coming to 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.
- 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.

<sup>2</sup> Chhotabhai Jethabhai Patel & Co vs UoI & Anr., 1962 AIR 1006

## Chapter 4

# Taxability under Customs Law

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What is the taxable event under the Customs Act,1962? To this end, Section 12 of the Customs 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" under the Customs Act,1962

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." Indian customs waters are now extended to the Exclusive Economic Zone.

"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 levied .....on 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’ become ‘imported goods’ to rush to quantify 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 provisions of Customs Act, Rules framed thereunder, or the Notifications issued thereunder become applicable as soon as the goods enter the ‘territorial waters’ of India. However, the liability to pay the duty shall arise only at the time of filing the Bill of Entry for home consumption under section 46.

Quantification of liability cannot be taken into the ‘territorial waters’. Section 15 has jurisdiction to specify when, goods that went pass 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*<sup>3</sup> decision where the Supreme Court held “.....Import being complete, when the goods entered the territorial waters is the contention which has already been rejected 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). This decision was reaffirmed in *Garden Silk Mills*<sup>4</sup>.

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.

The above understanding came to be established after the decisions in Apar Private Limited and Lucas TVS (citations below).<sup>5</sup> To appreciate the decision in Kiran Spinning Mills and Garden Silk Mills, a careful study of the above decisions that were overruled is apposite due to the wealth of knowledge contained.

When goods which are otherwise liable to IGST under section 5 of IGST Act, are imported into India, IGST would be levied under Customs Tariff Act and not under IGST Act. This is enabled by a proviso to section 5 of IGST Act and a corresponding sub-section (7) for levy under section 3 of Customs Tariff Act. Hence, IGST levied under Customs Tariff Act is a tax not in the nature of GST but in the nature of a duty of customs.

Another important aspect is that goods deposited and sold while being held in a bonded warehouse is made liable to IGST in the nature of duty of customs. Payment of the same shall however arise when the basic duty of customs is payable (bill of entry for home consumption u/s 46) by the buyer of said goods. For the determination of the value on which said IGST shall be calculated, sub-section (8A) has been inserted under section 3 of the Customs Tariff Act with effect from April 1, 2018. In a nutshell it provides that the value shall be either the value determined u/s 3(8) of the Customs Tariff Act (value in the hands of original importer) or the transaction value of such goods sold while being in the bonded warehouse (value in the hands of the last importer who files bill of entry u/s 46), whichever is higher.

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<sup>3</sup> Kiran Spinning Mills v. CC 1999 (113) ELT 753 (SC)

<sup>4</sup> Garden Silk Mills Ltd. v. Union of India 1999 (113) E.L.T. 358 (S.C.)

<sup>5</sup> UoI & Ors. v Apar Private Ltd. & Ors. 1999 (112) ELT 3 (SC) arising from Apar Private Ltd. & Ors. V. UoI & 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

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

### Types of duties

- Basic Custom Duty is levied under section 12 of the Customs Act, 1962 read with section 2 of the Customs Tariff Act
- 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' only on certain specific goods which have not been brought under GST ambit [CVD]
- 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 only on certain specific goods which have not been brought under GST ambit
- 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 only on certain specific goods which have not been brought under GST ambit [SAD]
- Integrated tax under section 3(7) of the Customs Tariff Act being the equivalent of integrated tax under the IGST Act, 2017 and
- Cess under section 3(9) of the Customs Tariff Act being the equivalent of Compensation Cess under the GST Compensation Cess Act, 2017.

Description	Rate	International	Domestic	Rate	Description
Assessable Value of an imported article		90	100		
Customs duty under section 12 of CA	10%	9	-		
Social Welfare Surcharge @ 10% on BCD of Rs.9	10%	0.90	--		
Total value		99.90	100		
"Duty equivalent IGST" under section 3(7) of CTA	18%	17.98	18	18%	IGST
Landed Cost		117.88	118		

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

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
Assessable Value of an imported article		45	100		
Countervailing duty u/s 9 of CTA	100%	45	-		
Total Value		90	100		
Customs duty under section 12 of CA	10%	09	-		
Social Welfare Surcharge @ 10% on BCD of Rs.9	10%	0.90	-	-	
Total value		99.90	100		
"Duty equivalent IGST" under section 3(7) of CTA section 3(7) of CTA	18%	17.98	18	18%	GST
Landed Cost		117.88	118		

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
- Anti-dumping duty

A comparative outlook of these protective duties is provided hereunder:

Criteria	Safeguard duty <sup>6</sup>	Countervailing duty <sup>7</sup>	Anti-dumping duty <sup>8</sup>
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

#### **"Duty equivalent to GST" on imported goods:**

As mentioned earlier, in terms of section 3(7) of Customs Tariff Act, integrated tax is *inter alia* levied on goods imported in India being the equivalent of integrated tax under the IGST Act, 2017. Section 3(8) which deals with valuation of goods for the purposes of calculating integrated tax specifies that integrated tax shall be computed on value of goods as determined under Section 14 of Customs Act plus other customs duties.

Further, goods liable to Compensation Cess under the GST (Compensation to the States) Act, 2017 when imported into India will be liable to "Duty equivalent Cess" under section 3(9) of Customs Tariff Act. Here, the valuation will be as per section 14 of Customs plus all duties all other customs duties in accordance with section 3(10) which is similar to section 3(8).

<sup>6</sup> Customs Tariff (Identification and Assessment of Safeguard Duty) Rules, 1997

<sup>7</sup> Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995

<sup>8</sup> Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995

**Social Welfare Surcharge:**

Social welfare surcharge (SWC) is levied under clause 110 of Finance Act, 2018 on the goods specified in the First Schedule to the Customs Tariff Act, 1975 to fulfil the commitment of the Government to provide and finance education, health and social security. The same shall be levied at the rate of 10% of the duties levied under section 12 of the Customs Act and any sum chargeable on the specified goods under any other law for the time being in force, as an addition to, and in the same manner as, a duty of customs excluding:

- (a) the safeguard duty referred to in sections 8B and 8C of the Customs Tariff Act;
- (b) the countervailing duty referred to in section 9 of the Customs Tariff Act;
- (c) the anti-dumping duty referred to in section 9A of the Customs Tariff Act;
- (d) the Social Welfare Surcharge on imported goods levied under sub-section 110(1).

Important to note that SWC will not apply on duties of customs or duties equivalent to IGST levied under provisions of the Customs Tariff Act. In view of the levy of SWC, cesses that were previously levied have been exempted on imports (54 and 55/2017-Cus. dated 30 June 2017).

## **Chapter 6**

# **Classification of Goods**

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Before venturing into classification, a brief history of the 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 99 Chapters (Chapter 77 is kept blank for future use) along with accompanying section and Chapter notes. Similarly, the export Tariff is enumerated in the Second Schedule, which at present has 50 tariff items (most of which are exempt).

What is the need for appropriate classification?

Let us consider the following illustrations:

- If there is a description in a heading, in the Customs Tariff 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 "Books for reading" include mathematics text books, accountancy reference books? Will it also include 'film news' magazine or other periodicals?

Classification is necessary to determine the effective rate of duty of particular goods (Section 12 provides that duty shall be levied at such rates as may be specified). 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. Indian Tariff System employs the 8-digit format. First four digits denote the heading. Next two digits denote the sub-heading. And the last two digits denote the tariff item. Said system also employs the dashes ("-") wherein description preceded by a single dash (-) connotes a group of goods. Two dashes (- -) connotes a sub-group and three dashes (- - -) connotes a sub-sub classification.

### **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. The 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, design, 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.*"<sup>9</sup>

## 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 (only for ease of reference);
2. Classification should, as far as possible, be according to terms of heading or Section and Chapter notes<sup>10</sup>;
3. These rules are applicable, only when classification is not possible under point 2 above. Therefore, Section and Chapter notes override these rules.

Classification is to be first tested on the basis of Rule 1 (*supra*). Hence, other Rules are to be looked sequentially only if Rule 1 does not resolve the issue.

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*

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<sup>9</sup> Collector of Central Excise v. Wood Craft Products Limited 1995 SCC (3) 454

<sup>10</sup> Track Parts Corporation v. CC (1992) 57 ELT 98 (CEGAT)

*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 failing 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<sup>11</sup>.

*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.*

In the case of Dhariwal Industries v. CCE<sup>12</sup>, the assessee was manufacturing “Calcutta meetha pan” which was a mixture of various items, primary ingredient being pan leaf. The product contained 70% of dry dates and mixture of spices and sweetener. It was held that classification, as per Rule 2(b) and 3(b) oughts to be under “Fruits, Nuts and Other Edible parts” under CETH 20.08 and not “pan masala”.

If for any reasons, goods are classifiable under 2 or more headings (after applying Rule 2) 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.

