

# Duty Drawback Scheme

Various schemes like EOU, SEZ, DEEC, manufacture under bond etc. are available to obtain inputs without payment of customs duty/excise duty or obtain refund of duty paid on inputs. In case of Central Excise, Manufacturers can avail Cenvat credit of duty paid on inputs and utilise the same for payment of duty on other goods sold in India, or they can obtain refund. Schemes like manufacture under bond are also available for customs. Manufacturers or processors who are unable to avail any of these schemes can avail 'duty drawback'. Here, the excise duty and customs duty paid on inputs is refunded to the exporter of finished product by way of '*duty drawback*'. Section 75 of Customs Act provide for drawback on materials used in manufacture or processing of export product. Section 37 of Central Excise Act allows Central Government to frame rules for purpose of the Act. Under these powers, 'Customs and Central Excise Duties Drawback Rules, 1995' have been framed.

It may be noted that duty drawback under section 75 is granted when imported materials are used in the manufacture of goods which are then exported, while duty drawback under section 74 is applicable when imported goods are re-exported as it is and article is easily identifiable.

***Drawback of customs and excise duty paid on inputs*** - Drawback means the rebate of duty chargeable on any imported materials or excisable materials used in manufacture or processing of goods which are manufactured in India and exported. Export means taking out of India. Supply of stores for use in vessel or aircraft proceeding to foreign port is also covered, since it is treated as 'export' as per section 89 of Customs Act.

Duty Drawback is equal to (a) customs duty paid on imported inputs including SAD *plus* (b) excise duty paid on indigenous inputs. Duty paid on packing material is also eligible. However, if inputs are obtained without payment of customs/excise duty, no drawback will be paid. If customs/excise duty is paid on part of inputs or rebate/refund is obtained, only that part on which duty is paid and on which rebate/refund is not obtained will be eligible for drawback. *No drawback is available on other taxes like sales tax and octroi.*

Duty drawback of SAD (Special Additional Duty) is allowable. – MF(DR) circular No. 58/2002-Cus dated 12-9-2002.

***Processing also eligible for Drawback*** - Drawback is allowable if any manufacture, process or any operation is carried out in India [section 75(1) of Customs Act]. Thus, drawback is available not only on manufacture, but also on processing and job work, where goods may not change its identity and no 'manufacture' has taken place.

**Type of Drawback Rates** – All Industry Drawback rates are fixed by Directorate of Drawback, Dept. of Revenue, Ministry of Finance, Govt. of India, Jeevan Deep, Parliament Street, New Delhi - 110 001. The rates are periodically revised - normally on 1st June every year. Data from industry is collected for this purpose. The types of rates are as follows :

**ALL INDUSTRY RATE** - This rate is fixed under rule 3 of Drawback Rules by considering average quantity and value of each class of inputs imported or manufactured in India. Average amount of duties paid is considered. These rates are fixed for broad categories of products. The rates include drawback on packing materials. Normally, the rates are revised every year from 1st June, i.e. after considering the impact of budget, which is presented in February every year. All Industry

drawback rate is not fixed if the rate is less than 1% of FOB Value, unless the drawback claim per shipment exceeds Rs 500.

The AIR (All Industry Rate) is usually fixed as % of FOB price of export products. However, in respect of many export products, duty drawback cap (ceiling) has been prescribed, so that even if an exporter gets high price, his duty drawback eligibility does not go above the ceiling prescribed.

The table gives allocation of the drawback allowed under two heads namely - Customs and Central Excise. The Customs portion covers basic customs duty, surcharge and SAD. Excise portion covers basic and special excise duty and CVD. Duty drawback of customs portion can be paid even if exporter has availed Cenvat credit, as Cenvat credit is only of excise duty and CVD. - MF(DR) circular No. 83/2000-Cus dated 16-10-2000.

The All Industry Rate (AIR) is fixed on the basis of weighted averages of consumption of imported / indigenous inputs of a representative cross section of exporters and average incidence of duties. Hence, individual exporter is not required to produce any evidence in respect of actual duties paid by him on inputs. – MF(DR) circular No. 24/2001-Cus dated 20.4.2001.

**BRAND RATE** - It is possible to fix All Industry Rate only for some standard products. It cannot be fixed for special type of products. In such cases, *brand rate* is fixed under rule 6. The manufacturer has to submit application with all details to Commissioner, Central Excise. Such application must be made within 60 days of export. This period can be extended by Central Government by further 30 days. Further extension can be granted even upto one year in if delay was due to abnormal situations as explained in MF(DR) circular No. 82/98-Cus dated 29-10-1998.

**SPECIAL BRAND RATE** - All Industry rate is fixed on average basis. Thus, a particular manufacturer may find that the actual duty paid on inputs is higher than All Industry Rate fixed for his product. In such case, he can apply under rule 7 of Drawback Rules for fixation of Special Brand Rate, within 30 days from export. The conditions of eligibility are (a) the all Industry rate fixed should be less than 80% of the duties paid by him (b) rate should not be less than 1% of FOB value of product except when amount of drawback per shipment is more than Rs. 500 (c) export value is not less than the value of imported material used in them - i.e. there should not be '*negative value addition*'.

**Drawback Rate Fixation** - Forms and procedures have been prescribed for submitting details to jurisdictional Commissioner of Central Excise, who will fix the rate of duty drawback. [Earlier, it was done by Director of Drawback, New Delhi, upto 313-2003]

**Drawback claim procedure** - Exporter shall endorse on the 'shipping bill' the description, quantity and other details to decide whether goods are eligible for duty drawback. He should submit one extra copy of shipping bill for drawback purposes. Copy of Invoice should be submitted.

**DECLARATION BY EXPORTER** - A declaration should be made rule 12(1)(a)(ii) of Duty Drawback Rules, on shipping bill or bill of export that claim of drawback is being made and that duties of customs and excise have been paid on materials, containers and packing materials and that no separate claim for rebate of duty will be made. If the exporter or his authorised agent was unable to make such declaration due to reasons beyond his control, Commissioner of Customs can grant exemption from this provision of making declaration on shipping bill or bill of export.

Further declarations are also required when brand rate or special brand rate has been fixed. These declarations have to be signed by exporter.

Triplicate copy of shipping Bill is the drawback copy and should be marked as 'Drawback Claim Copy'. It should be submitted with pre-receipt on reverse side with revenue stamp.

DECLARATION FOR NON-AVAILMENT OF CENVAT – (a) If the manufacturer-exporter or supporting manufacturer of merchant exporter is registered with Central Excise, fact of non-availment of Cenvat credit can be verified from ARE-1 form furnished (b) If the manufacturer-exporter or supporting manufacturer of merchant exporter is not registered with Central Excise, they have to submit self-declaration about non-availment of Cenvat in prescribed form. – MF(DR) circular No. 8/2003-Cus dated 17-2-2003. - - The drawback rate consists of two components - customs portion (consisting of basic customs duty, surcharge and SAD) and excise portion (consisting of basic excise duty, special excise duty and CVD). The Cenvat credit is only in respect of central excise. Hence, it has been clarified that even if Cenvat credit has been availed, duty drawback in respect of customs portion will be available.

### **Duty drawback on Re-export**

Section 74 of Customs Act, 1962 provide for drawback if the goods are re-exported as such or after use. This may happen in cases like import for exhibitions, goods rejected or wrong shipment etc. The re-exported goods should be identifiable as having been imported and should be re-exported within two years from date of payment of duty when they were imported. This period (of two years) can be extended by CBE&C on sufficient cause being shown. These should be declared and inspected by Customs Officer. Original shipping bill under which the goods were imported should be produced. The goods can be exported as cargo by air or sea, or as baggage or by post. - . - . - After inspection, export and submission of application with full details, 98% of the customs duty paid while importing the goods is repaid as drawback.

DISTINCTION BETWEEN SECTION 74 AND 75 - Section 74 is applicable when imported goods are re-exported as it is and article is easily identifiable, while section 75 is applicable when imported materials are used in the manufacture of goods which are then exported - *ABC India Ltd. v. UOI* 1992(61) ELT 205 (Del HC). In *LVT Products v. CC* 1998(103) ELT 663 (CEGAT), it was held that there is no provision for refund of import duty, if imported goods are re-exported. The assessee can only claim duty drawback u/s 74.

