

PROVISIONS RELATING TO ILLEGAL IMPORT, CONFISCATION, PENALTY & ALLIED PROVISIONS

12.1 INTRODUCTION

Chapters IV, IV A, IV B and IV C of the Customs Act deals with the provisions relating to prohibition on importation and exportation of goods and detection of illegal imports and exports. The relevant sections are sections 11, 11A to 11N. Before we understand these provisions, we should understand the meaning of “prohibited goods”.

12.2 PROHIBITION

The term “prohibited goods” has been defined under section 2(33) meaning “any goods the import or export of which is subject to any prohibition under this 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”.

This definition can be split into:

- any goods which is subject to any prohibition
- under this Act or any other law for the time being in force
- but does not include any such goods which complies with the conditions imposed

Hence, this definition is of a wider scope which covers goods not only subject to prohibition under this Act but also under any other law in force. One exception is those goods which complies or fulfills the condition imposed on it.

The prohibition provided under the Customs Act is in four parts:

Provisions	Sections	Chapter
General power to prohibit	11	IV
Special prohibition relating to detection of illegally imported goods and prevention/disposal thereof	11A to 11G	IV A

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Special prohibition relating to detection of illegally imported goods and prevention/disposal thereof	11H to 11 M	IV B
Power to exempt from the provisions of Chapters IVA and IVB	11N	IV C

12.2.1 General power to prohibit

Power to prohibit importation and exportation of goods [Section 11]:

(1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export of goods of any specified description.

(2) The purposes referred to in sub-section (1) are the following :-

- (a) the maintenance of the security of India;
- (b) the maintenance of public order and standards of decency or morality;
- (c) the prevention of smuggling;
- (d) the prevention of shortage of goods of any description;
- (e) the conservation of foreign exchange and the safeguarding of balance of payments;
- (f) the prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver;
- (g) the prevention of surplus of any agricultural product or the product of fisheries;
- (h) the maintenance of standards for the classification, grading or marketing of goods in international trade;
- (j) the prevention of serious injury to domestic production of goods of any description;
- (k) the protection of human, animal or plant life or health;
- (l) the protection of national treasures of artistic, historic or archaeological value;
- (m) the conservation of exhaustible natural resources;
- (n) the protection of patents, trade marks and copyrights;
- (o) the prevention of deceptive practices;
- (p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;

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- (q) the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security;
- (r) the implementation of any treaty, agreement or convention with any country;
- (s) the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;
- (t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;
- (u) the prevention of the contravention of any law for the time being in force; and
- (v) any other purpose conducive to the interests of the general public.

The Central Government has issued a large number of notifications under section 11, prohibiting, restricting or conditionally permitting import or export of various goods.

12.3 DETECTION OF ILLEGALLY IMPORTED GOODS AND PREVENTION OF THE DISPOSAL THEREOF [CHAPTER IVA]

12.3.1 This chapter was inserted in the Customs Act, in 1969 consequent to large scale smuggling of silver out of the country and various consumer articles smuggled into the country. It was felt necessary to make provisions to deal effectively with such cases. Therefore, the provisions of chapter IVA cannot be treated as procedural provisions.

Section 11A defines certain terms such as “illegal import” and “intimated place”. The term “illegal import” is defined as “the import of any goods in contravention of provisions of this Act or any other law for the time being in force”.

If the Central Government is satisfied that it is expedient in the public interest to take special measures for the purpose of

- checking the illegal import,
- circulation or disposal of such goods, or
- facilitating the detection of such goods,

it may, by notification in the Official Gazette, specify goods of such class or description. Such notification shall be issued having regard to the magnitude of the illegal import of goods of any class or description [Section 11B].

Provisions of Chapter IV A do not apply to goods such as terylene, terricot or cotton bush shirts, shirts and pants. Secondly, under this chapter, the burden of proving foreign origin of impugned goods is not cast on the person from whom the goods are seized as these are not covered or notified under section 123.

Under notification no. 204/84-Cus dated 20.7.98, VCRs and players were notified for the purpose of section 123. By notification no. 205/84-Cus dt 20.7.1984, VCRs and VCPs along with video cassette tapes were notified for the purpose of Chapter IV A. It was held

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that since video cassette tapes were not notified under section 123, the burden of proving that the said cassettes had been illegally imported was on the Revenue [*Hindustan Electronics (Gem House) vs. CC & CE, 1987 (31) ELT 252 (T-NRB)*].

12.3.2 Persons possessing notified goods to intimate the place of storage, etc.[Section 11 C]:

1. Intimation of possessing notified goods: Every person who owns, possesses or controls, on the notified date, any notified goods, shall, within seven days from that date, deliver to the proper officer a statement in relation to the notified goods owned, possessed or controlled by him and the place where such goods are kept or stored.