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<sup>11</sup> Scooter body unit without engine classifiable as scooter – LML Ltd. v. CC (1999) 105 ELT 718 (CEGAT) affirmed in 1999 (107) ELT A119 (SC)

<sup>12</sup> 2014 (304) ELT 585 (CESTAT) maintained in 2015 (319) ELT A123 (SC)

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 of goods in the sub-headings of a heading, the same shall be determined according to the terms of those sub-headings and any related sub-heading Notes (by applying *mutatis mutandis* to the above rules) on the understanding that only sub-headings at the same level are comparable. It also states that for the given purpose, relative Section and Chapter Notes shall also apply unless the context provides otherwise. Hence, the sub-headings within the same heading are comparable with each other and not with sub-headings under any other heading. Thus, heading is to be determined first and then sub-heading.

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

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Before venturing into valuation under the 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). So, 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.<sup>13</sup>"

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,

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<sup>13</sup> 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 Court<sup>14</sup>, 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 when<sup>15</sup>:
  - (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 restrictions<sup>16</sup>:
  - (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.

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<sup>14</sup> Garden Silk Mills Limited v. Union of India 113 ELT 358 (SC)

<sup>15</sup> Rule 3(3)(a) and (b) of the Customs Valuation (Determination of Value of Imported goods) Rules, 2007

<sup>16</sup> Proviso to Rule 3(2) of the Customs Valuation (Determination of Value of Imported goods) Rules, 2007

In case of export the transaction value will be rejected only when the buyer and seller are related, and the price is influenced by the relationship<sup>17</sup> 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 ("IVR") 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 (Rule 4);
- (b) Transaction Value of Similar goods(Rule5);
- (c) Deductive method(Rule7);
- (d) Computed method(Rule8);
- (e) Residual method(Rule9)

Note: If assessee apply and proper officer approve then Rule 8 can be applied before Rule 7(Rule 6)

## **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.

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<sup>17</sup> Rule 3 of the Customs Valuation (Determination of Value of export goods) Rules, 2007

## (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 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 is 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 commission<sup>18</sup>. – 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. The value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller Rule 10(1)(d)

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<sup>18</sup> "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'

6. 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 case*<sup>19</sup> 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 between unrelated seller (Bank) of processed-steel machinery was held to be includable in the assessable value.

7. 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.

8. Cost of Insurance – Rule 10(2)(b):

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.

9. Loading, Unloading and handling charges (deleted in Rules) is now merged into freight and is required to be added to the transaction value at actual upto the ‘place of importation’. Ad hoc addition of 1% of FoB value came to be struck down by Hon’ble SC<sup>20</sup> and corresponding changes were made in the Valuation Rules vide notification 91/2017-Customs (NT) dated 26 September 2017. For this purpose, ‘place of importation’ came to be defined in the Rules:

*“2(da) “place of importation” means the customs station, where the goods are brought for being cleared for home consumption or for being removed for deposit in a warehouse.”*

Reference may be had to circular 39/2017-Customs dated 26 September 2017. GST implications on ocean freight paid may be referred in circular F. No. 334/1/2017-TRU dated 30 June 2017 wherein it is stated that:

*“4. Where the value of taxable service provided by a person located in non-taxable territory to a person located in non-taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs*

<sup>19</sup> CC v. Essar Gujarat Ltd. 1996 (88) ELT 609 (SC)

<sup>20</sup> Wipro Ltd. Vs. Assistant Collector of Customs 2015 (319) ELT 177 (SC)

*station of clearance in India is not available with the person liable for paying integrated tax, the same shall be deemed to be 10 % of the CIF value (sum of cost, insurance and freight) of imported goods.”;*

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.

Reference may be had to Circulars 4/2016-Cus. and 5/2016-Cus. both dated 9 February 2016 applicable to cases and renewal cases that are briefly discussed here.

## 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.

In case of export, Rule 4 to 6 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 needs to sequentially follow if buyer and seller are related and the price is influenced by the relationship<sup>21</sup> or when price is not the sole consideration for sale.

- Rule 4 – (Parallel to Rule 4 and 5 of IVR) The value of the export goods shall be based on:
  - the transaction value of goods
  - of like kind and quality exported at or about the same time
  - to other buyers in the same destination country of importation or in its absence another destination country of importation
  - adjusted in accordance with Rule 4(2) with stipulates that the proper officer shall make such adjustments as appear to him reasonable, taking into consideration the relevant factors, including-
    - (i) difference in the dates of exportation,
    - (ii) difference in commercial levels and quantity levels,
    - (iii) difference in composition, quality and design between the goods to be assessed and the goods with which they are being compared,
    - (iv) difference in domestic freight and insurance charges depending on the place of exportation.
- Rule 5 - Computed Method (Parallel to Rule 8 of IVR) - The value of the export goods shall be based on computed value, which include:
  - a) cost of production, manufacture or processing of export goods;

<sup>21</sup> Rule 3 of the Customs Valuation (Determination of Value of export goods) Rules, 2007

- b) charges, if any, for the design or brand;
  - c) an amount towards profit.
- Rule 6 - Residual Method (Parallel to Rule 9 of IVR) - e value shall be determined using reasonable means consistent with the principles and general provisions of these rules provided that local market price of the export goods may not be the only basis for determining the value of export goods.

Rule 7 stipulates that the exporter shall furnish a declaration relating to the value of export goods in the manner specified in this behalf. And if proper officer is not satisfied, then Best Judgment assessment will be done as laid in Rule 8

Electronic Cash Ledger – payment of duty or any other sum will flow into an ‘electronic credit ledger’ u/s 51A and all appropriation of sums due may be made out of balance in this ledger. Conditions and safeguards are to be prescribed. Board is authorized to grant exemption from operation of this method of payment management.

## Chapter 8

# Import Procedures

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

<b>Steps</b>	<b>Importer or Customs Broker<sup>22</sup></b>	<b>Person-in-charge of Conveyance<sup>23</sup></b>	<b>Customs</b>	<b>Port Authority</b>
1			Customs obtains permission to occupy and manage the export-import activities through that port (being a notified Customs Station)	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 aircraft/vessel	
3		Conveyance (aircraft / vessel) files Import General Manifest (IGM) <sup>24</sup> – which contains full list of all types of cargo to be unloaded or	Takes stock of all cargo, gives permission to store cargo (unloaded) in carrier's warehouse. Goods in this warehouse	

<sup>22</sup> 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.

<sup>23</sup> as defined in Section 2(31)

<sup>24</sup> Import Manifest (Aircraft) Regulations, 1976 or Import Manifest (Vessels) Regulations, 1971; Import Report (Form) Regulations, 1976 – for imports by land routes

		retained to be taken to next port	cannot be taken out without customs permission	
4	Importer or through Customs Broker 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 apply		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	
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Note 1 – Documents for import clearance to be filed by importer are:

- Commercial import invoice and import contract – to know nature and terms of contract
- Product brochure – to verify classification for rate of import duty
- Packing list – to inspect the shipment and verify contents
- Bill of entry<sup>25</sup> – to assess 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

<sup>25</sup> Bill of Entry (Forms) Regulations, 1976 or Bill of Entry (Electronic Declaration) Regulations, 2011

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 exporter-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), packing (actual), commission (actual), which shall also be added to arrive at landed price. See chapter on Valuation for details of these adjustments to the transacted 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 entry<sup>26</sup> 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 exported 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

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<sup>26</sup> There are 5 types of courier bills of entry

- (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:

- (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/- and transaction in which foreign exchange is involved

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 exported 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 Customs 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 Advance Authorization, 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.

## Authorized Economic Operator Program

As a step towards Ease of Doing Business, Government has offered this accreditation program to invite voluntary compliance and transparency in Customs compliance vide circular 33/2016-Cus. dated 22 July 2016 read with circular 3/2018 dated 17 January, 2018 where the following procedural relaxations are allowed to those who have obtained AEO certification:

1. Self-declaration of SION under Para 4.07A of FTP 2015-20 for AEO status holder Exporters in cases where SION is not notified.
2. Inclusion of Direct Port Delivery of imports to ensure just-in-time inventory management by manufacturers – clearance from wharf to warehouse for AEO T1, T2 and T3.
3. Inclusion of Direct Port Entry for factory stuffed containers meant for export by AEOs for AEO T1, T2 AND T3.
4. ID cards to be issued to AEO's personnel for allowing entry to Customs House, CFS and ICD.
5. Investigation related to AEO status holder shall be fast tracked within 6-9 months.
6. Dispute resolution related to AEO status holder shall be completed/ adjudicated within 6 months.
7. AEO status holder will get a e-mail regarding arrival/ departure of vessel carrying their consignment.
8. Faster disbursal of drawback amount within 72 hours of EGM submission.
9. The assessment/examination shall be done processed on priority basis.
10. Faster disbursal of refund, including IGST refund and rebate for AEO status holder within 45 days of submission of complete documents.
11. Automatic activation of Deferred Duty Payment option for AEO – T2 and AEO T3 status holder.
12. Benefits of Mutual Recognition Agreements with other Customs Administrations for AEO T2 and AEO T3.
13. Extension of facilitation to exports in addition to imports depending on the tier of certification.
14. Self-certified copies of FTA / PTA origin related, or any other certificates required for clearance would be accepted.
15. Request based on-site inspection /examination.
16. Paperless declarations with no supporting documents.
17. Recognition by Partner Government Agencies and other Stakeholders as part of this programme.