VALUE AT THE TIME OF EXPORT IS RELEVANT - As per section 74(4), goods are deemed to have been entered for export on the date rate of duty is to be calculated under section 16. As per section 16, value of export goods will be taken on the date on which proper officer makes an order permitting clearance of goods for export under section 51 of Customs Act. Hence, 'Value' for the purposes of section 76(1)(b) will be value at the time of export and not the original value of import of the goods. This was stated by Commissioner, Customs; at the meeting of Customs Advisory Committee held at Mumbai dated 28-10-93. (Ref. : W.O.B. 45/93 dated 9-11-93).

GOODS CAN BE RE-EXPORTED TO ANY PARTY AND FROM ANY PORT – It has been clarified that goods can be re-exported to any party (and not only to the same supplier) and re-export can take place from any port. – CBEC circular No. 72/2002-Cus dated 1-11-2002.

DRAWBACK FOR USED GOODS - If the imported goods are used before re-export, the drawback will be allowed at a reduced percentage [section 76(2) of Customs Act, 1962]. If the goods were in possession of the importer, they *might be treated as used* by the importer. As per the rules framed by Central Government, the table is as follows : (a) use upto 6 months ; 85% (b) 6 months to 12 months : 70% (c) 12 months to 18 months : 60% (d) 18 months to 24 months : 50% (e) 24 months to 30 months : 40% (f) 30 months to 36 months : 30% (g) over 36 months : Nil. Drawback is allowed if the use is over 24 months only with permission of Commissioner of Customs if sufficient cause is shown.

GOODS FOR PERSONAL USE - If the goods (including motor car) were imported for personal use, the reduction in import duty refundable is 4% per quarter for first year, 3% per quarter for second year, 2.5% per quarter for third year and 2% per quarter for fourth year.

**Advance Authorisation** - Inputs required to manufacture export products can be imported without payment of customs duty under Advance Authorisation. Advance Authorisation can be granted to merchant exporter or manufacturer exporter to import raw materials. Since the raw materials can be imported before exports of final products, the Authorisations issued for this purpose are called '**advance authorisations**'.

'Manufacture' has the meaning assigned to it in para 9.30 of EXIM Policy. This definition is very wide. Hence, import for mere processing will also be permissible.

Advance Authorisation is issued to allow duty free import of inputs with normal allowance for wastage. In addition, fuel, oil, energy, catalysts etc. required can also be allowed. Duty free import of mandatory spares upto 10% of CIF Value of Authorisation, which are required to be exported with resultant products may also be allowed. However, prohibited items of imports cannot be imported.

Advance Authorisation issued on pre-export basis (i.e. where import takes place before fulfilment of export obligation), would contain description, value and quantity of each material permitted against it and value of export obligation to be fulfilled. Advance authorisation issued on post-exportation basis (i.e. where import takes place after fulfilment of export obligation), would, in addition, contain details of exports made against the authorisation. – CBE&C circular No. 24/2002-Cus dated 6-5-2002.

Material can also be imported free of cost, which shall be re-exported after job work, after allowing for wastage.

The advance Authorisation will be for Actual User only. It is not transferable. The material imported under advance authorisation is also not transferable even after completion of export obligation. There must be positive value addition.

Advance Authorisation can be issued for (a) Physical Exports (b) Intermediate Supplies (c) Deemed Exports.

Advance Authorisation for physical exports can be issued to manufacturer-exporter or merchant-exporter tied to supplementary manufacturer.

Advance Authorisation after exports can be issued on basis of actual proof of exports. In such case, BG/LUT [Bank Guarantee/Letter of Undertaking] is not necessary.

Advance Authorisation is valid for 12 months for import and 18 months for export. - - Export obligation under Advance Authorisation should be fulfilled within 18 months. In case of projects, export obligation shall be fulfilled within duration of execution of project. Advance authorisation can be revalidated for 6 months if export obligation was fulfilled, on payment of composition fee of 1%. Further extension of 6 months can be obtained on payment of 5% of unfulfilled FOB Value as composition fee.

Goods exported under Advance authorisation/DFRC/DEPB may be re-imported in the same or substantially same form under 'Duty Neutralisation Scheme'.

The imports of raw materials is on the basis of standard input - output norms (SION). The SION are finalised and quantity allowed to be imported will be based on quantity exported. The price of inputs will be as declared by applicant. However, there must be positive value addition.

Application for authorisation shall be made in form given in Appendix 10B to licensing authority of DGFT.

Advance Authorisation will indicate name and description and of items to be imported and exported/supplied, aggregate CIF value of imports, FOB/FOR value and quantity of exports/supplies. If quantity cannot be indicated, value shall be indicated.

If the goods are cleared from warehouse, the licence should be valid on date of clearance from warehouse. However, licence issued after date of shipment but before its clearance from customs or customs bonded warehouse is acceptable. - CC, Mumbai PN 19/99 dated 10-2-1999.

Goods can be exported in anticipation of advance authorisation, after submission of application to licensing authority.

**Annual Advance Authorisation to status holders** – Annual Advance Authorisation would be issued to status holder (export houses / trading houses / star trading houses / super star trading houses) to enable them to import their requirements of inputs on annual basis. Annual Advance Authorisation will be granted upto 200% of FOB value of exports in preceding financial year. There should be positive value addition. The authorisation is valid for 12 months for import and 18 months for export. No extension will be granted. The authorisation is subject to actual user condition. They have to give LUT (Letter of Undertaking) only and not bank guarantee. – – MF(DR) circular No. 25/2003-Cus dated 1-4-2003 and Customs Notification No. 56/2003-Cus dated 1-4-2003

**Duty Entitlement Pass Book Scheme (DEPB Scheme)**- The scheme is easy to administer and more transparent. The scheme is similar to Cenvat credit scheme. The exporter gets credit when he exports the goods. The credit is on basis of rates prescribed. This credit can be utilised for payment of customs duty on imported goods.

Provisions are contained in notification No. 45/2002-Cus dated 22-4-2002.

The objective of the scheme is to neutralise incidence of customs duty on the import content of export product. The neutralisation shall be provided by way of grant of duty credit against the export product.

Exports under DEPB scheme are allowed only when DEPB rate for the concerned export product is finalised.

Under this scheme, exporters will be granted duty credit on the basis of notified entitlement rates. The entitlement rates will be notified by DGFT. The entitlement rates will be a % of FOB. The entitlement rate will be fixed on basis of SION (Standard Input Output Norms) and deemed import content. Value addition achieved in export product will also be taken into account.

Supplies made to unit in SEZ are also entitled to DEPB. – MF(DR) Circular No. 25/2003-Cus dated 1-4-2003.

DEPB is issued only on post-exportation basis. Excise duty paid in cash on inputs will be eligible for brand rate of duty drawback. – CBE&C circular No. 24/2002-Cus dated 6-5-2002.

Non-transferable DEPB can be issued before realisation of export proceeds, but if export proceeds are not realised within 6 months, full customs duty along with SAD should be paid with 15% interest.

CIF Value of Imports affected under DEPB shall not exceed FOB Value against which DEPB has been issued.

Value of exports (i.e. export earnings) should be in freely convertible currency like dollars, Euro, British Pounds, Yen etc. Thus, the DEPB scheme is not available in case of exports to Nepal or Bhutan where we have Rupee trade or to Russia etc., if the export is not in hard currency. The credit will be granted on basis of actual amount of FOB value of export realised, as per Bank certificate.

The credit of duty in pass book will entitle the exporter to import raw materials, components, packaging materials etc. duty free. Goods which are otherwise eligible for imports can be imported under the credit. However, capital goods cannot be imported under DEPB.

The scheme is available to both manufacturer exporters as well as merchant exporters. DEPB has to be registered with customs house.

The DEPB rates fixed are inclusive of SAD (Special Additional Duty) w.e.f. 1-4-2002. Hence, goods imported under DEPB scheme are not free from special additional customs duty. [SAD].

If DEPB credit is insufficient, excess amount of duty can be paid in cash. Two separate entries in Bill of Entry should be made.

The CVD (additional duty) paid in cash on inputs can be utilised for availing Cenvat credit.

Export under this scheme will be under a blue coloured shipping bill so that customs authorities can maintain separate record. Declaration in prescribed form should be made on the shipping bill. The shipping bill should give details Serial number of export product in public notice issued by DGFT specifying the rate of entitlement and rate claimed. Exports under the scheme can be made from specified CFS (Container Freight Station) also.

Samples will be drawn for test as per guidelines issued by department.