Every person who acquires any notified goods, after the notified date, before making such acquisition,

- shall deliver to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored after such acquisition and
- shall, immediately on such acquisition, deliver to the proper officer a statement in relation to the notified goods acquired by him.

2. Intimation of shifting of any notified goods: If any person intends to shift any notified goods to any place other than the intimated place, he shall, before taking out such goods from the intimated place, deliver to the proper officer an intimation containing the particulars of the place to which such goods are proposed to be shifted. No person shall, after the expiry of seven days from the notified date, keep or store any notified goods at any place other than the intimated place.

3. Sale or transfer of notified goods: Where any notified goods have been sold or transferred, such goods shall not be taken from one place to another unless they are accompanied by the voucher referred to in section 11F.

No notified goods (other than those which have been sold or transferred) shall be taken from one place to another unless they are accompanied by a transport voucher prepared by the persons owning, possessing or controlling such goods.

12.3.3 Precautions to be taken by persons acquiring notified goods [Section 11D]:

As per section 11D, no person shall acquire (except by gift or succession, from any other individual in India), after the notified date, any notified goods unless such goods are accompanied by the voucher referred to in section 11F or the memorandum referred to in sub-section (2) of section 11G.

Persons possessing notified goods have to maintain, as prescribed by rules made, a true and complete account of such goods. [Section 11E]. Sale or transfer of notified goods should be evidenced by vouchers as per Section 11 F].

Conclusion: The Notified Goods (Prevention of Illegal Import) Rules, 1969 provide for the particulars to be given in the statements, transport voucher, account forms, sale memos, etc. These rules also provide for reasonable steps to be taken by the person acquiring the

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notified goods. Rule 9 also sets out the particulars of the notified goods which should be incorporated in the records, such as description, quantity, identifying particulars like make, brand, serial number, country of origin etc. The intention is that, once the identity of the goods are so pin pointed by these records, its origin and movement can be traced backwards and if it is not possible to correlate the goods to any duty payment document and thereby satisfy oneself that the goods have actually paid import duty, a reasonable presumption can be had that the goods have been smuggled into India without payment of duty and in contravention of existing regulations.

12.4 PREVENTION OR DETECTION OF ILLEGAL EXPORT OF GOODS [CHAPTER IV B]

Under normal circumstances, an illegal export is said to be committed only when the goods have been exported out of India. In such a situation, the goods are not available to the Government to take action against them. For taking action in the case of illegal export, the goods have to be caught when the act of illegal export is being committed. This has to be done only at the borders or the custom ports. As an alternative, it has been provided that the goods which are attempted to be illegally exported are also liable to penal action. The problem in such a case is what constitutes an attempt for illegal export. Admittedly conception of a plan to export illegally or making preparations for execution of such a plan cannot be legally proceeded against. An attempt has been understood in judicial parlance as a series of events which will eventually result in the commission of a particular offence. It has been difficult to determine precisely in any particular situation when an attempt has commenced and what acts constitute such an offence. Chapter IV B was introduced in the Customs Act to prevent or detect such export of goods illegally.

Section 11-I defines certain terms relevant for the purpose of this chapter. Definition of some of the terms are given below:

- (a) "Illegal export" means the export of any goods in contravention of the provisions of this Act or any other law for the time being in force;
- (b) "intimated place" means a place intimated under sub-section (1), sub-section (2) or sub-section (3), as the case may be, of section 11J;
- (c) "specified area" includes the Indian customs waters, and such inland area, not exceeding one hundred kilometres in width from any coast or other border of India, as the Central Government may, having regard to the vulnerability of that area to smuggling, by notification in the Official Gazette, specify in this behalf.

Section 11I empowers the Central Government to specify goods, having regard to the magnitude of the illegal export of goods of any class or description for the purpose of checking the illegal export or facilitating the detection of goods which are likely to be illegally exported. At present silver and acetic anhydride have been so notified.

The next measure prescribed in this regard is to compel persons possessing such specified goods, in a specified area to follow the procedure prescribed under section 11J, 11 K, 11 L and 11 M.

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The restriction imposed include the following:

1. Section 11J (1) specifies that, every person who owns, possesses or controls any specified goods on the specified date, the market price of which exceeds Rs.15,000 shall, within seven days from that date, deliver to the proper officer an intimation containing the particulars of the place where such goods are kept or stored within the specified area.
2. Every person who acquires (within the specified area), after the specified date, any specified goods, -
 - (i) the market price of which, or
 - (ii) the market price of which together with the market price of any specified goods of the same class or description, if any, owned, possessed or controlled by him on the date of such acquisition,exceeds Rs.15,000 shall, before making such acquisition, deliver to the proper officer an intimation containing the particulars of the place where such goods are proposed to be kept or stored after such acquisition.
3. Transport of specified goods has to be covered by vouchers, in such form and containing such particulars as may be specified by rules made in this behalf.
4. Every possessor of specified goods is required to maintain accounts in the prescribed form, inter alia, showing details of receipts and disposal.