There are multiple tiers of certification in the new AEO Programme. For importers and exporters there are three tiers providing varying levels of benefits:

- AEO T1 – Verified on the basis of document submission only
- AEO T2 – In addition to document verification, onsite verification is also done
- AEO T3 – For AEO T2 holders who have enjoyed the status for 2 years only on the basis of document verification and for AEO T2 holders who has not enjoyed the status continuously or has introduced major changes in business, the applicant is subjected to physical verification.

For logistics providers, custodians or terminal operators, custom brokers and warehouse operators there is only one tier:

- AEO LO - In addition to document verification, onsite verification is done.

## 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 (being a notified Customs Station).	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	Exporter directly or through Customs Broker files export documents with customs (See note 1)		Customs inspects the shipment and assesses the shipping bill	
4	Exporter pays the duty, if applicable, and returns with proof of payment		Customs issues assessed Shipping Bill	
5		Carrier collects cargo and prepares for departure		

6		Carrier prepares Export Manifest <sup>27</sup> – which contains full list of all types of cargo to be unloaded or retained to be taken to next port	Customs issues 'let export' order. With this, responsibility of cargo is no longer with customs	
7	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	
8		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

- Zero-rated Supply formalities:
  - LUT for exports 'under bond' (see section 16(3)(a) of IGST Act)
  - IGST payment for exports 'under rebate' (see section 16(3)(b) of IGST Act)
- Customs formalities:
  - Submit tax invoice (foreign currency) and packing list
  - GR form (advisable to refer Master Circular on Export of Goods and Services issued by RBI annually in July 20XX)
  - Export license, if any
  - Shipping bill which are of 5 types:
    - Shipping bill for duty-free goods
    - Shipping bill for dutiable goods
    - Shipping bill for advance authorization / EPCG authorization exports

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<sup>27</sup> Export Manifest (Aircraft) Regulations, 1976, Export Manifest (Vessels) Regulations, 1976 and Export Report (Form) Regulations, 1976

- Shipping bill for duty drawback exports
- Shipping bill for ex-bond exports
- Export contract and technical brochure about description/classification of export goods
- Letter of credit and copy of bill of lading/airway bill.

## **Chapter 10**

# **Warehousing**

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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.

Duty free warehouses are permitted to be established under section 58A (called Special Warehouse). Such Special Warehouse is also commonly referred as 'Duty Free Shop'. For detailed procedure of DFS, reference may be had to FAQs published by Government available at <http://www.cbec.gov.in/resources//htdocs-cbec/customs/faq-cs-bwarehsing-11082016.pdf>

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/ EHTP/STP units or any warehouse where manufacture or other operations have been permitted, may be kept till their clearance from warehouse;
- Goods other than the capital goods intended for use in any EOU/EHTP/STP, may be kept, till their consumption or clearance from warehouse;
- 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 and for other goods, the period of one year may be extended by the Principal Commissioner or Commissioner of Customs by one year at a time. Interest is applicable on these goods after 90 days of warehousing.

Although the above concession – non-payment of import duties – continues for EOU/EHTP/STP units, the requirement of setting-up a private bonded warehouse has been dispensed with from 13 August 2016 for EOUs , EHTPs, STPs and Bio-technology Park units. Please refer to the chapter on EOUs for a detailed discussion on the events surrounding this change vide notification 44/2016-Customs dated 29 July 2016.

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 their premises;
- 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 presents 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.

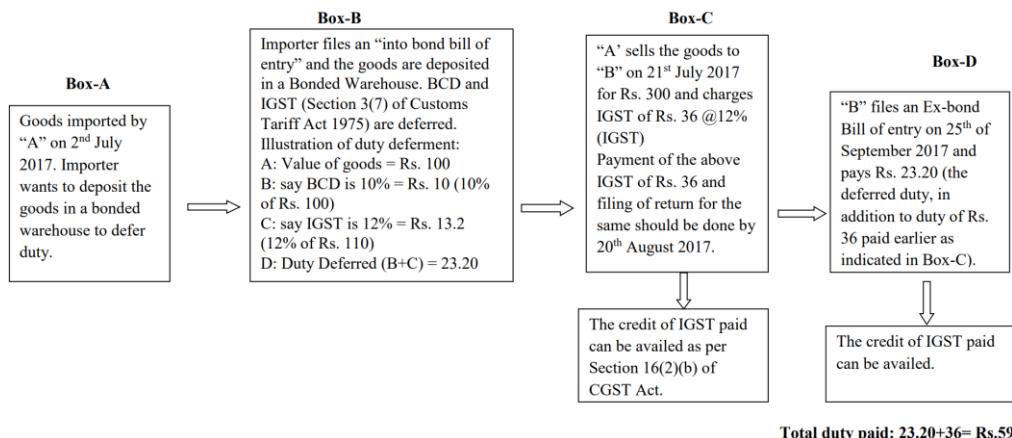
Every warehouse will be periodically audited for compliance with the Regulations. And upon sale / export of all warehoused goods, cancellation of warehouse license and the warehouse bond may be granted.

#### **Sale of Goods in ‘bonded warehouse’:**

Goods ‘brought into India’ and stored in a ‘bonded warehouse’ under section 57, 58 or 58A, import duties including duties equivalent to IGST are suspended (till they remain warehoused). But, while remaining in the bonded warehouse, they may be resold by the importer/warehouse-keeper. Although this is permissible under the warehousing provisions, it appears to violate the provisions of GST law in so far as such ‘in-bond sales’ appear to attract levy of GST. To this end, Government has issued circular 46/2017-Customs dated 24 November 2017. This circular requires GST to be paid on the ‘transacted price’ even though customs duties continue to be suspended. In other words, GST is to apply on sales in the interregnum when they remain in-bond on the ‘transacted value’. And when cleared from bonded-warehouse under an ex-bond bill of entry, appropriate import duties (on original import price) is to be assessed.

Illustrations from the circular are reproduced below for quick reference and they must be carefully studied to appreciate the treatment of law being clarified:

## ILLUSTRATIVE CHART- A

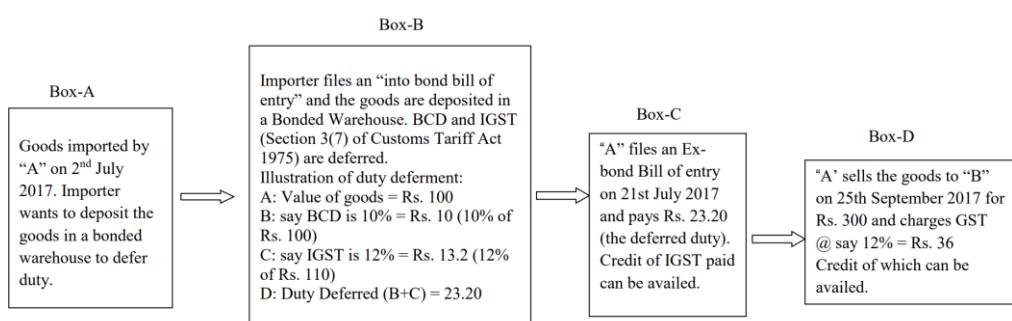
Goods imported, bonded and sold while in the Bonded Warehouse and clearance thereof:

[Note: In this case, when 'A' sells the goods to 'B', 'A' becomes the supplier of the goods as per IGST Act and is therefore liable to pay IGST under section 5 of IGST Act, as explained in Box-C. 'B' in turn becomes the importer and is therefore liable to pay the duties deferred as in Box-B, on ex-bonding, as explained in Box-D above.]

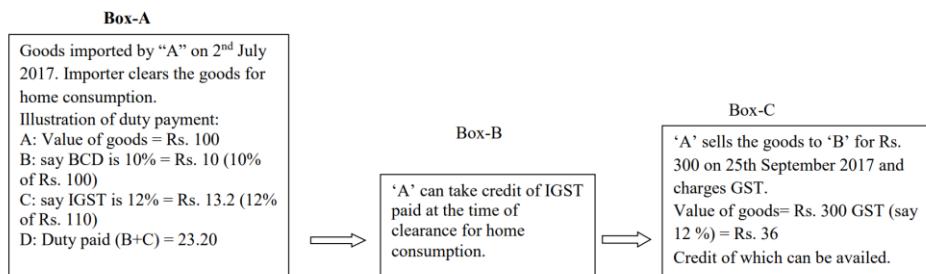
## ILLUSTRATIVE CHART- B

Goods imported, bonded and cleared for home consumption and subsequent sale thereof:

## ILLUSTRATION



## ILLUSTRATIVE CHART- C

Goods imported and cleared for home consumption and subsequent sale thereof:

Total duty paid: 23.20+36= Rs.59.2

The Finance Act, 2018 has introduced sub-section (8A) and (10A) to section 3 of Customs Tariff Act, 1975 to pronounce the above proposition. In terms of this amendment, a new valuation mechanism has been enabled to impose GST on in-bond sales at the 'transaction value'. This transaction value is not the same the valuation as determined under section 14 of Customs Act, 1962. Explanation inserted states that "*transaction value*", in relation to warehoused goods, means the amount paid or payable as consideration for the sale of such goods.