LIMIT ON CREDIT BASED ON PMV - Where DEPB rate is 10% or more, amount of credit shall not exceed 50% of PMV (Present Market Value) of the product. Customs can check PMV (Present Market Value) of export goods, if over invoicing is suspected. It is clarified that PMV will be verified only if there is specific intelligence. There will be no verification of PMV where value cap exists.

**Duty Free Replenishment Scheme** - Duty Free Replenishment Scheme allows import of inputs without payment of duty after goods are actually exported. Thus, it is post import remission scheme. Under the scheme, after completion of exports, the exporters will be able to obtain transferable duty-free replenishment certificate (DFRC) for importing inputs used in the export products as per the standard input-output norms (SION).

Provisions are contained in notification No. 46/2002-Cus dated 22-4-2002.

DFRC is issued to merchant-exporter or manufacturer-exporter for import of inputs without payment of basic duty and SAD. However, CVD is payable on inputs imported under DFRC, on which duty drawback / Cenvat credit can be claimed.

DFRC may be issued in respect of exports for which payments are received in non-convertible currency, if prescribed norms of value addition are achieved. DFRC can be obtained on deemed exports also.

DFRC can be issued only where SION have been fixed. DFRC is issued for import of inputs as per SION. Validity of authorisation will be 18 months.

DFRC is subject to minimum value addition of 25%. In case of gem and jewellery, required value addition is lower.

Application for DFRC shall be filed within 6 months from date of realisation of export proceeds. However, in case of exports against irrevocable Letter of credit (LC), application can be made immediately after exports.

The authorisation or material imported under authorisation is freely transferable.

Exporter is eligible for drawback benefits in respect of duty paid on inputs not covered under SION. Basic duty and SAD is not payable, but CVD and anti-dumping duty / safeguard duty (if any) will be payable. *Hence, DFRC scheme is presently not very popular.*

Exporter exporting goods under DFRC scheme are eligible for Central Excise portion of All Industry rate of Drawback in respect of inputs imported and cleared on payment of duty, if he has not availed Cenvat credit. However, if he had availed Cenvat credit on inputs, he is not entitled to any drawback at all.

**EPCG scheme** - Under Export Promotion Capital Goods (EPCG) scheme, a licence holder can import capital goods (i.e. plant, machinery, equipment, components and spare parts of the machinery) at concessional rate of customs duty of 5% and without CVD and special duty. Computer software systems are also eligible. Import of spares of capital goods is permitted, without any limit. Jigs, fixtures, dies, moulds will be allowed to the extent of 100% of CIF value of licence. Spares for existing plant and machinery can also be imported. Second hand capital goods upto 10 year old can also be imported under EPCG scheme.

EPCG authorisation is issued with validity period of 24 months. Relevant exemption notification is 55/2003-Cus dated 1-4-2003 (earlier No. 44/2002-Cus dated 19-4-2002).

Merchant Exporters can also import capital goods under EPCG scheme, if the capital goods are installed in the factory of their supporting manufacturer. The name and address of supporting manufacturer should be endorsed on EPCG licence and bond with Bank guarantee has to be executed jointly and severally by merchant exporter and his supporting manufacturer.

The basic customs duty payable is 5%. Additional Customs Duty / CVD is exempt.

Importer has to fulfil export obligation equal to eight times duty saved on imported capital goods to be fulfilled over a period of 8 years. In respect of EPCG authorisations for Rs 100 crore or more, the export obligation shall be required to be fulfilled over a period of 12 years. Similarly, sick companies under BIFR and units in Agri Export Zones can fulfil export obligation in 12 years. Export obligation for every block of two/four years has been specified. In first two years, there is no export obligation. Extension for fulfilling export obligation upto two years can be obtained. – MF(DR) circular No. 25/2003-Cus dated 1-4-2003.

The export obligation shall be fulfilled by export of goods capable of being manufactured or produced by the capital goods imported under the scheme. However, goods can be

manufactured in other unit of authorisation holder also. - - Export obligation can also be fulfilled by export of other goods and services by enhancing export obligation. If the goods are further processed, export obligation shall stand enhanced by 50%. The export obligation will be over and above the average level of exports of previous three years.

Export shall be physical exports, but certain specified deemed exports are also permissible.

Year-wise slab rates for achieving export obligation have been specified. If the goods are not exported as per the obligation, differential customs duty plus 15% interest is payable. The importer of capital goods has to execute 'Letter of Undertaking' (LOU) and execute a bond.

Manufacturer-exporters having exports over Rs one crore and having clean track record and status holders (star trading houses etc.) can execute bond without bank guarantee. Others will have to execute bond with bank guarantee equal to 50% of the differential duty.

The authorisation holder can also procure such machinery from India. The Indian manufacturer will be able to import components for the machinery at concessional rate of 5%. However, the export obligation will be that of licence holder and not of Indian machinery manufacturer.

If the goods are cleared from warehouse, the licence should be valid on date of clearance from warehouse. However, licence issued after date of shipment but before its clearance from customs or customs bonded warehouse is acceptable. - CC, Mumbai PN 19/99 dated 10-2-1999.

### **Power of Customs Officers**

Customs authorities have been given various powers to ensure that there is no evasion of customs duty and duty is correctly recovered. These powers are similar to powers of Central Excise Officers, with suitable modifications to meet requirements of Customs.

***Power of Customs Officers to inspect*** - Under section 106A, Customs officers have powers to inspect the premises intimated as storage places of 'notified goods' or 'specified goods'. The inspection can be at any reasonable time, with or without notice. The officers can check the records and inspect the goods. The person in charge of premises is required to produce accounts required to be maintained by 'notified goods' or 'specified goods'. Places other than those intimated under provisions of 'notified goods' or 'specified goods' cannot be inspected under this section. (Since now there are no 'notified goods' or 'specified goods', these powers are redundant.)

***Power to stop and inspect conveyance*** - Customs Officer is empowered under section 106 to stop any aircraft, vessel, vehicle or animal and to examine and search the aircraft, vehicle or vessel. He can break open any lock of door or package, if key is withheld. If the vessel, aircraft etc. does not stop or land after giving signals, it may be chased. If it refuses to stop after firing a signal, the vehicle may be fired upon.

***Power of Customs Officers of search*** - Customs Officer can search a person if he has reason to believe that smuggled goods or documents relating thereto are secreted in his person (section 100). Such search may be of (a) any person who has landed from or is about to board or is on board of a vessel or foreign going aircraft or vehicle arrived from or going to any place out of India (b) any person who has entered or is about to leave India (c) any person in Customs area. Before the search, at least two persons should be called to attend and witness the search. Search should be made in presence of them and list of things seized should be signed by the witnesses. [section 102(4)]. A female can be searched only by a female. The person being searched can request that the search may be carried out before a Gazetted Officer or magistrate. If such



requisition is made, search must be carried out before Gazetted Officer of customs or magistrate. [section 102(2)]

**Power to search other persons** - The aforesaid powers of search under section 100 are in respect of people in customs area or people entering or leaving India only. However, as per section 101 of Customs Act, an Officer of Customs *empowered by special order of Commissioner of Customs* can search *any person* (anywhere in India), if he has reason to believe that such person is carrying gold, diamonds, manufacture of gold and diamonds or watches, *which are liable to confiscation*. Before the search, two or more persons should be called to attend and witness the search. Search should be made in presence of them and list of things seized should be signed by the witnesses [section 102(4)]. A female can be searched only by a female. The person being searched can request that the search may be carried out before a Gazetted Officer or magistrate. If such requisition is made, search must be carried out before Gazetted Officer of customs or magistrate [section 102(2)]

**Search of premises** - Under section 105 of Customs Act, Assistant Commissioner of Customs, who has reasons to believe that any goods liable to confiscation or any document or thing relevant to any proceeding under Customs Act are secreted in any place, can authorise any Customs Officer or he may himself search for such goods, documents or things. Search should be as per provisions of Criminal Procedure Code, with the difference that report of search is to be submitted to Commissioner of Customs and not to Magistrate.

**Vexatious search/arrest by Customs Officer** - Section 136(2) of Customs Act provides that in case of vexatious search and seizure, the officer is punishable with imprisonment upto six months or fine upto Rs. 1,000 or both. Vexatious search means (a) searching a person or place without any 'reason to believe' (b) arresting a person without reason to believe. This punishment can be imposed only by Court of Law.