12.5 EXEMPTIONS FROM THE OPERATION OF CHAPTER IV A & IV B

Section 11N empowers the Central Government to exempt generally, either absolutely or subject to such conditions as may be specified in the notification, goods of any class or description from all or any of the provisions of Chapter IVA or Chapter IVB.

The following are notified goods:

1. Photographic cameras, flash guns and colour films [*M.F. (D.R. & I.) Notification No. 74-Cus, dated 7th April, 1969*]
2. Zip fasteners and parts thereof [*M.F. (D.R. & I.) Notification No. 74-Cus, dated 7th April, 1969*]

12.6 CONFISCATION OF GOODS AND CONVEYANCES AND IMPOSITION OF PENALTIES [CHAPTER XIV]

Confiscation means seizure of private property by the Government without compensation to the owner, often as a consequence of conviction for crime, or because possession or use of the property was contrary to law.

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This chapter deals with confiscation of goods and conveyances and imposing penalties. The provisions are contained in sections 111 to 127.

12.6.1 Confiscation of improperly imported goods [Section 111]:

The following goods brought from a place outside India shall be liable to confiscation:

- (a) any goods imported by sea or air which are unloaded or attempted to be unloaded at any place other than a customs port or customs airport appointed under clause (a) of section 7 for the unloading of such goods;
- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;
- (c) any dutiable or prohibited goods brought into any bay, gulf, creek or tidal river for the purpose of being landed at a place other than a customs port;
- (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any dutiable or prohibited goods found concealed in any manner in any conveyance; any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;
- (f) any dutiable or prohibited goods which are unloaded from a conveyance in contravention of the provisions of section 32, other than goods inadvertently unloaded but included in the record kept under sub-section (2) of section 45;
- (g) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;
- (h) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
- (i) any dutiable or prohibited goods removed or attempted to be removed from a customs area or a warehouse without the permission of the proper officer or contrary to the terms of such permission;
- (j) any dutiable or prohibited goods imported by land in respect of which the order permitting clearance of the goods required to be produced under section 109 is not produced or which do not correspond in any material particular with the specification contained therein;
- (k) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;

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- (l) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77
- (m) in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;
- (n) any dutiable or prohibited goods transitted with or without transshipment or attempted to be so transitted in contravention of the provisions of Chapter VIII;
- (o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;
- (p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

◆ Case laws:

1. The word “prohibition” used in clause (d) not only takes within its fold total prohibition, but also restrictions or controls of all imports and exports [*Sheikh Mohd. Omer vs. CC 1983 ELT 1439 (SC)*].
2. If the goods are imported from countries other than those permitted in the license, such import would be without license, conferring jurisdiction on the customs authorities to confiscate the goods under section 111 (d) [*CC & CE vs. Hindustan Motors Ltd 1979 ELT J313 (Cal)*].
3. Prior to 1973, clause (m) provided for confiscation of goods that did not correspond with the bill of entry in any material particular. By Act 36 of 1973, this was amended to include “value” and “any other particular”. Therefore, prior to amendment, any difference in value between the bill of entry and value as found by the department cannot be said to be variation in material particular within the meaning of this clause [*Rib Tapes (India) Pvt. Ltd & Anr vs. UOI AIR 1985 SC 2014*].
4. In *Jacsons Thevara vs. CC & CE 1992 (61) ELT 343 (SC)*, the importer had cleared goods under project imports regulations and concessional assessment under heading no. 84.66 of the Customs Tariff. Subsequently, these goods were diverted to a new unit and were not used for substantial expansion of capacity at the existing unit. Since the post importation conditions of exemption had not been complied with, the goods were confiscated after due process of law. This was upheld by the Supreme Court rejecting the contention of the appellant that the provisions of the clause (o) would apply only to exempt goods and not to goods which were liable to duty.