Reference may be had to Circular 3/1/2018-IGST dated 25 May 2018 wherein it was clarified that IGST will not be applicable to goods supplied while being deposited in a customs bonded warehouse after 1 April 2018. Further, the proviso to section 5(1) of the IGST Act, 2017 provides that the integrated tax on goods imported to India would be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975. Thus, in case of supply of the warehoused goods, the point of levy would be the point at which the duty is collection which is at the time of clearance of goods.

**Customs Audit –** After import of goods or export of goods has been assessed, Customs officers are permitted u/s 99A to carry out an audit of the said assessment. Such audit applies to importer, exporter and even licensee of a bonded warehouse / special bonded warehouse.

## Chapter 11

# Baggage Rules

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. Used personal effects are exempt without any limit and the duty-free allowance is in respect of dutiable articles imported as 'baggage' but not being articles listed in Annexure I (to the Baggage Rules) which comprises of articles that are not permitted to be imported as baggage even on payment of duty.

Duty free baggage allowance (of dutiable and non-prohibited articles) is as stated below:

Passenger*		Entry into India from	Duty-free Allowance**
Primary	Additional		
Any passenger	of Indian origin or usually resides in India	Other than Nepal, Bhutan, Myanmar	Rs. 50,000
Every tourist	of Foreign origin	Other than Nepal, Bhutan, Myanmar	Rs. 15,000
Any passenger (by air only)	of Indian origin or usually resides in India	Nepal, Bhutan, Myanmar	Rs. 15,000
Any passenger	Residing outside India for more than 1 year	Any	<u>Gold jewellery:</u> - Gentlemen – 20 grams with a value cap of Rs. 50,000 - Lady – 40 grams with a value cap of Rs. 1 lac

\* excludes infants who is allowed duty-free import of used personal effects only.

\*\* pooling of duty-free allowance with co-passengers/tourists is not allowed.

Customs duty is leviable at the rate of 38.50% (Basic Customs duty at 35% + Social welfare surcharge at 10% of BCD; IGST is exempt vide notification 43/2017-Cus. dated 1 July 2017) on the value of dutiable goods in Baggage that is in excess of the Duty-free Allowance. Baggage avails HSN 9803 and it applies notwithstanding the classification otherwise applicable to individual item imported as baggage. Definition of personal effects have undergone sea change and requires to be updated in keeping with the times. For e.g. Mobile phone and laptop (both used) can well be justified as objects of daily use by travelling passengers.

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. This is called 'TR Rule' where the following benefits are available:

<b>Duration of stay abroad</b>	<b>Articles allowed free of duty</b>	<b>Conditions</b>	<b>Relaxation</b>
From three months upto six months	Duty-free imports: - Personal articles - Household articles - Annexure III up to a total value of Rs. 60,000 Other than: - Annexure I - Annexure II	Facility available only if passenger is Indian	Nil
From six months upto one year	Duty-free imports: - Personal articles - Household articles - Annexure III up to a total value of Rs.1 lac Other than: - Annexure I - Annexure II	Facility available only if passenger is Indian	Nil
Minimum stay of one year during the preceding two years	Duty-free imports: - Personal articles - Household articles - Annexure III up to a total value of Rs.2 lacs Other than: - Annexure I - Annexure II	Facility available: - only if passenger is Indian and - once in 3 years	Nil
Minimum stay of two years or more.	Duty-free imports:	Facility available to any passenger if:	(a) For condition (i), shortfall of upto two

	<ul style="list-style-type: none"> <li>- Personal articles</li> <li>- Household articles</li> <li>- Annexure III up to total value of Rs.5 lacs</li> </ul> <p>Other than:</p> <ul style="list-style-type: none"> <li>- Annexure I</li> <li>- Annexure II</li> </ul>	<p>(i) minimum 2 year stay aboard prior to entry on TR</p>	<p>months in stay abroad can be condoned by DC/AC if early return is due to: -</p> <ul style="list-style-type: none"> <li>(i) terminal leave or vacation being availed of by the passenger; or</li> <li>(ii) any other special circumstances.</li> </ul>
		<p>(ii) Total stay in India on short visit should not exceed six months; and</p>	<p>(b) For condition (ii), the Principal Commissioner or Commissioner may condone short visits in excess of six months in special circumstances.</p>
		<p>(iii) Not availed this concession in the preceding three years.</p>	<p>No relaxation.</p>

Understanding TR Rule is very important as international executives frequently use this rule when they arrive in India for employment/profession. This concession is available even for unaccompanied baggage. Unaccompanied baggage can arrive up to 1 month after their arrival or up to 2 months before their arrival.

Concession under Baggage Rules can be availed by members of a crew on their last journey before cessation of their services as a crew along with a concession of Rs.1,500 towards items of gift such as chocolates, cosmetics, etc. But, during their services as a crew will enjoy additional concession due to their services.

Export Report is a declaration of articles carried by a passenger at the exit port which when produced along with the said articles (duly identified) would be allowed entry without applying Baggage Rules to them.

## **Chapter 12**

### **Drawback of Duty**

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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 follows<sup>28</sup>:

<b>Sl. No.</b>	<b>Time Period</b>	<b>Extent of drawback</b>
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.

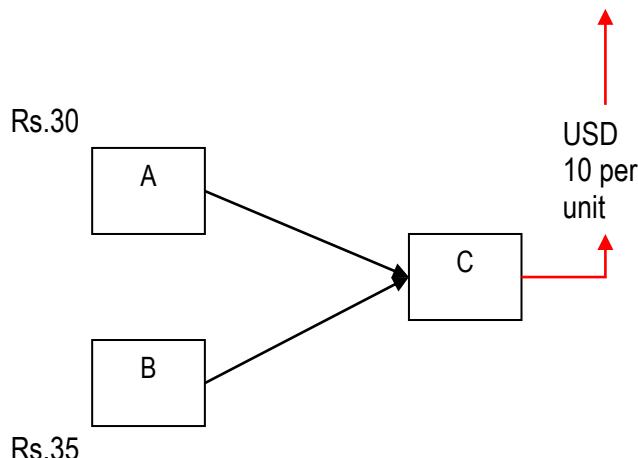
Similarly, it is possible that raw materials imported may be found deficient that necessitates returning to the supplier. In such cases, as long as the identity of the exported goods can be matched with the imported goods section 74 will address the situation. But, if the imported materials have been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

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<sup>28</sup> 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.35 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.65 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.65 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.65<sup>29</sup>. With that, the duty drawback would effectively recompense the exporter for the duty paid on A and B.

The Central Government has notified Customs and Central Excise Duty Drawback Rules, 2017 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:

<sup>29</sup> at exchange rate of 1 USD = 65 INR (assumed for sake of illustration)

- 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<sup>ths</sup> 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).

With the introduction of GST, 'drawback' has been defined to exclude GST paid on the inputs used in the export goods. Rightly so, because GST paid on inputs being available as input tax credit cannot be included in drawback. As a measure of neutralization of taxes/duties on export goods, CGST-SGST-IGST is neutralized through the mechanism of allowing input tax credit and zero-rated benefit of this GST. As regards, customs duties that are not included as input tax credit, through the mechanism of duty drawback.

## **Chapter 13**

# **Prohibitions and Restrictions**

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“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 but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported are complied with”. 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 serious than others.

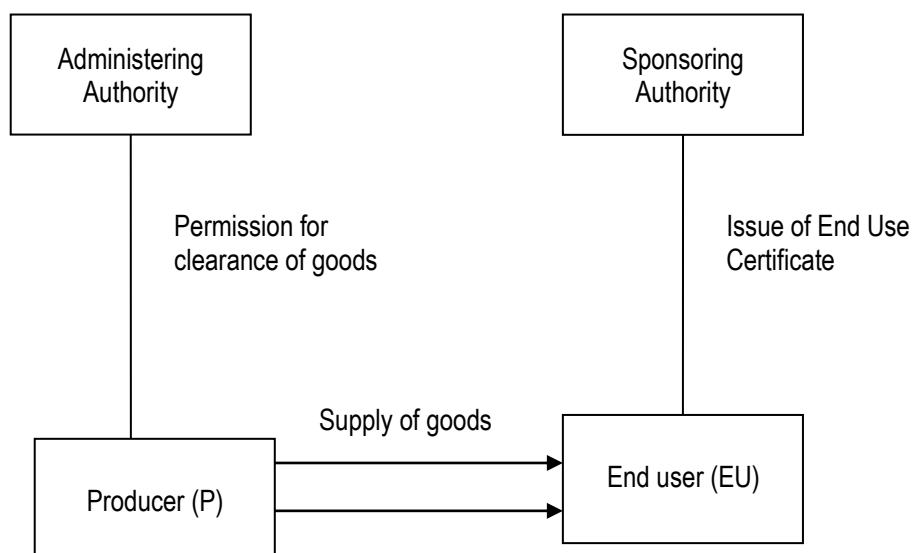
Customs authorities not only administer the Customs Act but are assigned responsibilities under other enactments that need enforcement / monitoring at the gateways of India like Environment Protection Act, Wild Life Act, Indian Trade and Merchandise Marks Act, Arms Act, etc.