**Power of Customs Officers to X ray bodies** - Section 103 provide that if Customs Officer has reasons to believe that any person coming to India or leaving from India or any person in customs area has secreted inside his body any goods liable to confiscation, he can detain and take him to nearest magistrate. If the Magistrate is satisfied that reasonable grounds exist, he can order that body of such person may be X-rayed. The X-rays will be taken by a *qualified radiologist* and his report may be given to Magistrate. If the report indicates that goods are secreted inside, he may direct that suitable action may be taken to take out goods as per advise of qualified doctor. Magistrate can order that the person may be kept in custody. If the person himself admits that the goods are secreted inside his body and voluntarily submits for action to bringing out the goods, X-ray etc. may not be taken.

**Seizure by Customs Officers** - If, during search, some goods are found, which are liable for confiscation, the same can be seized by Customs Officers under section 110. Customs Officer is empowered to seize the goods if he has reasons to believe that such goods are liable to confiscation under Customs Act. If the goods are bulky, they can be kept in possession of the owner himself and a notice be served on him that he should not remove or in any way deal with the goods. [section 110(1)].

**IMMEDIATE SALE OF SEIZED GOODS** - Penalty proceedings for confiscating goods etc. may take time and goods may get deteriorated. Hence, under section 110(1A), Central Government can notify some goods considering if the goods are perishable or hazardous or if storage space is not adequate or if the goods depreciate fast. Such goods can be disposed of immediately by Customs Officers as per prescribed procedure. However, before disposing them of, full inventory will be taken and application will be made by Customs Officer to Magistrate to (a) certify correctness of inventory (b) certify photographs of goods (c) take samples and certify its correctness. *The goods covered under this section are* : liquor, photographic films, medicines, battery cells, wrist watches, zip fasteners, electronic goods, Gold, Silver, dangerous drugs,

vehicles, man-made yarn and fabrics and bulk drugs and chemicals. However if finally, after adjudication, goods are not confiscated or if the confiscation is set aside by appellate authority, sale proceeds must be refunded to owner of goods.

**SEIZURE OF DOCUMENTS** - Documents relevant to proceedings under the Customs Act can also be seized. The person from whom the documents are seized is entitled to take extracts therefrom in presence of Customs Officer [section 110(4)].

*Return of seized goods within 6 months if no SCN* - If seized goods are felt to be liable for confiscation, a show cause notice has to be served giving him grounds for confiscation, asking his representation and giving him opportunity of personal hearing as per section 124 of Customs Act. If no show cause notice is issued within six months of seizure, the goods shall be returned to person from whose possession they were seized [section 110(2)]. This aspect has been discussed under Central Excise.

**Other Powers of Customs Officers** - Other powers of Customs Officers are summarised below.

**POWER TO CALL FOR DOCUMENTS AND EXAMINE A PERSON** - Under section 107, an officer of Customs, empowered by Commissioner, during enquiry in connection with smuggled goods, may require any person to produce relevant document or examine any person acquainted with the facts of the case.

**POWER TO SUMMONS** - Section 108 of Customs Act authorises all Gazetted Officers of customs to issue summons to any person for inquiry in connection with smuggling of goods. He can require a person to produce any document relevant to enquiry and examine a person. The provisions are similar to section 14 of CEA. These are discussed under 'Central Excise'.

**POWER TO ARREST** - In case of customs, as per section 104 of Customs Act, an officer of customs who has been empowered by Commissioner of Customs by general or special order, can arrest a person whom they have '*reason to believe*' to be liable to be punished under section 135 - i.e. for evasion of duty or importing prohibited goods or dealing in goods liable to confiscation. - - The officer can arrest him and inform him ground of arrest. The person arrested has to be forwarded to the Magistrate. He must be produced before a magistrate within 24 hours. The magistrate may grant the bail on bond or refuse the bail and remand him to custody. Bail is at the total discretion of Court. Offences under Customs Act are non-cognizable. The Customs Officer can himself release the person on bail. - - These are discussed under 'Central Excise'.

**POWERS UNDER FEMA** - In respect of following, powers of Enforcement have been conferred on customs /excise officers. – (a) Offences u/s 6(3)(g) of FEMA. This section related restrictions / prohibitions on export, import or holding of currency or currency notes (2) Offences u/s 7(1)(a) of FEMA. This section relates to furnishing of export value of goods exported. – MF(DR) Order No. SO 1156(E) dated 5.1.2001.

### **Prohibitions on Imports and Export**

Collecting revenue for Central Government by way of Customs duty is, of course, a major purpose of Customs Act. However, another major purpose is to prohibit or restrict illegal imports and exports. Section 11 of the Customs Act, 1962, empowers Central Government to prohibit the import or export of goods of any specified description. Such prohibition may be absolute or conditional. The conditions for prohibitions may be required to be fulfilled before or after clearance. (e.g. there may be condition that after imports, goods should be used only for production purposes and not for trading). Such prohibition can be made by issuing a notification.

Various notifications have been issued by Government of India from time to time, the earliest one being of 1898. Some items prohibited are (a) labels impressed with designs of currency notes (b) dummy pistols (c) explosives (d) dead or alive animals and birds (e) narcotic drugs (f) monkeys from yellow fever areas (g) arms and ammunition (h) Counterfeit currency notes etc. Various offensive books and periodicals have been banned for import. Similarly, exports of some items is restricted and is subject to permission from prescribed authority e.g. quartz, obscene books, monkeys, jewellery etc. Some items are not allowed to be exported unless they are graded by appropriate authorities e.g. wool, goat hair, tea, fruit products, black pepper, chillies, vegetable oils, tendu leaves, ginger, turmeric, onions, garlic, potatoes etc.

**Prohibitions under other Acts** - Besides prohibitions placed under Customs Act itself, other Acts also place prohibitions on export/imports and provisions of Customs Act are used to enforce or implement these prohibitions. Some of these Acts are as follows :

**FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992** - This Act has replaced Import and Export (Control) Act, 1947. Section 3(3) of the Act specify that any order by Government under the Act restricting the imports and exports of any goods shall be deemed to be in respect of goods import or export of which is restricted or prohibited under section 11 of Customs Act and all provisions of Customs Act shall apply if the order is violated. Customs authorities are authorised to implement the prohibitions. In fact, Import restrictions are always scrutinised by customs officers before import is allowed by Customs. Similarly, export is permitted only if it conforms to Export (Control) Order. (It may be noted that the import/export policy is looked after by Commerce Ministry while Customs and Central Excise are under Finance Ministry).

**ANCIENT MONUMENTS AND ANTIQUES** - Ancient Monument Prevention Act authorises Central Government to prohibit or restrict removal of any antiquities. Antiques and Art Treasures Act also authorises Central Government to restrict exports of art treasures and antiquities. Export of the antiquities and art treasures prohibited under order issued under these Acts is deemed to have been prohibited under section 11 of Customs Act. - - As per Ancient Monument Prevention Act, an antique includes any coin, sculpture, manuscript, epigraph or other work of arts or craftsmanship. It should be in existence for at least 100 years.

**ARMS ACT** - Arms and ammunition cannot be imported or exported without a licence.

**NARCOTICS, PSYCHOTROPIC SUBSTANCES ACT** - Narcotics like *Gard*, opium etc. are becoming a big danger to new generation. The Act authorises Customs and Excise officers to search, seize, recover and confiscate any narcotic, psychotropic substance or its derivatives.

**COFFEE ACT** - The Act imposes Customs Duty on export of Coffee. Coffee can be exported only with authorisation from Coffee Board.

**COIR INDUSTRY ACT** - Coir fibre, coir yarn or coir products can be exported only under licence from Coir Board.

**TEA ACT** - Tea can be exported only against a licence from Tea Board.

Thus, Customs Act and administrative machinery developed under the Act is used for multifarious activities and collection of revenue is only one of the activities, though major one.

### **Warehousing**

After the goods are imported, the importer can keep the goods in warehouse without payment of customs duty. He can pay customs duty and clear imported goods from the warehouse as and when needed. This facility is available to traders as well as direct importers.

Goods are cleared from customs port under bond and kept in the warehouse. Procedure for removal of goods from port for warehousing has already been discussed in earlier chapter. The goods kept in warehouse are then cleared on payment of duty when needed.

A trader can import goods and keep in warehouse. He can supply the goods to buyers from warehouse, after paying customs duty. Thus, small importers, duty free shops etc. can procure goods from bonded warehouse without actually importing the goods.

Even duty free clearances can be made from bonded warehouse, if buyer is otherwise eligible for obtaining goods duty free, as confirmed vide MF(DR) circular No. 79/2000-Cus dated 22-9-2000.