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5. Confiscation being a proceeding *in rem*, is enforceable even against goods whose ownership is disclaimed [*Satyanarayan vs. CCE 1987 (29) ELT 247 (T-A) etc.*].
6. Section 111 does not use the word “imported goods”. It refers to “goods brought from a place outside India”. The definition of “import” in Section 2(23) may also refer to bringing of goods into India from a place outside India. This definition does not include goods cleared for home consumption, whereas, the expression “goods brought from a place outside India” makes no such exclusion. It is not permissible to use definitions in the Act as substitutes for phraseology adopted in the provisions. [*N. Devidas & Co vs. CC 1987 (29) ELT 247 (T-A)*].
7. Burden of proof that the goods are smuggled goods would be on the department. [*B.S. Jewellers vs. Addnl CCE & C 1986 (26) ELT 451 (T-NRB)*].
8. In *Sigma Electronics vs. CC 1997 (91) ELT 401 (T)* there is an interesting observation that when no bill of entry is filed, the appellant cannot be charged of having misdeclared the material particulars such as value or description under clause (m). On the other hand, for confiscating the goods under clause (d), no such declaration is necessary. If, upon examination, the goods are found to be prohibited or restricted, the goods can be confiscated.

12.6.2 Confiscation of goods attempted to be improperly exported, etc. [Section 113]:

The following export goods shall be liable to confiscation:

- (a) any goods attempted to be exported by sea or air from any place other than a customs port or a customs airport appointed for the loading of such goods;
- (b) any goods attempted to be exported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the export of such goods;
- (c) any goods brought near the land frontier or the coast of India or near any bay, gulf, creek or tidal river for the purpose of being exported from a place other than a land customs station or a customs port appointed for the loading of such goods;
- (d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
- (e) any goods found concealed in a package which is brought within the limits of a customs area for the purpose of exportation;
- (f) any goods which are loaded or attempted to be loaded in contravention of the provisions of section 33 or section 34;
- (g) any goods loaded or attempted to be loaded on any conveyance, or water-borne, or attempted to be water-borne for being loaded on any vessel, the eventual destination of which is a place outside India, without the permission of the proper officer;

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- (h) any goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under section 77;
- (i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof;
- (ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback under section 75;
- (j) any goods on which import duty has not been paid and which are entered for exportation under a claim for drawback under section 74;
- (k) any goods cleared for exportation which are not loaded for exportation on account of any wilful act, negligence or default of the exporter, his agent or employee, or which after having been loaded for exportation are unloaded without the permission of the proper officer;
- (l) any specified goods in relation to which any provisions of Chapter IVB or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.

12.6.3 Confiscation of conveyance [Section 115]:

- (1) The following conveyances shall be liable to confiscation:
 - (a) any vessel which is or has been within the Indian customs waters, any aircraft which is or has been in India, or any vehicle which is or has been in a customs area, while constructed, adapted, altered or fitted in any manner for the purpose of concealing goods;
 - (b) any conveyance from which the whole or any part of the goods is thrown overboard, staved or destroyed so as to prevent seizure by an officer of customs;
 - (c) any conveyance which having been required to stop or land under section 106 fails to do so, except for good and sufficient cause;
 - (d) any conveyance from which any warehoused goods cleared for exportation, or any other goods cleared for exportation under a claim for drawback, are unloaded, without the permission of the proper officer;
 - (e) any conveyance carrying imported goods which has entered India and is afterwards found with the whole or substantial portion of such goods missing, unless the master of the vessel or aircraft is able to account for the loss of, or deficiency in, the goods.
- (2) Any conveyance or animal used as a means of transport in the smuggling of any goods or in the carriage of any smuggled goods shall be liable to confiscation, unless the owner of the conveyance or animal proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the

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conveyance or animal :

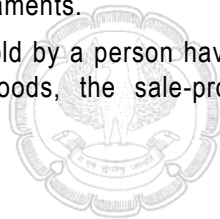
Where any such conveyance is used for the carriage of goods or passengers for hire, the owner of any conveyance shall be given an option to pay in lieu of the confiscation of the conveyance a fine not exceeding the market price of the goods which are sought to be smuggled or the smuggled goods, as the case may be.

12.6.4 Confiscation of packages and their contents [Section 118]: Where any goods imported in a package are liable to confiscation, the package and any other goods imported in that package shall also be liable to confiscation [Section 118(a)]. Where any goods are brought in a package within the limits of a customs area for the purpose of exportation and are liable to confiscation, the package and any other goods contained therein shall also be liable to confiscation [Section 118(b)].

12.6.5 Confiscation of goods used for concealing smuggled goods [Section 119]: As per this section, any goods used for concealing smuggled goods shall also be liable to confiscation.

12.6.6 Confiscation of smuggled goods and their sale proceeds [Section 120-121]: These two provisions specifically relate to smuggled goods like gold etc. which after smuggling are changed in physical form or characteristics. For example, gold biscuits are made into primary gold or gold ornaments.

Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation.



12.7 PENALTIES ON PERSONS

The personal penalty is a heavy punishment. The entire Customs Act being in the nature of an indirect tax, no person can be penalised unless he is known to have personally committed the offence with full knowledge of the illegality of his action. However, this element of *mens rea* would defeat the very objective of deterrent action against persons involved in smuggling. Therefore, the persons involved in smuggling have been categorised into two, namely,

1. those directly involved in doing any act or omission which legally constitutes smuggling and
2. others, who wittingly or unwittingly get themselves involved in the various stages of smuggling.