## 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) Rules, 2017 and 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 mineral's 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.

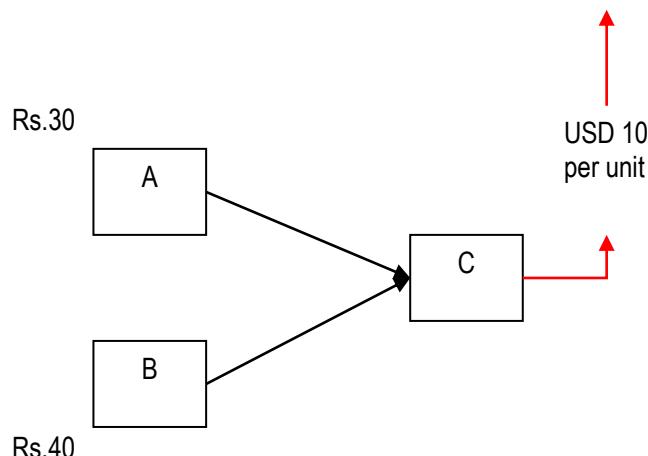
The permitting authority for clearance is the proper officer at the customs port or airport at which the goods are imported. One additional requirement under this regulation is that under regulation 7, once the last consignment under the project is cleared, within three months a statement indicating 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 Commerce and 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.40 are the import duties (excluding IGST on imports) 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.70 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

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 Exemption Schemes (Advance Authorization or Duty-Free Import Authorization schemes) 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 (Standard Input Output Norms or SION)
- Inventory of C not attached with any export obligations already

This kind of post-export license is also a feature of Duty Exemption schemes. Key aspects of these licenses are:

Criteria	Advance Authorization (AA)	Duty Free Import Authorization (DFIA)
Pre-export	Yes	No
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

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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:

- AA 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 (ARO) – 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**

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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 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. 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, up to 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 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:

<b>Supply by Manufacturer</b>	<b>Supply by Contractor / Sub-contractor</b>
Sale of excisable goods to license holders (AA or DFIA)	Supply to projects funded by notified Agencies / Funds (i) on duty-free supply terms of tender (ii) involving imported goods on 'delivered duty-paid' terms (iii) under international competitive bidding basis (iv) to specified agencies in App.7A
Sale of excisable goods to EOU/EHTP/STP/BTP	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
	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
- Terminal excise duty refund (on applicable goods).

### **Effect of GST**

With the introduction of GST, except for the list of articles that continue to be liable to Central Excise duty, deemed export benefits have been realigned to be in harmony with incentives/duty neutralization measures in GST. Deemed exports as defined in FTP are not in harmony with deemed exports notified under section 147 of CGST Act (refer 48/2017-CT dated 18 October 2017). GST rate applicable on supply to eligible recipients (deemed exports), the output tax will be 0.1% IGST or 0.05%+0.05% CGST-SGST. As a result, the recipient will enjoy a low rate of GST on inward supplies (which is also creditable) but the

supplier will now have an inverted rate structure and be eligible for refund of input tax incurred that is higher than this 0.1% rate of tax.

Pursuant to this notification, various concessions are allowed, namely:

<b>Notification</b>	<b>Nature of GST Concession</b>	<b>Condition</b>
48/2017-CT	Notifies deemed exports	
40/2017-CT (R)	Specifies CGST of 0.05% on supply to deemed exports	Supplier to claim refund due to 'rate inversion' in his hands. As no refundable taxes paid by deemed-exporter, no refund remains to be availed
41/2017-Int. (R)	Specifies IGST of 0.1% on supply to deemed exports	
78/2017-Cus.	Exempts IGST on imports	No refund since no IGST paid
79/2017-Cus.	Exempts IGST on imports	

Where the rate of GST has been reduced to 0.05% CGST for supplies by any Supplier where the Recipient and the Supply is included in as a deemed export under GST. With this measure, the Supplier would be liable to charge 0.1% IGST or 0.05%+0.05% CGST-SGST though much higher rate of tax may have been paid on this Supplier's inputs. This results in an 'inverted rate' situation for the Supplier who is entitled to claim refund under section 54(3) of CGST Act. Please note that this reduced rate of GST paid by the Recipient will be available as credit albeit for the nominal amount paid (refer para 13.2 of Circular 37/11/2018-GST dated 15 March 2018).

## Chapter 19

# **Survey of Incentive Scheme (SEIS/ MEIS)**

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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 and Central Excise Duty (where applicable) on freely transferable basis. These scrips are not eligible for payment of GST (refer Q7 in FAQs issued by DGFT on GST changes, see link in <http://dgftcom.nic.in/exim/2000/DGFT-GST-FAQ.pdf>)

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 markets as per Appx. 3B/3C	Notified services as per Appx. 3D above \$ 15,000 in the year of rendering service
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 and other sources 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.
- Duty Credit Scrips are valid for 18 months and revalidation will not be permitted.

### **Effect of GST**

Care should be taken to avoid claiming SEIS scrips in cases that do not fall with Appendix 3D. It is noticed that all service-exporters are making a beeline to claim SEIS scrips. Any benefit claimed under FTP is open for recovery if improper claim is discovered through an investigation. It must be ensured that the description of the service exported under other trade laws is in alignment with the description in Appendix 3D.

Duty credit scrips is classified under HSN 4907 and they are exempted from the whole of GST by an amendment to notification 2/2017-CT (R) dated 28 June 2018 by notification 35/2017-CT (R) dated on 13 October 2017. It is important to note that duty credit scrips are held to be 'goods' for purposes of GST.

## **Chapter 20**

# **Export Oriented Unit**

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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.

Exemption from duties is allowed vide notification 52/2003-Cus. dated 31 March 2003. This notification grants exemption 'subject to conditions' without any requirement of 'warehousing'. EOUs have been delicensed from 13 August 2016 and made liable to 'condition' of safe-keeping in the premises. End-use of exempt goods is validated at first by the oversight-authority and any movement or disposal thereafter is with approval by Customs authorities. Finished goods manufactured by EOUs are permitted to be exported outside India, transferred to other EOUs or sold in DTA (units in Domestic Tariff Area). There is no incidence of duty on export and underlying obligation of duty foregone is passed on to a transferee-EOU. But in case of DTA sales, along with payment of GST (Central Excise in case of select goods still liable to CE duty) the finished goods will entail reversal of duties foregone on the inputs used in their manufacture (based on SION).

The export-products are exported directly from the EOU and 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 two, from Customs.

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

EOUs permitted to sell their finished product in DTA are monitored based on their overall export earnings position such that it meets the minimum norms for the given industry. Since, EOUs operate under a 'special condition' and not as a 'warehouse', provisions of section 65 do not apply in respect of DTA sales by EOUs, finished goods sold in DTA will be liable to GST along with reversal of exemptions availed.

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-neutralization benefits on their production and supply.

Warehousing provisions recast in 2016 are:

- Warehouse (Custody and Handling of Goods) Regulations, 2016
- Special Warehouse Licensing Regulations, 2016
- Special Warehouse (Custody and Handling of Goods) Regulations, 2016
- Private Warehouse Licensing Regulations, 2016
- Public Warehouse Licensing Regulations, 2016
- Warehoused Goods (Removal) Regulations, 2016

Duty exemptions to EOUs are as follows:

<b>Duty</b>	<b>Capital Goods</b>	<b>Inputs</b>	<b>Input Services</b>
Basic customs duty	Exempt	Exempt	Exempt
Customs surcharge	Exempt	Exempt	Exempt
Additional customs duty*	Exempt	Exempt	Exempt
IGST and Cess*	Exempt	Exempt	Exempt

\* exemption to expire on 1 April 2019 vide 65/2018-Cus. dated 24 September 2018

In order to 'ease' doing business in India, 44/2016-Cus. dated 26 July 2016 has brought about the following changes:

- Warehousing discontinued

- Duty exemptions continued
- Control through 'condition' monitoring

As a result, EOUs are no longer have the levy 'suspended' but 'deferred'. This is a very significant change that has been brought about in relation to operation of EOUs. Circular 35/2016-Cus. dated 26 July 2016 explains the nature of this change brought about. With this change, EOUs are now a location within the *terra firma* of India and transactions with EOUs will entail GST. Please refer to discussion on GST effect of in-bond sales in the chapter on Warehousing.

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 neutralization 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**

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As could be observed from a study of the scheme of EOU, 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 (UAC) 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).

It is very important to call to attention, the following provision from SEZ Act:

*"53. A Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations."*

From the above, it can be noted that supplies from domestic tariff are (DTA) to SEZ is treated as export by the DTA unit and the converse as import. Reference may be had to procedures for import and export discussed in an earlier chapter.