The facility is useful to direct importers also, in following cases -

(a) Importer has to plan his purchases well in advance. He also has to maintain some stocks to ensure that there is no loss of production if a shipment of imported raw materials is delayed. Thus, when the goods arrive in the port, the importer may not immediately require the goods as he may be having stock.

(b) The importer may be intending to clear the goods without payment of duty under Advance Licence or DEPB scheme. However, the licence / DEPB may not be in hands when imported goods have arrived at the docks.

(c) The importer may not be having adequate ready funds to pay customs duty.

(d) Importer would like to store the imported goods without payment of customs duty as far as possible and pay duty only when goods are required for his immediate use, so that his funds are not blocked.

WAREHOUSING BY TRADERS - EXIM policy permits keeping imported goods in bonded warehouse without payment of duty. These can be cleared later on payment of duty. Even goods under negative list can be imported by traders and kept in warehouse. These can later be supplied on payment of duty against specific licence.

**Warehousing to avoid demurrage and pilferage** - If the goods are not cleared from port, heavy demurrage is payable to port authorities. Provision for heavy demurrage has been made to discourage delays in clearance of goods from port. There is shortage of space in ports. Port authorities have to make sure that ports are not cluttered with goods and space is available to store new incoming goods. Thus, importer has to clear goods from ports as quickly as possible.

HEAVY PILFERAGE IN THE PORTS - Goods lying in port area are susceptible to pilferage and hence importer is interested in taking out goods as soon as possible.

**Warehouse to store imported goods without payment of duty** - Provision of warehousing has been made in Customs Act to enable importer to store goods in warehouse without payment of duty and clear goods from warehouse only when these are actually required by him. Importer only has to pay warehousing charges. Thus, he can delay payment of customs duty. Both public and private warehouses are available all over India where goods can be stored.

*Public/Private Bonded warehouses* – Warehouse can be opened at places declared as 'warehousing station'. Power to declare a place as warehousing station have been delegated to Chief Commissioner. - *Chapter 10 Para 2 of CBE&C's Customs Manual, 2001.*

**Warehouses can be public or private.**

**Warehousing period** - Section 61 of Customs Act prescribes warehousing period. If goods are not removed within the prescribed period, Customs Officer can sell the goods after notice to owner as much quantity as he deems fit.

NORMAL WAREHOUSING FOR ONE YEAR - Section 61(1)(b) provides warehousing period as one year from the date of issue of order by Customs Officer permitting deposit of goods in a warehouse. The period of one year can be reduced by Commissioner if goods are likely to deteriorate. This period can be increased by Commissioner upto 6 months and by Chief Commissioner of Customs without any limit of period.

FIVE YEARS WAREHOUSING FOR CAPITAL GOODS FOR EOU - The warehousing period can be upto five years in case of capital goods intended for use in EOU unit, as per section 61(1)(a) of Customs Act. This period can be reduced by Commissioner if goods are likely to deteriorate. The period can be extended without any upper limit.

However, if goods are stored beyond a period of five years, interest is payable for storing goods beyond the period of five years in the warehouse. The interest is payable on the basis of duty payable at the time of clearance (and not duty assessed when goods were warehoused). [section 61(2)(i)].

**Interest payable beyond warehousing period** - In case of goods allowed to be warehoused, interest is payable at prescribed rate. - - In case of EOU, interest is payable if warehousing is beyond three years in case of inputs/consumables/spares and five years in case of capital goods. - - Presently, the interest rate is 15% [Notification No. 18/2003-Customs (NT) dated 1-3-2003]. Earlier, the interest rate was 24%.

In case of normal warehousing (other than EOU), interest is payable if goods are warehoused beyond 90 days. [section 61(2)(ii)].

Interest should be payable upto *and including* the date of payment of duty. – MF(DR) circular No. 48/2002-Cus dated 9-8-2002.

WAIVER OF INTEREST – Provision of interest @ 15% after just 90 days has made the provision of warehousing slightly unattractive. [Now, warehousing will be beneficial only when goods can be cleared later without payment of duty against advance license etc.]

**Manufacture in bonded warehouse** - With sanction of Assistant Commissioner, manufacturing or other operations can be carried out in the warehouse (section 65 of Customs Act). The facility is useful if final products are to be exported after manufacture (*though final products can be cleared for home consumption too*). After manufacture, the produced goods may either be exported without payment of customs duty or cleared for home consumption on payment of duty.

These provisions are applicable to EOU, STP or EHTP units who have to manufacture goods under customs bond. They have to obtain license from customs.

**Clearance from bonded warehouse** - Goods stored in warehouse can be cleared in one of the following ways.

REMOVAL FOR HOME CONSUMPTION - Under section 68, goods stored in warehouse can be removed on payment of duty. Importer has to submit bill of entry in prescribed form. Duty, penalties, rent and interest is payable as per rules. Goods are then allowed to be cleared by Customs Officer. Separate form of bill of entry has been prescribed for this purpose. It may be remembered that as per section 15(1)(b), rate of duty as prevalent on date of presentation of Bill of Entry for home consumption for clearance from warehouse is applicable and not rate prevalent when goods were removed from customs port. -

TRANSFER TO OTHER BONDED WAREHOUSE - Section 67 permit removal to other warehouse under bond. Transit bond for customs duty involved backed by bank guarantee / security should be furnished. In the case of EOU, bank guarantee for transfer of goods is not required. - *Chapter 10 Para 13 of CBE&C's Customs Manual, 2001.*

CLEARANCE AGAINST ADVANCE LICENSE / DEPB - Goods stored in a customs bonded warehouse can be cleared against advance license. These can also be cleared by adjusting customs duty in a DEPB scrip. Clearance against DEPB scrip is available only at ports where TRA (Telegraphic Release Advice) facility is available. - CBE&C circular No. 16/99-Cus dated 7-4-1999

CLEARANCE FOR EXPORT - Warehoused goods can be exported without payment of duty, vide section 69 of Customs Act. A shipping bill has to be presented. Export duty, penalties, rent, interest etc. is payable as applicable and then goods are allowed to be exported.

*Reassessment can not be made at warehouse* – The department has clarified as follows – 'Insofar as value for assessment of duty is concerned, it is not required to be re-determined and it is the original value as determined at the time of filing of into Bond Bill of Entry and assessments before warehousing'. - *Chapter 10 Para 15 of CBE&C's Customs Manual, 2001.*

This is the policy normally followed in warehouses. - - The declaration to be given by importer on Green Bill of Entry (which is required to be submitted at the time of clearance from warehouse) also indicates the intention that there will be no assessment of goods (for classification and value) at the time of clearance from warehouse. The declaration on Green Bill of Entry is significantly different from declaration required to be given on Bill of Entry which is required to be submitted at the time of clearance from the port/airport. The declaration on Green Bill of Entry does not contain declarations related to classification or valuation.

**Storage without warehousing** - The warehousing we have seen above is after goods are assessed to duty. However, occasionally, it may happen that assessment of duty may take time for want of some clarification/reports etc. In such cases, goods lying in docks may incur heavy demurrage. There is a provision that Customs department can issue 'detention certificate' and on the basis of such certificate, port trust authorities *may* remit demurrage. However, chances of pilferage or loss are high if goods lie at docks. Hence, if assessment is likely to be delayed, section 49 allows that goods can be stored in public warehouse. However, such goods are not to be treated as 'warehoused goods' for purposes of Customs Act as the goods are not assessed. Hence, it is called 'storage without warehousing' or 'warehousing without warehousing'. The goods are cleared from the warehouse after duty is assessed and paid.

### **Containers and Inland Container Depots**

Conventional mode of shipment was to pack the goods in cases. Such cases can be of varying sizes and weights, due to which their handling and storage in ships is difficult. Hence, modern trend in sea or air freight is to use containers. These containers are usually quite big - upto size of a truck. Goods are stuffed in the container and then the whole container is loaded/unloaded with

the help of crane. This also reduces chances of damage during handling of cargo. [*Reader will be able to such big containers loaded in trucks on a Highway or on railway wagons.*]

**Inland Container Depot / Container Freight Station** - Importer would like to take delivery of the goods from near his place. Similarly, exporter would like to stuff the goods in container itself at his factory so that whole container can be sent for export. Hence, section 7(aa) of Customs Act make provision for approving 'Inland Container Depots' for unloading of imported goods and loading of export goods. Under these powers, ICDs have been appointed at various places.