12.8 PENAL PROVISIONS UNDER THE CUSTOMS ACT

The word 'penalty' means punishment under the law, i.e., such punishment as is provided in penal laws. It also means the sum payable as a punishment for a default.

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12.8.1 Penalties in respect of improper importation of goods [Section 112]:

The person involved in omission or commission under the Customs Act, in relation to any goods which renders such goods liable to confiscation under section 111, or abets the same, or 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, shall be liable to penalties as follows :-

- (i) in the case of goods in respect of which any prohibition is in force under the Customs Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;
- (ii) in the case of dutiable goods, other than prohibited goods, the person shall be liable to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;
- (iii) in the case of goods or baggage in respect of which misdeclaration of value has been done, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;
- (iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;
- (v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

The various penalties are tabulated below:

SI No.	OFFENCE	PENALTY
01	Any person who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or	
02	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	

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	111, shall be liable to penalty,	
	(a) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force	the value of the goods or five thousand rupees, whichever is the greater;
	(b) in the case of dutiable goods, other than prohibited goods	the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;
	(c) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof	the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater
	(d) in the case of goods falling both under clauses (a) and (c)	the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest
	(e) in the case of goods falling both under clauses (b) and (c)	the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest.

12.8.2 Penalties in respect of improper exportation of goods [Section 114]

The person involved in commission or omission, in relation to any goods, which renders such goods liable to confiscation under section 113, or abets the same, shall be liable to penalties in different types of cases as follows:-

1. in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;
2. in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees,

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whichever is the greater;

3. in the case of any other goods, to a penalty not exceeding the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater.

12.8.3 Mandatory Penalty for short-levy or non-levy of duty in certain cases

[Section 114A] : In cases of non-levy or short levy of duty or where the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined. However, where such duty or interest, as the case may be, and the interest payable thereon, is paid within thirty days from the date of the communication of the order, the amount of penalty to be paid shall be reduced to 25% of the duty or interest.

If the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the duty or interest as reduced or increased, as the case may be, shall be taken into account. Also, in a case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the Court, then, the benefit of reduced penalty shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon, and 25% of the consequential increase in penalty have also been paid within thirty days of the communication of the order. Where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

12.8.4 Use of false and incorrect material to be penalized [Section 114AA]: Section 114AA lays down that if a person knowingly or intentionally

- makes,
- signs or uses, or
- causes to be made,
- signed or used,

any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of the Customs Act, shall be liable to a penalty. The penalty shall not exceed 5 times the value of goods.

12.8.5 Penalty for not accounting for goods [Section 116]: If any goods loaded in a conveyance for importation into India, or any goods transshipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at that destination, and if the failure to unload or the deficiency is not accounted for to the

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satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, the person-in-charge of the conveyance shall be liable to: -

- (a) in the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;
- (b) in the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported.

12.8.6 Penalties for contravention, etc., not expressly mentioned [Section 117] :

Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding Rs.1,00,000.

12.9 ADJUDICATION OF CONFISCATIONS AND PENALTIES [SECTION 122]

The Customs Act enjoins quasi-judicial proceedings to be followed before any penalties are imposed and any confiscation action etc. initiated against any offending goods. Apart from issuing proper show cause notice under section 124, the persons concerned are also required to be given opportunity of representation in writing and personal hearing in the matter. The proper adjudication authority is then to pass final order taking due note of all evidences brought on record.

As per section 122 of the Customs Act, where anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged, -

- (a) without limit by a Commissioner of Customs or a Joint Commissioner of Customs;
- (b) where the value of the goods liable to confiscation does not exceed two lakhs rupees, by an Assistant Commissioner of Customs or Deputy Commissioner of Customs;
- (c) where the value of the goods liable to confiscation does not exceed ten thousand rupees, by a Gazetted Officer of Customs lower in rank than an Assistant Commissioner of Customs. -

Generally, '*mens rea*' is not required to be proof for the imposition of penalty under the provisions of the Customs Act. The amount of penalty depends on the gravity of the offence and is to act as the deterrent for future.

Whenever the goods are confiscated by an adjudicating authority, if these are not prohibited goods, an option is to be given to the party as per section 125 of the Customs Act, to pay a fine known as 'redemption fine' of quantum as the adjudicating authority deems fit, in lieu of the confiscation. Prohibited goods can be confiscated absolutely.

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12.9.1 Adjournment procedure [Section 122A]

Section 122A provides that Adjudicating Authorities shall give an opportunity of being heard to a party in a proceeding if the party so desires. The Adjudicating Authority may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties and adjourn the hearing for reasons to be recorded in writing. However, such adjournment shall not be granted for more than three times to a party during the proceeding.