As regards services supplied to SEZ, the UAC Approved services by UAC are found to be listed in <http://sezindia.gov.in/writereaddata/GeneralNotifications/Uniform%20list.pdf>

With the introduction of GST, supplies ‘to or by’ SEZs are always inter-State supply. And supplies ‘to’ SEZs are eligible for benefit of zero-rated supply. Reference may be had to the detailed discussion in the Background Material of ICAI on GST in the context of section 16 of IGST Act where the working of zero-rated benefit and Customs duty/GST-effect of DTA supplies are illustrated.

## **Chapter 22**

# **Adjudication**

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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 been 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

Some key changes made by Finance Act, 2018 in relation to adjudication are as follows:

- Pre-Notice Consultation – is permitted to be held before SCN is issued to explore possibility of speedy disposal of matter in case assessee amiable to admit and discharge liability along with interest and concession in penalty, to the extent permitted, may be extended;
- Issue of Supplementary Notice – where SCN issued can be supplied any deficiencies through such a Supplement;
- Service by e-mail – where e-mail transmissions is recognized to be valid service of all official transmissions such as notice, hearing intimation and orders;

These changes are remarkable as they seem to undermine the legal significance of 'notice' and the concept of 'service'. Unless these changes are overturned, the course of adjudication is permanently affected by these amendments. Opportunity available in the form of pre-notice consultations are welcome whereas service by e-mail can be quite onerous.

## **Chapter 23**

## **Refund**

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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. Its 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 borne 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 can be found in *Mafatlal Industries Ltd. v. UoI & Others* 1997 (89) ELT 247 (SC)

## Refund Under GST

Refund is defined in explanation to Section 54 of the CGST Act, 2017. As per the said definition, refund includes refund of tax and interest paid on:

1. Zero-rated supplies of goods or services or both; or
2. Inputs or input services used in the effecting such zero-rated supplies of goods or services or both; or
3. Supply of goods regarded as deemed exports; or
4. Refund of unutilized input tax credit at the end of any tax period in case the rate of output tax is less than the rate of input tax.

Refund application is to be filed before the expiry of two years from the relevant date. The relevant date is different for each situation and the same is provided below:

Situation	Relevant date	
Refund is in respect of goods exported outside India (or on inputs/ input services used in such goods)		
(i) By sea	Date on which the ship or the aircraft in which such goods are loaded, leaves India	
(ii) By Air		
(iii) By land	Date on which such goods pass the frontier	
(iv) By post	Date of dispatch of goods by the concerned Post Office to a place outside India	
Refund in respect of deemed exports	Date on which the return relating to such deemed exports is filed	
Refund is in respect of services exported (or on inputs/ input services used in such services)	Where supply of service completed prior to receipt of payment	Date of receipt of payment in convertible foreign exchange
	Where payment for service received in advance	Date of issue of invoice
Tax becomes refundable as a consequence of: (i) Judgment (ii) Decree (iii) Order (iv) Direction of Appellate Authority, Appellate Tribunal or any Court	Date of communication of such judgment, decree, order or direction	
Refund of unutilized input tax credit	End of the financial year in which such claim for refund arises	
Tax is paid provisionally under this Act or the rules made thereunder	Date of adjustment of tax after the final assessment thereof.	
In case of a person other than the supplier	Date of receipt of goods or services by such person	
In any other case	Date of payment of tax	

Any person, except the persons covered under notification issued under section 55, claiming refund of any tax, interest, penalty, fees or any other amount paid by him, other than refund of integrated tax paid on goods exported out of India, may file an application, either electronically in FORM GST RFD-01 through the common portal, either directly or through a Facilitation Centre notified by the Commissioner OR manually in **FORM GST RFD-1A**

Rule 96 of the CGST Rules, shipping bill filed by an exporter shall be deemed to be an application for refund of IGST tax paid on the goods exported out of India

As per Rule 96A of CGST Rules, 2017, any registered person availing the option to make a zero-rated supply of goods or services without payment of integrated tax shall furnish a bond or a Letter of Undertaking in **FORM GST RFD-11** prior to execution of such supply.

### **Deemed Export**

Deemed Exports are defined as “Supplies” as may be notified under Section 147 of the CGST Act, where goods supplied do not leave India, and payment for such supplies is received either in Indian rupees or in convertible foreign exchange, if such goods are manufactured in India

The Central Government vide *Notification No. 48/2017 – Central Tax dated 18-10-2017* has notified the following items as “Deemed Exports”

- Supply of goods by a registered person against Advance Authorization
- Supply of capital goods by a registered person against Export Promotion Capital Goods Authorization (EPCG)
- Supply of goods by a registered person to Export Oriented Unit (EOU). EOU refers to
  - Export Oriented Unit (EOU)
  - Electronic Hardware Technology Park Unit (EHTP) or
  - Software Technology Park Unit (STP) or
  - Bio-Technology Park Unit (BTP).

[The Government vide Circular No. 14/14/2017-GST dated 6 November 2017, has issued detailed guidelines on the procedure to be adopted for Supply of goods to EOU, EHTP, STP and BTP]

- Supply of gold by a bank or Public Sector Undertaking specified in the *Notification No. 50/2017-Customs, dated 30 June 2017* (as amended) against Advance Authorization.

It is imperative to state here that, The Foreign Trade Policy (2015-2020) in terms of Para 7.02 has provided a list of Supply which are Deemed Supplies under the FTP. However, only the aforesaid four supplies have been covered under Deemed Export under GST. Further, the recipient is eligible to take Input Tax Credit of the tax paid by the Supplier subject to restrictions.

What is the procedure for claim and grant of refund of IGST paid on goods exported out of India?

In terms of Rule 96 of the CGST Rules, shipping bill filed by an exporter shall be deemed to be an application for refund of IGST tax paid on the goods exported out of India, when

- (a) person in charge of the conveyance carrying the export goods duly files an export manifest or an export report covering no. and date of shipping bills or bills of export; and
- (b) the applicant has furnished a valid return in **FORM GSTR- 3B**.

In this regard, the details of the relevant export invoices contained in **FORM GSTR-1** shall be transmitted electronically by the common portal to the system designated by the Customs ("Custom System") and said system will revert the confirmation of export of goods. In case where, date of furnishing **FORM GSTR-1** for a tax period has been extended, the supplier shall furnish the information relating to exports as specified in Table 6A of **FORM GSTR-1** (auto-drafted for the said tax period) after the return in **FORM GSTR-3B** has been furnished and the same shall be transmitted electronically to Custom System. [Refer Notification No. 51/2017 – Central Tax dated 28.10.2017]

Upon the receipt of the information regarding the furnishing of a valid return in **FORM GSTR- 3B**, the Custom System shall process the claim for refund and an amount equal to the IGST paid in respect of each shipping bill or bill of export, shall be electronically credited to the bank account of the applicant mentioned in his registration particulars and as intimated to the Customs authorities.

Moreover, the Central Government vide Circular No. 37/11/2018-GST dated 15 March 2018 has clarified following issues in relation to processing of claims for refund under GST. [These instructions shall apply to exports made on or after 1<sup>st</sup> July 2017]:

1. Non-availment of drawback:

- It has been clarified that the drawback of Central Tax and Integrated Tax should not have been availed while claiming refund of accumulated ITC on zero rated supplies made without payment of tax.
- A supplier availing of drawback only with respect to basic customs duty shall be eligible for refund of unutilized input tax credit of Central tax / State tax / Union territory tax / Integrated tax / Compensation cess under section 54(3) of CGST Act.
- It is further clarified that refund of eligible credit on account of State tax shall be available even if the supplier of goods or services or both has availed of drawback in respect of central tax.

Is pertinent to mention that Rule 2(a) of C & CE Drawback Rules, 2017 already excludes GST paid on imported material and this clarification does not lay any new tax position. As such, drawback and zero-rated benefit can co-exist and operate simultaneously.

Further, Rule 96(10) of the CGST Rules places a restriction in case claim of IGST refund also implies that IGST refund can co-exist with drawback of non-GST Central duties (NGCDs). Note that refund of IGST arises when exports are on 'payment of IGST' under section 16(3(b) of IGST Act. Moreover, restriction in rule 96(10) is to ensure that the domestic Supplier and Exporter/Deemed-Exporter cannot both claim refund (language appears to place an embargo on refund to exporter);

48/2017-CT	Notifies deemed exports	Supplier to claim refund due to 'rate inversion' in his hands. As no refundable taxes paid by deemed-exporter, no refund remains to be availed
40/2017-CT (R)	Specifies CGST of 0.05% on supply to deemed exports	
41/2017-Int. (R)	Specifies IGST of 0.1% on supply to deemed exports	
78/2017-Cus.	Exempts IGST on imports	No refund since no IGST paid
79/2017-Cus.	Exempts IGST on imports	

Further, para 13.2 of this circular, clarified that GST at 0.5%/0.1% in case of supplies to Merchant Exporters causing 'rate inversion' in the hands of Supplier, while the Supplier is eligible to refund of relatable ITC, the ME is eligible to ITC of the (nominal rates of) GST paid

NGCDs are neutralized through drawback, all GSTs are neutralized through zero-rated supply as clarified here. It is therefore clear that SGST is refundable vide zero-rated supply facility without being affected by drawback provisions.