ICD / CFS essentially function like a dry port. ICD / CFS functions as common user facility offering all services for customs clearance like any other port. It has facilities for handling and temporary storage of imported / export goods and empty containers. These are carried to / from ICD under customs transit by any mode of transport. All activities related to clearance of goods for home use, warehousing, temporary admissions, re-export, temporary storage for onward transit and outright export, transshipment, take place from such stations. - Chapter 23 Para 2 of CBE&C's Customs Manual, 2001.

Exporter has to submit shipping bill at the container depot. Export containers can be sealed at the depot. Normally, the containers will not be examined at the gateway port. However, checking may be done if seal is damaged or there is some information or doubt.

Import cargo is brought to the ICD by road / rail from sea-port / airport. Importer can take delivery from ICD on submitting bill of entry and making payment of duty.

These containers are moved from ICDs to ports/airports by way of railway wagons/trucks.

**DE-STUFFING OF CONTAINERS** - In view of economy achieved in sending goods by containers, international transport agencies often collect small parcels and stuff them in a container. Since all parcels in a container may not be for same destination, these are often de-stuffed at another port and transshipped to another container for shipment to another country.

**TRANSPORT OF CONTAINERS CONTAINING EXPORT CARGO** - Normally, transport of the containers will be by rail. However, in case rail facilities are not available, containers containing export cargo can be sent by road by executing a bond equal to value of goods as a revenue safeguard. - Detailed procedure has been prescribed, vide CBE&C circular No. 57/98-Cus dated 4-8-1998.

**TRANSPORT OF CONTAINERS CONTAINING IMPORTED CARGO** - Containers containing imported cargo can be sent by road from gateway port to CFS / ICD. Bond should be executed by custodian of cargo. - Detailed procedure has been prescribed, vide CBE&C circular No. 69/99-Cus dated 6-10-1999.

**CONTAINER FREIGHT STATION** – ICD is normally located outside port towns, whereas no site restrictions apply to CFS. The CFS is treated as extension of a port / ICD / air cargo complex. An ICD may have CFS attached to it. An ICD is a place where containers are aggregated for onward movement to and from ports, whereas CFS is a place where containers are stuffed, un-stuffed and aggregation / segregation of cargo takes place. - *Chapter 23 Para 4 of CBE&C's Customs Manual, 2001.*

**Consolidation / reworking of cargo at gateway port** - Cargo brought from ICD / CFS may be to different destinations / different shipping lines. Hence, it is necessary to consolidate and re-work the cargo received from various ICD / CFSs and then send it directly to various destinations. Facility of congregation / assimilation of LCL (LCL – Loose Container Load – FCL means Full Container Load) cargo at the inland ICDs / CFSs, movement of this cargo to HUB points for

further re-working and export to destination ports is permitted. Prescribed procedure should be followed. - CBE&C circular No. 55/2000-Cus dated 30-6-2000. – see *Chapter 11 of CBE&C's Customs Manual, 2001 for detailed procedure.*

### **Customs House Agent**

An importer or exporter can himself transact business of imports and exports. However, generally, it is not possible for an individual to complete customs formalities and obtain clearance from ports. Hence, appointment of Customs House Agent (CHA) is necessary. An importer can appoint or change CHA at his will. 'No objection Certificate' from previous CHA is not necessary. - CC, New Delhi PN 32/97 dated 5.4.1997.

In order to ensure that only authorised persons are permitted to work as CHA, section 146 provide for licence to persons to carry on business as an agent relating to import or export of goods or entry/departure of conveyance. Board is authorised to make regulations for this purpose.

### **Appeals under Customs**

Except for change in section numbers and some words which are relevant only to customs; provision of appeal are identical in Excise and Customs. In fact, the Appellate Tribunal [CESTAT] is same. Under section 128 of Customs Act, appeal against decision or order passed under the Act by any officer lower than rank of Commissioner, lies with Commissioner (Appeals).

Appeal against order of Commissioner of Customs as adjudicating authority or Commissioner (Appeals) lies with Tribunal. [section 129A(1) of Customs Act] Appeal does not lie in respect of (a) Any goods imported or exported as baggage (b) any goods loaded in conveyance for importation in India but not unloaded at place of destination in India (c) payment of duty drawback. Tribunal can also refuse to admit an appeal if the value of goods or difference of duty or penalty/fine is less than Rs. 50,000. Revision application lies with Central Government under section 129DD in respect of matters where appeals does not lie with Tribunal i.e. in respect of baggage, drawback and goods loaded for importation in India but not unloaded in India.

OTHER PARALLEL SECTIONS - Section 129E provide for deposit of duty and interest (if any) pending appeal; section 130A regarding appeal to High Court on substantial question of law in respect of matters other than classification and valuation; section 130E(a) regarding appeal to Supreme Court in case of decision of Tribunal in cases of classification and valuation and section 130E(b) regarding appeal against order of High Court, if certified by High Court as fit for appeal. All these provisions are identical with provisions in Central Excise.

### **Penalties under Customs Act**

Provisions of penalties and offences are quite similar to Excise Law. Like Excise, Customs Law envisages two types of punishments i.e. (a) **Civil Liability** : Penalty for violation of statutory provisions involving a penalty of money and confiscation of goods. (b) **Criminal Liability** : Criminal punishment is of imprisonment and fine; which can be granted only in a criminal court after prosecution. Both penalty and punishment can be imposed for same offence.

Penalties are imposed on any person who, in relation to any goods, does or omits to do an act which renders such goods liable for confiscation. Hence, it is necessary to first understand what are goods liable for confiscation. Broadly, goods are liable for confiscation in case of improperly importing goods or improperly attempting to export goods. Section 111 provides goods liable for



confiscation for improper imports while section 113 contains details of goods liable for confiscation for attempt of improper export.

**Smuggling** - Smuggling, in relation to any goods, means any act or omission which will render such goods liable for confiscation under section 111 or 113. [section 2(39)].

Thus, \* improper importation \* attempting improper importation or \* attempting improper export will amount to 'smuggling'. Thus, '*smuggling*' is much broader term than we normally understand. **Since 'smuggling' has been specifically defined, normal or dictionary meaning is not applicable.** - *N K Bapna v. UOI* - 1992 (60) ELT 13 (SC) = (1992) 75 Comp. Cas. 745 (SC).

**Improper imports** - As per section 111, goods improperly brought in India from a place outside India are liable to confiscation. In brief, importing or attempting to import prohibited goods, avoiding duty payment, mis-declaring goods or violating rules regarding movement, storage, unloading or use of imported goods will make them liable for confiscation under section 111. This is covered in the definition of 'smuggling'.

**PROHIBITED GOODS** - Section 2(33) of Customs Act defines - 'prohibited goods means any goods the import or export of which is prohibited under 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 have been complied with.

**Improper exports** - As per section 113, 'goods attempted to be improperly exported' are liable to confiscation. In brief, attempting to export goods in violation of law, mis-declaring goods, export under false claim of duty drawback or violating rules regarding movement, storage or loading of export goods will make them liable for confiscation under section 113. This is all covered in the definition of 'smuggling'.

**NON-DUTIABLE AND NON-PROHIBITED GOODS CAN ALSO BE CONFISCATED** – Section 113 earlier provided for confiscation only in case of 'dutiable or prohibited' goods. Now these words have been deleted w.e.f. 14-5-2003. Hence, attempt to export any goods illegally or mis-declaring any goods (whether dutiable or prohibited or not) shall be liable to confiscation.

**Over Invoicing / mis-declaration for export** - Some times, exports are made at inflated prices to avail export benefits.

In *Om Prakash Bhatia v. CC* 2001(127) ELT 81 (CEGAT 5 member bench), it was held that over invoicing for export is an offence under Customs Act. [Appeal of importer admitted by SC, but no stay. – (2002) 141 ELT A278].

**Persons who can be penalised** - Customs authorities are empowered to impose (a) monetary penalty (b) confiscation of goods, conveyance etc. These are separately provided as, if, the smuggled goods are abandoned, smuggler may not be traceable. In such cases, it is not possible to impose penalty, but goods can be confiscated. Penalty can be imposed for improper import as well as attempt to improperly export.

**PENALTY FOR IMPROPER IMPORT** - Section 112 of Customs Act provide that penalty can be imposed on any person : (a) who does or omits to do any act which act or omission would render such goods liable for confiscation under section 111 of Customs Act or who abets in doing or omission of such act (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111.