12.9.2 Burden of proof in certain cases [Section 123] : Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be

- (i) on the person from whose possession the goods were seized; and
- (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

in any other case, on the person, if any, who claims to be the owner.

This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.

12.9.3 Issue of show cause notice before confiscation of goods etc. [Section 124]: No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

- (a) is given a notice in writing with the prior approval of the officer of customs not below the rank of a Deputy Commissioner of Customs informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty;
- (b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and
- (c) is given a reasonable opportunity of being heard in the matter :

The notice referred to in clause (a) and the representation referred to in clause (b) may, at the request of the person concerned be oral.

12.9.4 Option to pay fine in lieu of confiscation [Section 125] : Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit.

Without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of

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imported goods the duty chargeable thereon.

Where any fine in lieu of confiscation of goods is imposed, the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

12.9.5 On confiscation, property to vest in Central Government [Section 126] :

When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government. The officer adjudging confiscation shall take and hold possession of the confiscated goods.

12.9.6 Award of confiscation or penalty by customs officers not to interfere with other punishments [Section 127] :

The award of any confiscation or penalty under this Act by an officer of customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under the provisions of Chapter XVI of this Act or under any other law.

12.10 POWERS OF CUSTOMS OFFICERS

12.10.1 Power to search suspected persons entering or leaving India, etc. [Section 100] :

Sub-section (1) provides that if the proper officer has reason to believe that any person to whom this section applies has secreted about his person, any goods liable to confiscation or any documents relating thereto, he may search that person.

Sub-section (2) lays down that this section applies to the following persons, namely : –

- (a) any person who has landed from or is about to board, or is on board any vessel within the Indian customs waters;
- (b) any person who has landed from or is about to board, or is on board a foreign-going aircraft;
- (c) any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India;
- (d) any person not included in clauses (a), (b) or (c) who has (d) entered or is about to leave India;
- (e) any person in a customs area.

12.10.2 Power to search suspected persons in certain other cases [Section 101] :

Sub-section (1) lays down that without prejudice to the provisions of section 100, if an officer of customs empowered in this behalf by general or special order of the [Commissioner of Customs], has reason to believe that any person has secreted about his person any goods of the description specified in sub-section (2) which are liable to confiscation, or documents relating thereto, he may search that person.

As per sub-section (2), the goods referred to in sub-section (1) are the following : –

- (a) gold;

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- (b) diamonds;
- (c) manufactures of gold or diamonds;
- (d) watches;
- (e) any other class of goods which the Central Government may, by notification in the Official Gazette, specify.

12.10.3 Persons to be searched may require to be taken before gazetted officer of customs or magistrate [Section 102]: Sub-section (1) provides that when any officer of customs is about to search any person under the provisions of section 100 or section 101, the officer of customs shall, if such person so requires, take him without unnecessary delay to the nearest gazetted officer of customs or magistrate.

As per sub-section (2), if such requisition is made, the officer of customs may detain the person making it until he can bring him before the gazetted officer of customs or the magistrate.

The gazetted officer of customs or the magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made [sub-section (3)].

Before making a search under the provisions of section 100 or section 101, the officer of customs shall call upon two or more persons to attend and witness the search and may issue an order in writing to them or any of them so to do; and the search shall be made in the presence of such persons and a list of all things seized in the course of such search shall be prepared by such officer or other person and signed by such witnesses [sub-section (4)].

No female shall be searched by any one excepting a female [sub-section (5)].

12.10.4 Power to screen or X-ray bodies of suspected persons for detecting secreted goods [Section 103]: Where the proper officer has reason to believe that any person referred to in sub-section (2) of section 100 has any goods liable to confiscation secreted inside his body, he may detain such person and produce him without unnecessary delay before the nearest magistrate [sub-section (1)].

A magistrate before whom any person is brought under sub-section (1) shall, if he sees no reasonable ground for believing that such person has any such goods secreted inside his body, forthwith discharge such person [sub-section (2)].

Where any such magistrate has reasonable ground for believing that such person has any such goods secreted inside his body and the magistrate is satisfied that for the purpose of discovering such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect [sub-section (3)].

Where a magistrate has made any order under sub-section (3), in relation to any person,

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the proper officer shall, as soon as practicable, take such person before a radiologist possessing qualifications recognized by the Central Government for the purpose of this section, and such person shall allow the radiologist to screen or X-ray his body [sub-section (4)].

A radiologist before whom any person is brought under sub-section (4) shall, after screening or X-raying the body of such person, forward his report, together with any X-ray pictures taken by him, to the magistrate without unnecessary delay [sub-section (5)].