2. Amendment through Table 9 of GSTR-1: It has been clarified that if a taxpayer has committed an error while entering the details of an invoice / shipping bill / bill of export in Table 6A or Table 6B of FORM GSTR-1 due to which refund claims are not being processed, so now taxpayer can rectify the same in Table 9 of FORM GSTR-1 in order to get the refund.

It may be noted that, Rectification does not limit the number of times such rectification may be made. It is prudent to ensure that the correct amounts are reflected in Table 9 of GSTR-1 so as to facilitate refund claims.

3. Exports without LUT: It has been clarified that the facility for export under LUT may be allowed on *ex post facto* basis taking into accounts the facts and circumstances of each case.
4. Exports after specified period: It has been reported that the exporters have been asked to pay integrated tax where the goods have been exported but not within 3 months from the date of the issue of the invoice for export. In this regard, it is emphasized that exports have been zero rated under the Integrated Goods and Services Tax Act, 2017 (IGST Act) and as long as goods have actually been exported even after a period of

three months, payment of integrated tax first and claiming refund at a subsequent date should not be insisted upon.

Therefore, in such cases, the jurisdictional Commissioner may consider granting extension of time limit for export as provided in the said sub-rule on post facto basis keeping in view the facts and circumstances of each case. The same principle should be followed in case of export of services.

5. **Deficiency memo:** In this connection, a clarification has been provided that once an applicant has been communicated the deficiencies in respect of a particular application, the applicant shall furnish a fresh refund application after rectification of such deficiencies and once an application has been submitted afresh, pursuant to a deficiency memo, the proper officer will not serve another deficiency memo with respect to the application for the same period, unless the deficiencies pointed out in the original memo remain unrectified, either wholly or partly, or any other substantive deficiency is noticed subsequently.
6. **Self-declaration for non-prosecution:** In terms of Notification No. 37/2017-Central Tax dated 4 October 2017, the facility of export under LUT is available only to those who have not been prosecuted for any offence under the CGST Act or the IGST Act for which a person intending to export under LUT is required to give a self-declaration at the time of submission of LUT that he has not been prosecuted. In this regard it has been clarified that requirement is already satisfied in case of exports under LUT and asking for self-declaration with every refund claim where the exports have been made under LUT is not warranted.
7. **Refund of transitional credit:** As per section 54 Refund of unutilized input tax credit availed on inputs and input services during the relevant period is allowed. in this regard it has been clarified that the transitional credit pertains to duties and taxes paid under the existing laws viz., under Central Excise Act, 1944 and Chapter V of the Finance Act, 1994, the same cannot be said to have been availed during the relevant period and thus, cannot be treated as part of 'Net ITC' therefore, not refundable.
8. **Discrepancy between values of GST invoice and shipping bill/bill of export -** It has been clarified that in case of discrepancy in value of the goods declared in the GST invoice and shipping bill/bill of export than the value in the GST invoice and corresponding shipping bill / bill of export should be examined and the lower of the two values should be sanctioned as refund.

*In the authors view, this clarification brings to light the practice that was common under Central Excise for 'assessable value' to be different from 'commercial value'. Invoice under section 31 would be for 'assessable value' which can be different from 'commercial value'. Clue can be taken from here for issuing Tax Invoice for exchange and barter transactions and for supplies where consideration is in non-monetary form. Tax Invoice is required in all these cases even though no 'price' may exist.*

9. **Refund of taxes paid under existing laws:** Section 142 of the CGST Act provides that refunds of tax/duty paid under the existing law shall be disposed of in accordance with the provisions of the existing law. It is observed that certain taxpayers have applied for such refund claims in FORM GST RFD-01A also. In this regard, it has been advised through this circular to reject such applications and pass a rejection order in FORM GST PMT-03 and communicate the same on the common portal in FORM GST RFD-01B.
- Furthermore, the amount arising out of refund claims under existing laws shall be refunded in cash only. It should be insured that no refund of the amount of CENVAT credit is granted in case the said amount has been transitioned under GST.
10. **Filing frequency of Refunds:** In this regard, it is hereby clarified that the exporter, at his option, may file refund claim for one calendar month / quarter or by clubbing successive calendar months / quarters. The calendar month(s) / quarter(s) for which refund claim has been filed, however, cannot spread across different financial years.
11. **BRC / FIRC for export of goods:** In case of export of goods, realization of consideration is not a pre-condition. Therefore, it is clarified that, insistence on proof of realization of export proceeds for processing of refund claims related to export of goods has not been envisaged in the law and should not be insisted upon.
12. **Supplies to Merchant Exporters:** It is clarified that the benefit of supplies at concessional rate is subject to certain conditions and the said benefit is optional and the goods may be procured at the normal applicable tax rate. It is also clarified that the supplier who supplies goods at the concessional rate is also eligible for refund on account of inverted tax structure as per the provisions of section 54 of the CGST Act.
13. **Requirement of invoices for processing of claims for refund:** A list of documents required for processing the various categories of refund claims on exports is provided in the Table below. Apart from the documents listed in the Table below, no other documents should be called for from the taxpayers, unless the same are not available with the officers electronically:

<b>Table</b>	
<b>Type of Refund</b>	<b>Documents</b>
Export of Services with payment of tax (Refund of IGST paid on export of services)	<ul style="list-style-type: none"> <li>• Copy of FORM RFD-01A filed on common portal</li> <li>• Copy of Statement 2 of FORM RFD-01A</li> <li>• Invoices w.r.t. input, input services and capital goods</li> <li>• BRC/FIRC for export of services</li> <li>• Undertaking / Declaration in FORM RFD-01A</li> </ul>

Export (goods or services) without payment of tax (Refund of accumulated ITC of IGST / CGST / SGST / UTGST / Cess)	<ul style="list-style-type: none"> <li>• Copy of FORM RFD-01A filed on common portal</li> <li>• Copy of Statement 3A of FORM RFD-01A generated on common portal</li> <li>• Copy of Statement 3 of FORM RFD-01A</li> <li>• Invoices w.r.t. input and input services</li> <li>• BRC/FIRC for export of services</li> <li>• Undertaking / Declaration in FORM RFD-01A</li> </ul>
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Under GST the **Central Government vide Circular No. 40/14/2018-GST dated 6 April 2018 has clarified regarding the acceptance of LUTs being submitted online in FORM GST RFD-11 by making certain modifications in Circular no. 8/8/2017 dated 4 October 2017.** Modifications made are explained below:

- (a) **Form for LUT:** Earlier the (exporters) were required to download the **FORM GST RFD-11** from the website of the Central Board of Excise and Customs ([www.cbec.gov.in](http://www.cbec.gov.in)) and furnish the duly filled form to the jurisdictional Deputy/Assistant Commissioner Now, the registered person (exporters) shall fill and submit **FORM GST RFD-11** on the common portal and the LUT shall be deemed to be accepted as soon as an acknowledgement for the same, bearing the Application Reference Number (ARN), is generated online.
- (b) **Documents for LUT:** Earlier, self-declaration by the exporter to the effect that he has not been prosecuted should suffice for the purposes of Notification No. 37/2017- Central Tax dated 4 October 2017. Now, by this circular it has been clarified that no such document needs to be physically submitted to the jurisdictional office for acceptance of LUT.

**Acceptance of LUT/bond:** Earlier, LUT/bond should be accepted within a period of 3 working days of its receipt along with the self-declaration and if not accepted within a period of 3 working days from the date of submission, it shall be deemed to be accepted. Now the LUT shall be deemed to have been accepted as soon as an acknowledgement for the same, bearing the Application Reference Number (ARN), is generated online. If it is discovered that an exporter whose LUT has been so accepted, was ineligible to furnish an LUT in place of bond as per Notification No. 37/2017-Central Tax, then the exporter's LUT will be liable for rejection. In case of rejection, the LUT shall be deemed to have been rejected ab initio."

## Chapter 24

# Appeals and Review

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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 of any officer are found (within 3 months) by the Committee of Principal Commissioner or 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 said 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 said Commissioner of Customs to so file the appeal
Interim compliance	Mandatory pre-deposit of 7.5% of disputed, duty or duty + penalty or penalty, as demanded	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 Principal Commissioner or 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(1))
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 said 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	Not applicable

	stage of disputed, duty or duty + penalty or penalty demanded	
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	

\* LB of Tribunal had ruled that the pre-deposit of 10% for second appeal is in addition to the pre-deposit of 7.5% made at the time of first appeal in re. Quantum of Mandatory Deposit (2017-TIOL-1414-CESTAT-DEL-LB). This decision came to be stayed by Hon'ble High Court of Delhi in WP 4551/2017 vide interim order on 23 May 2017. Accordingly, Tribunal issued circular F No. 01/05/Circular/CESTAT/2015 dated 11 July 2017 that insisting on a further deposit of 10% for acceptance of second appeal be kept in abeyance.