**Liability of Ship Owner/Airlines** - If goods are unloaded without including in 'Import manifest' or loaded without entering in 'export manifest', the shipper is liable. The 'mens rea' is not relevant. Thus, when five packages were sent to New York without entering in 'Export manifest', penalty was imposed on 'Air India'.

**Monetary Penalty in Customs** - The Customs Act provides for following monetary penalties.

IMPROPER IMPORTS - Section 112 provides penalties for improper imports : (i) Not exceeding the value of goods or Rs 5,000 whichever is greater, if these are prohibited for imports under Customs Act or any other law (ii) Not exceeding the duty sought to be evaded in case of dutiable goods, which are not prohibited goods or Rs 5,000 whichever is greater (iii) If actual value is higher than the value declared in Bill of Entry or declaration of contents of baggage, not exceeding the difference in actual value and declared value or Rs 5,000 whichever is greater (iv) If the goods are prohibited and the value is mis-declared, penalty not exceeding the value of goods **or** the difference between actual value and declared value, or Rs 5,000, *whichever is higher*. (v) If the goods are not prohibited but duty is sought to be evaded and the value is mis-declared, penalty not exceeding the duty sought to be evaded **or** the difference between actual value and declared value, or Rs 5,000 *whichever is higher*.

**In each case, minimum penalty is Rs. 5,000/-.**

ATTEMPT TO IMPROPERLY EXPORT - Section 114 provides for penalty for attempt to improper export (i) If goods are prohibited for export under any law, not exceeding the value of goods or Rs 5,000 whichever is higher (ii) if goods are liable to export duty but not prohibited goods, penalty not exceeding duty sought to be evaded or Rs 5,000 whichever is higher (iii) In case of other goods, penalty not exceeding the value of goods, as declared by exporter, or as value determined under Customs Act, whichever is greater.

The last clause i.e. (iii) is amended w.e.f. 14-5-2003, to cover cases where export value is inflated. The export value is inflated, so that exporter is entitled to higher export benefits. [The excess amount collected in invoice is sent back through *havala*]. - - In case of (i) or (ii), minimum penalty is Rs. 5,000.

RESIDUAL PENALTY - Section 117 of Customs Act provide general penalty to a person who contravenes any provision of the Act or abets in contravention and *if no penalty has been prescribed*, the penalty would be upto Rs. 10,000.

PENALTY IS MANDATORY - Sections 112, 114 and 117 use the words 'shall be liable to penalty'. In *Indo-China Steam Navigation v. Jasjit Singh* 1983(13) ELT 1392 = 1984 ECR 467 (SC), it was held that if the word used is 'shall', some penalty must be imposed, though amount can be lower if there are extenuating circumstances. - followed in *CC v. Swastik Woollen Mills* - 1999(112) ELT 156 (CEGAT).

**Procedure for imposing penalty** - Section 124 of Customs Act provide that before imposing a penalty, show cause notice must be issued to the person, informing grounds for confiscation and he should be given opportunity to make representation and being heard. *Such notice and representation can be oral at the request of the person concerned*. [This provision has been made to speed up the clearing process].

**Penalty for short landing** - If the goods were loaded for importation in India, but they were not unloaded in India - partly or fully - the Shipping Agent must explain the reason for deficiency. If it is not satisfactorily explained, Assistant Commissioner can impose penalty upto twice the amount of duty normally payable on the imported goods, under section 116. The penalty is payable by the 'person in charge of conveyance' i.e. carrier of goods. This provision is to make sure that carrier

unloads goods at authorised places only and that there is no smuggling with connivance of the carrier.

### **Confiscation of Goods**

In addition to penalty on the person liable, some goods can be confiscated. 'Confiscation' means the goods become property of Government and Government can deal with it as it wants. On the other hand 'seizure' means goods are in custody of Government, but the property of goods remains with the owner.

**Goods that can be confiscated** - Goods improperly imported - (Goods liable for confiscation under section 111 of Customs Act) and goods attempted to be improperly exported (Goods liable for confiscation under section 113 Customs Act) can be confiscated. In addition, following can be confiscated - \* conveyance for transport of smuggled goods \* packages \* Goods used for concealing \* sale proceeds of contravening goods. The proceedings of confiscation are *in rem* against goods. Procedure for confiscation, effect of wrong confiscation and provisions of redemption fine in lieu of confiscation are identical to provisions under Central Excise Act. These aspects are already discussed under Central Excise.

**Confiscation of goods after clearance from port** - It is permissible to take action under section 28 of Customs Act and confiscate the goods, even after goods are cleared from customs. This can be done by issuing a show cause notice cum demand.

### **Re-export of offending goods**

Often it is found that goods are not eligible for import as per Import Policy. In such cases, re-export of such goods is permitted as per EXIM Policy. However, in such cases, penalty and redemption fine is payable. In *CC v. Elephanta Oil* 2003(152) ELT 257 (SC), it was held that even if goods are confiscated and goods are allowed to be re-exported, penalty can be levied. Power to levy penalty u/s 112 is different from power of confiscation of goods u/s 125 and giving option to pay fine in lieu of confiscation.

Permission for re-export in such cases may be given - *Collector v. N Patel* - 1992 (62) ELT 674 (GOI). In *Kusumbhai Dahyabhai Patel v. CC (P)* - 1995 (79) ELT 292 (CEGAT) also, it was held that even if goods are allowed to be re-exported, redemption fine can be imposed. In *K&K Gems v. CC* 1998(100) ELT 70 (CEGAT), it was held that fine in lieu of confiscation i.e. redemption option can be imposed.

**Re-export by foreign exporter or sale to another buyer** - If the Indian importer does not release the goods, the foreign exporter continues to be owner of the goods and can apply for re-export or sale to other eligible buyer in India if (a) At the time of importation, the import was legal (b) The foreign exporter was not party to fraud (c) The Indian importer has not paid for the goods or has not made arrangements for payment of goods (like letter of credit) to foreign exporter- *UOI v. Sampat Raj Dugar* - 1992 (58) ELT 163 (SC) = (1993) 88 STC 176 = AIR 1992 SC 1417 = JT 1992 (1) SC 554 = (1992) 2 SCC 66 = 1992 AIR SCW 1420 (SC - 3 member bench) - followed in *Savitri Electronics Co. v. CC* - 1992 (62) ELT 395 (CEGAT) \* *J P Electronics v. UOI* 2001(133) ELT 32 = 45 RLT 609 (Bom HC DB) \* *Grand Prime v. CC* 2001(137) ELT 795 (CEGAT) \* *Pacific International Traders v. UOI* 2002(142) ELT 544 (Bom HC DB).

### **Departmental Adjudication**

Monetary penalties and confiscation can be ordered by departmental authorities themselves. These are '*quasi-judicial*' powers. The powers are as follows : (a) Gazetted officer lower in rank than Assistant Commissioner (like Appraiser) : when the goods liable to confiscation does not

exceed Rs. 10,000 (b) Assistant Commissioner / Dy Commissioner : when the goods liable to confiscation does not exceed Rs. 2,00,000 (c) Additional Commissioner or Joint Commissioner : Rs. 10 lakhs - *as per Board circular* (d) Additional Commissioner or Joint Commissioner : without limit in cases of baggage and duty drawback (e) Commissioner : without limit. - - All notices pertaining to demands on account of collusion, wilful mis-statement or suppression of facts will be issued only by Commissioner if demand is over Rs 5 lakhs, even if demand is issued within six months/one year. In case of demand upto Rs 5 lakhs, show cause notice for collusion, fraud, mis-statement etc. can be issued by Additional Commissioner / Jt Commissioner. [CBE&C circular No 47/97-Cus dated 6.10.97]

It may be noted that as per section 122 of Customs Act, Additional Commissioner or Joint Commissioner is authorised to adjudicate the cases without any limit of amount. Restriction of Rs. 10 lakhs is only by an administrative instructions. Further, as per section 28 (1) of Customs Act, show cause notice can be issued by '*proper officer*' i.e. an officer of customs who is assigned the functions to be performed under Customs Act, by Board or Commissioner of Customs. (Chief Commissioner, Commissioner, Additional Commissioner, Joint Commissioner, Deputy Commissioner, Assistant Commissioner and Appraiser are all 'officers of Custom' and hence authority can be given to them by Board).