Where on receipt of a report from a radiologist under sub-section (5) or otherwise, the magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct that suitable action for bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction.

However, in the case of a female no such action shall be taken except on the advice and under the supervision of a female registered medical practitioner [sub-section (6)].

Where any person is brought before a magistrate under this section, such magistrate may for the purpose of enforcing the provisions of this section order such person to be kept in such custody and for such period as he may direct [sub-section (7)].

Nothing in this section shall apply to any person referred to in sub-section (1), who admits that goods liable to confiscation are secreted inside his body, and who voluntarily submits himself for suitable action being taken for bringing out such goods [sub-section (8)].

Explanation. - For the purposes of this section, the expression "registered medical practitioner" means any person who holds a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916, or notified under section 3 of that Act, or by an authority specified in any of the Schedules to the Indian Medical Council Act, 1956.

12.10.5 Power to arrest [Section 104]: To tackle the menace of smuggling and other serious economic offences including commercial frauds effectively, apart from penal action in departmental adjudication, the Customs Act, also provides for criminal prosecution action. The persons involved can be arrested and prosecuted in a Court of Law. Prosecution action can also be taken for providing false documents/declarations to Customs and for obstructing Customs officers working intentionally.

A customs officer duly authorised by the Commissioner can arrest any person, in India or within the Indian customs waters, who is guilty of an offence punishable under section 132 or section 133 or section 135 or section 135A or section 136 of the Customs Act [Section 104(1)].

Under the law, the person being arrested is entitled to be informed about the grounds for such arrest under the law. The said section also enjoins that provides that every person

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arrested under the Act has to be taken without unnecessary delay to the nearest Magistrate. Since the Customs Act doesn't contain any provision regulating the manner in which a person arrested is to be dealt with by the Magistrate, therefore, the provisions of the Criminal Procedure Code which regulate this aspect would be applicable to the person arrested under the provisions of the Customs Act. The power to remand to judicial custody vests in the Magistrate by virtue of section 165 of the Criminal Procedure Code. An offence under this Act shall not be cognizable.

Department has issued several instructions to ensure that powers of arrest by Customs officers are exercised with care at senior level and arrest should be resorted in sufficient grave nature of offences as per laid down guidelines.

12.10.6 Power to search premises [Section 105]: Section 105 provides that if the Assistant/Deputy Commissioner of Customs or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.

The provisions of the Code of Criminal Procedure, 1898 relating to searches shall, so far as may be, apply to searches under this section.

12.10.7 Power to stop and search conveyances [Section 106]: Section 106 (1) provides that where the proper officer has reason to believe that any aircraft, vehicle or animal in India or any vessel in India or within the Indian customs waters has been, is being, or is about to be, used in the smuggling of any goods or in the carriage of any goods which have been smuggled, he may at any time stop any such vehicle, animal or vessel or, in the case of an aircraft, compel it to land, and -

- (a) rummage and search any part of the aircraft, vehicle or vessel;
- (b) examine and search any goods in the aircraft, vehicle or vessel or on the animal;
- (c) break open the lock of any door or package for exercising the powers conferred by clauses (a) and (b), if the keys are withheld.

Sub-section(2) of section 106 provides that where for the purposes of sub-section (1)

- (a) it becomes necessary to stop any vessel or compel any aircraft to land, it shall be lawful for any vessel or aircraft in the service of the Government while flying her proper flag and any authority authorised in this behalf by the Central Government to summon such vessel to stop or the aircraft to land, by means of an international signal, code or other recognized means, and thereupon, such vessel shall forthwith stop or such aircraft shall forthwith land; and if it fails to do so, chase may be given thereto by any vessel or aircraft as aforesaid and if after a gun is fired as a signal the vessel fails to stop or the aircraft fails to land, it may be fired upon;

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(b) it becomes necessary to stop any vehicle or animal, the proper officer may use all lawful means for stopping it, and where such means fail, the vehicle or animal may be fired upon.

12.10.8 Power to inspect [Section 106A]: Any proper officer authorised in this behalf by the Commissioner of Customs may, for the purpose of ascertaining whether or not the requirements of this Act have been complied with, at any reasonable time, enter any place intimated under Chapter IVA or Chapter IVB, as the case may be, and inspect the goods kept or stored therein and require any person found therein, who is for the time being in charge thereof, to produce to him for his inspection the accounts maintained under the said Chapter IVA or Chapter IVB, as the case may be, and to furnish to him such other information as he may reasonably require for the purpose of ascertaining whether or not such goods have been illegally imported, exported or are likely to be illegally exported.]