## 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

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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 days 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 Principal Commissioner or Commissioner of Customs to furnish his report within 30 days based on facts
Interim orders	Authorized 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**

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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:

<b>Parameter</b>	<b>Advance Ruling</b>
Key Aspect	"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 and have a valid IEC (ii) a JV in India or (iii) a notified class of resident persons which includes any public sector company and resident private limited company
Disqualification	(a) resident Indian who does not fit in the definition of "Applicant" (b) questions that are hypothetical in nature (c) question is already pending in applicant's case before an officer of Customs / Tribunal (d) identical matter decided by Tribunal or Court
Authority	To issue a 'binding' interpretation on Customs matters
Scope of application	(a) classification of goods (b) applicability of exemption notification (c) applicability of valuation principles (d) applicability of notification levying duty under Customs Act or any other law (e) determination of 'origin' of goods
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 Principal Commissioner or 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
Appeal	Orders passed by AAR are now provided to be appealable within 60 days before the Appellate Authority for AAR newly constituted

## Chapter 27

# Offences and Penalties

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"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* – justice to serve society at large
- *jus in personam* – justice to sever specific person(s)

Offending actions are:

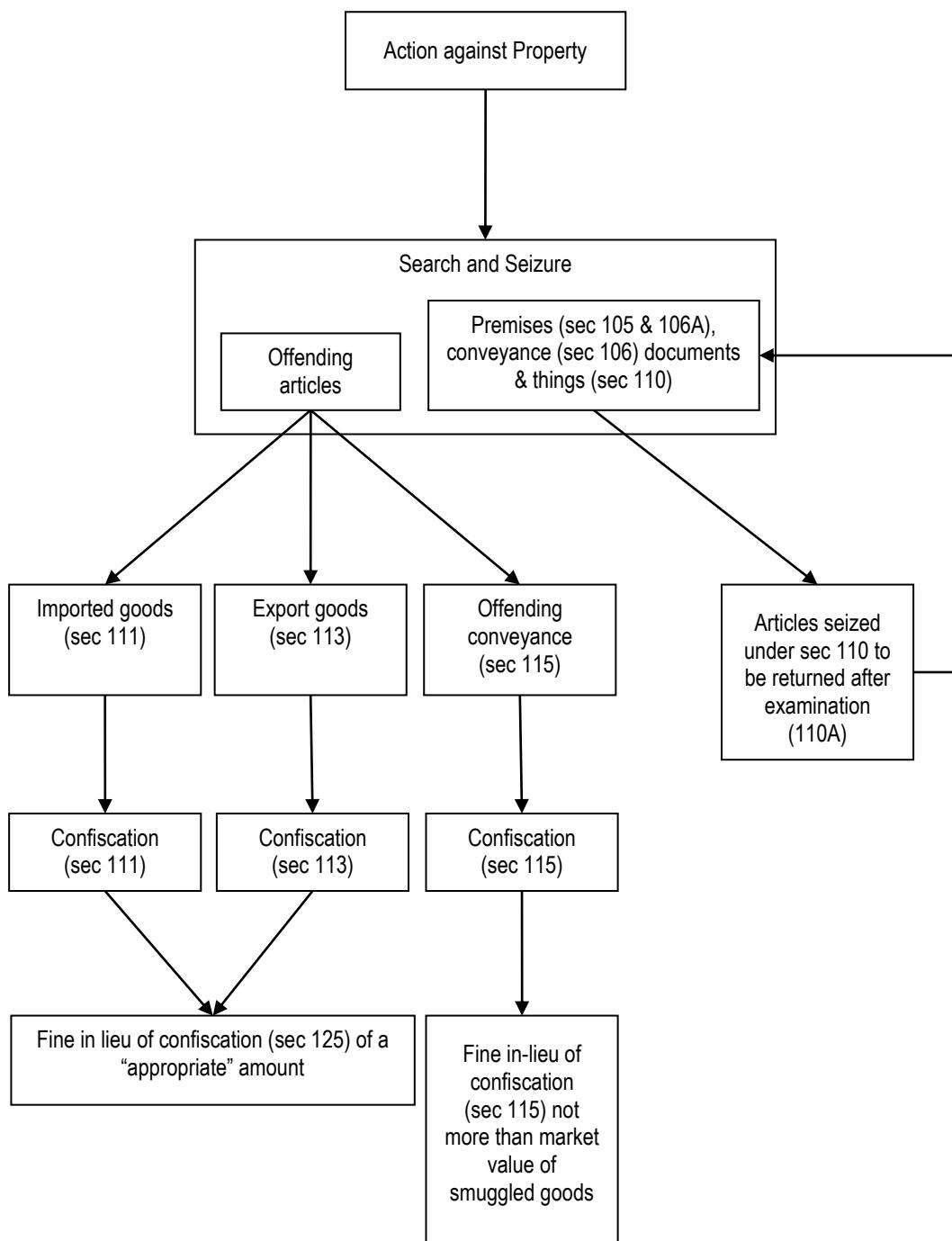
- goods that have been imported in a way that is illegal
- goods concerned with an 'attempt' to export in a way that is illegal
- conveyance used knowingly in such illegal import or (attempt to) export

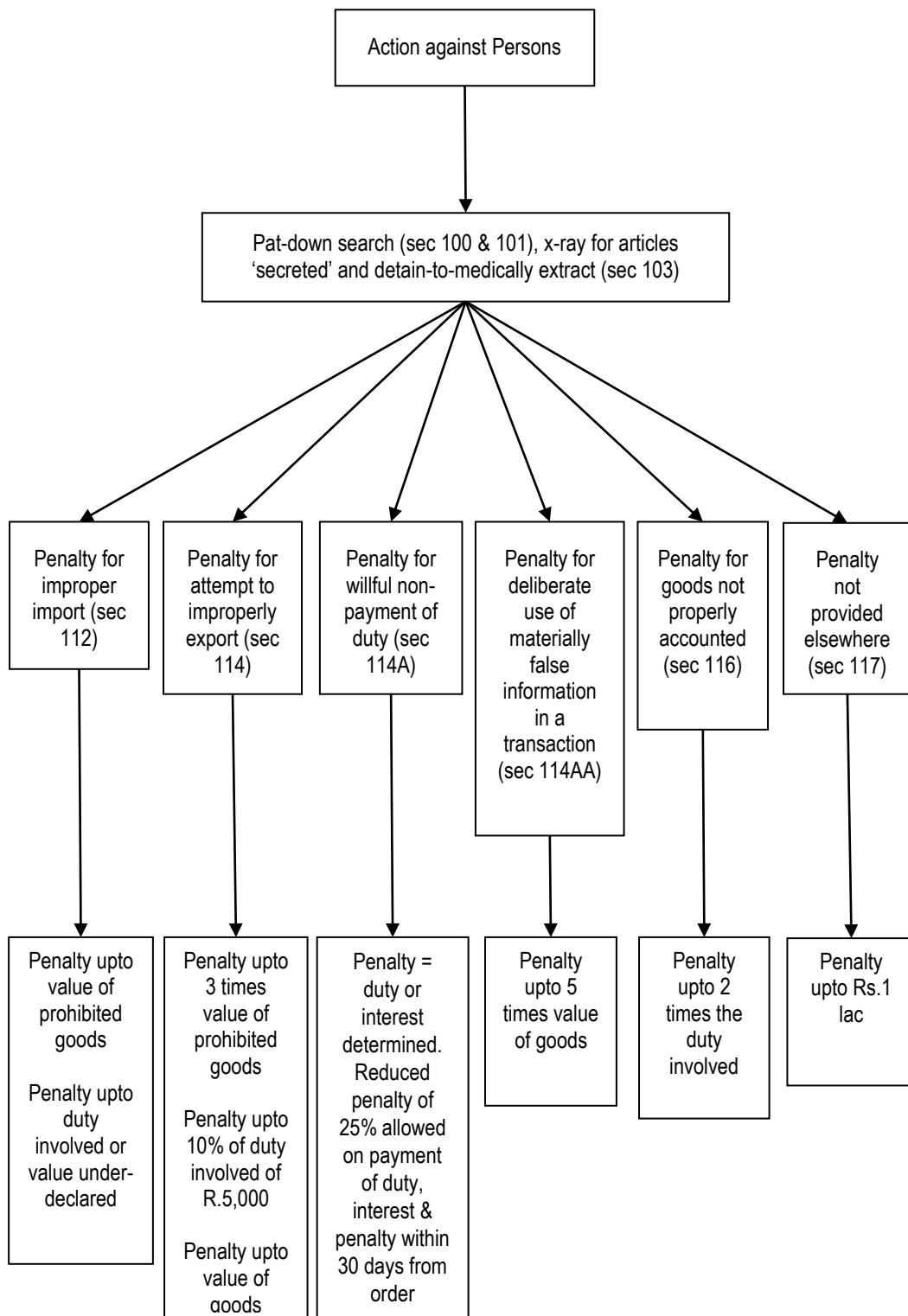
Goods that are imported or attempted for export are of two kinds:

- 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 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 Principal Commissioner or 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.