**ADJUDICATING POWERS TO CUSTOMS / EXCISE OFFICERS IN SOME FEMA MATTERS –**  
In respect of following offences, adjudication powers have been conferred on customs /excise officers. – (a) Offences u/s 6(3)(g) of FEMA. This section related restrictions / prohibitions on export, import or holding of currency or currency notes (2) Offences u/s 7(1)(a) of FEMA. This section relates to furnishing of export value of goods exported. The adjudication powers are as under – (a) Commissioner of Customs / CE – Cases where amount involved exceeds Rs one crore (b) Additional Commissioner of Customs / CE – When amount involved in between Rs 75 lakhs and Rs one crore (c) Joint commissioner of Customs / CE – When the amount involved is less than Rs 75 lakhs. – MF(DR) Order SO No. 1155(E) dated 5.1.2001.

**Opinion of other departments** - As per EXIM policy, In case of interpretation of EXIM policy, decision of Director General of Foreign Trade (DGFT) is final. Hence, the decision of DGFT in this regard is binding on customs authorities - *R N Rajan and Co. v. CC 1995 (77) ELT 600 (CEGAT)*. Similarly, license issued by DGFT cannot be questioned by customs authorities. [case law discussed in earlier chapter].

### **Prosecution for Offences**

Customs Law provides stiff punishments of imprisonment and fines for violation of Customs Act. These can be imposed only by *Court of Law* and these are independent of monetary penalties and confiscation of goods that can be ordered by Customs Authorities through departmental adjudication. Hon. Supreme Court have held that both can be imposed simultaneously for same offence.

**Evasion of Duty and prohibited goods** - Main penal provision contained in section 135 of Customs Act is in respect of evasion of duty and breaking prohibitions under the Act.

**WHO CAN BE PUNISHED** - The punishment is imposable on a person (a) who is knowingly concerned in mis-declaration of value or in any fraudulent evasion or attempt to evasion of duty or of any prohibition imposed on the imports/export of such goods (b) who acquires possession or is in any way concerned with carrying, harbouring, keeping, concealing, selling or purchasing, or otherwise dealing with goods which he knows or has reason to believe are liable to confiscation under section 111 i.e. improper imports or under section 113 i.e. attempt to improperly export (c) who attempts to export any goods which he knows or has reason to believe are liable to confiscation u/s 113. [section 135(1)]

**PUNISHMENT THAT CAN BE IMPOSED** - Punishment imposable is (a) **Goods under section 123** : In case of goods covered under section 123 ( i.e. gold, watches, synthetic yarn and metallised yarn, fabrics of synthetic yarn, electronic calculators, zip fasteners and silver bullion) : imprisonment upto seven years and fine (without limit) except in exceptional cases, the imprisonment cannot be less than three years (b) **In other cases** : three years or with fine or both [second part of section 135(1)] (c) **repeat conviction** : a person already convicted for offence under Customs Act is convicted again, the imprisonment punishment can be seven years and fine and in absence of special and adequate reasons, the punishment shall not be less than one year. [section 135(2)]

**PUBLICATION OF NAME** - If a person is convicted under this Act, Court can order publication of names, place of business or residence, nature of contravention etc., under section 135B. Such publication will be at the cost of accused and in newspaper or otherwise as directed by Court.

**Other minor Offences** - Other minor offences under Customs Act are as follows.

**FALSE DECLARATION** - Person making, signing or using any statement, declaration or document knowing or having reason to believe that such statement, declaration or document is false in any material particular, shall be punishable with imprisonment upto six months or fine or both (section 132 of Customs Act).

**OBSTRUCTION OF OFFICERS OF CUSTOMS** - If any person intentionally obstructs any officer of Customs in exercise of any powers conferred under the Customs Act, he shall be punishable with imprisonment upto six months or fine or both (section 133 of Customs Act).

**REFUSAL TO BE X-RAYED** - If any person refuses to take X-ray picture of his body in accordance with order of Magistrate or refuses to allow suitable action to be taken to bringing out goods from his body under supervision of a doctor, he shall be punishable with imprisonment upto six months or fine or both (section 134 of Customs Act). This provision is mainly in respect of persons smuggling goods by hiding the same in their body.

**PREPARATION FOR IMPROPER EXPORT** - Attempting to make exports in contravention of Customs Act is punishable with imprisonment upto three years or fine or both.

***Offence in case of Company*** - Though Company is an independent legal person, it works through Managing Directors, directors and employees. Personal penalty can be imposed on person in-charge or responsible to pay customs duty. If an employee is involved in fraud, penalty can be imposed on him. In case of Company or partnership firm, every person who was in-charge of or was responsible to affairs of the Company/firm is deemed to be guilty [section 140 (1) of Customs Act]. Normally, a Managing Director (partner in case of firm) or other person specially authorised is deemed to be in-charge. However, such person can prove that offence was committed without his knowledge or he had taken due care to prevent the offence. In addition, if it is proved that the offence in relation to Company is committed with consent or connivance of, or due to neglect on part of any director, Manager or Secretary or other officer of Company, such person shall be deemed to be guilty [section 140 (2) of Customs Act]. Difference between provisions of section 140 (1) and 140 (2) is that in former case, the person in charge is deemed to be guilty and burden of proof is on him to prove that he had no knowledge; while in later case, burden of proof is on prosecution to prove that offence was committed with knowledge or connivance of the director, manager, secretary or other officer.

***Offence by Officers of Customs*** - If an Officer of Customs enters into any agreement to do or abstains from doing or permits any act or connives at any act or thing, whereby any fraudulent export is effected, or by which duty of customs is evaded or prohibited goods are allowed to enter

India or go out of India, he shall be punishable with imprisonment upto a term of three years or with fine, or both. [section 136(1)].

If any customs officer (a) requires a person to be searched for goods without any reason to believe that he has such goods (b) Arrests a person without any reason to believe that he has committed an offence u/s 135 or (c) Searches or authorises search without any reason to believe that any goods, documents or things are secreted in the place; he shall be punishable with imprisonment upto 6 months or fine upto Rs 1,000 or both. [section 136(2)].

If an officer of customs discloses any information obtained by him in official capacity, he shall be punishable with imprisonment upto 6 months or fine upto Rs 1,000 or both. Of course, he can disclose the information in discharge of his duties on in compliance with any law in force. [section 136(3)].

The prosecution can be launched in Court only with previous sanction of Central Government in case of prosecution against officer of rank of Assistant Commissioner and above. In lower ranks, previous sanction of Commissioner is required. [section 137(2)]

### **Proof in Customs Law**

**Burden of Proof of Offence is on Department** - In Customs law, the commitment of offence has to be proved by department beyond reasonable doubt. However, the accused has to prove beyond reasonable doubt that there was no culpable state of mind like intention, knowledge, belief etc. In case of goods covered under section 123, burden of proof is on person from whom goods are seized as explained below.

MENS REA PRESUMED - Section 138A of Customs Act provides that 'mens rea' shall be presumed by Court '*burden of proof regarding non-existence of Mens rea is on the accused*'. This proof has to be '**beyond reasonable doubt**'. Thus, department has to prove the offence beyond reasonable doubt. However, the accused has to prove that he had no 'culpable state of mind'. - validity of this provision upheld in *Devchand Kalyan Tandel v. State of Gujarat* 1997(89) ELT 433 (SC) = AIR 1996 SC 2787.

**Burden of proof in case of goods covered under section 123** - Section 123 of Customs Act makes special provisions in respect of certain sensitive goods like Gold, Synthetic yarn and metallised yarn, fabrics made of synthetic yarn, Electronic calculators, watches, watch movements, zip fasteners and Silver bullion. In case of these items, if these are seized in the reasonable belief that they are smuggled goods, the owner or possessor has to prove that these are not smuggled goods. In other words, 'burden of proof' that these are not smuggled is on accused. Validity of this section (section 178A of earlier Act) has been upheld in *CC v. Nathella Sampathu Chetty* AIR 1962 SC 316 = 110 ELT 157 (SC 5 member bench).

**Statement before Customs is relevant as evidence** - Statement made and signed before any Customs Officer of gazetted rank is allowed as evidence in the prosecution as follows : (a) in case of a person who is dead or if he cannot be found or whose presence cannot be obtained without undue delay or expenses, the statement *will be* allowed as evidence (b) In case of person who is present before the Court and is examined as witness, Court *may* admit the statement if it is of the opinion that the statement should be admitted in the interest of justice. Thus, discretion is given to Court in case of statements made before Customs Officer, only if such person is examined as witness. *This provision is applicable to departmental adjudication also.* – section 138.

Question of relevancy of statement made before customs officer, retraction of statement etc. has been discussed in relevant chapter in Central Excise.