12.10.9 Power to examine persons [Section 107]: Any officer of customs empowered in this behalf by general or special order of the Commissioner of Customs may, during the course of any enquiry in connection with the smuggling of any goods, -

- (a) require any person to produce or deliver any document or thing relevant to the enquiry ;
- (b) examine any person acquainted with the facts and circumstances of the case.

12.10.10 Power to summon persons to give evidence and produce documents [Section 108]: Any Gazetted officer of Customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned. All persons so summoned shall be bound to attend either in person or by an authorised agent and state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required.

12.10.11 Power to require production of order permitting clearance of goods imported by land [Section 109]: Any officer of customs appointed for any area adjoining the land frontier of India and empowered in this behalf by general or special order of the Board, may require any person in possession of any goods which such officer has reason to believe to have been imported into India by land, to produce the order made under section 47 permitting clearance of the goods :

However, this section shall not apply to any imported goods passing from a land frontier to a land customs station by a route appointed under clause (c) of section 7.

12.10.12 Seizure of goods documents and things [Section 110]: An officer of Customs can seize any goods, if he has reason to believe that the same are liable to

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confiscation, under the Customs Act. The proper officer may also seize any document or things that may be relevant to any proceedings under the Custom Act. However, the person from whom these documents are seized is entitled to make copies of the same.

The person from whom the goods are seized is issued a show cause notice, usually within six months. However, the Commissioner of Customs, on sufficient cause being shown, can extend the time period for issue of Show cause notice, by a further six months.

In case the seized goods are perishable or hazardous in nature or is prone to depreciate in value over time or for reasons of constraints in space, the government can notify these goods and these goods can be disposed off before the conclusion of the proceedings eg. All electronic goods, currency, liquors, P&P medicine, Gold, Silver etc. [Section 110]

Seized goods, documents and things pending adjudication to be released provisionally: Section 110A lays down that any goods, documents or things seized under section 110, may, pending the order of the adjudicating officer, be released to the owner. Such release shall be made when the owner executes a bond in the proper form with such security and conditions as the Commissioner of Customs may require.

12.11 OFFENCES AND PROSECUTION - SPECIFIC PROVISIONS

The offences under the Customs Act can be broadly categorised in two categories – non-bailable or cognisable offences & bailable or non-cognisable offences.

(i) Non-bailable or cognisable offences

The offences punishable with imprisonment for a term of more than 3 years are covered in this category. As per section 135 (1) of the Customs Act if any person-

- (a) is in relation to any goods, in any way knowingly concerned in mis-declaration of value in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or
- (b) 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 or section 113 as the case may be, or
- (c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113;

shall be punishable, in the case of an offence relating to any of the goods to which section 123 applies and the market price whereof exceeds one lakh of rupees, with imprisonment for a term which may extend to seven years and with fine.

If any person convicted of an offence under section 135(1) or of section 136 (1) (applicable to customs officers) of the Act is again convicted of an offence under the same sections, then, he shall be punishable for the second and for every subsequent offence

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with imprisonment for a term which may extend to seven years and with fine.

(ii) Bailable or non-cognisable offences

The offences punishable with imprisonment for a term of less than 3 years or only fine are covered in this category. The offences under this category are as follows:-

- (a) If a person makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, he shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both (section 132).
- (b) If any person intentionally obstructs any officer of customs in the exercise of any powers conferred under this Act, such person shall be punishable with imprisonment for a term, which may extend to six months, or with fine, or with both (section 133).
- (c) If any person resists or refuses to allow a radiologist to screen or to take X-ray picture of his body in accordance with an order made by a Magistrate under section 103, or resists or refuses to allow suitable action being taken on the advice and under the supervision of a registered medical practitioner for bringing out goods liable to confiscation secreted inside his body, as provided in section 103, he shall be punishable with imprisonment for a term which may extend to six months, or with fine, or with both (section 134). In all offences under the Customs Act other than those mentioned under 'non-bailable or cognisable offences' above, the punishment for imprisonment may extend to a term of three years, or with fine, or with both. However, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than one year [section 135 (i)].

If a person makes preparation to export any goods in contravention of the provisions of this Act, and from the circumstances of the case it may be reasonably inferred that if not prevented by circumstances independent of his will, he is determined to carry out his intention to commit the offence, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both (section 135A).

The officers of Customs also cannot escape serious action including prosecution action, if they are found abusing their powers or are shown to be colluding/conniving with tax evaders. In the following cases, prosecution proceeding against a customs officer may be initiated under section 136 of the Customs Act:-

In cases of connivance in the act or thing whereby any duty of customs leviable on any goods, or any prohibition for the time being in force under this Act or any other law for the time being in force with respect to any goods is or may be evaded, a customs officer shall be punishable with imprisonment for a term which may extend to three years, or with fine,

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or with both.

In cases of vexatious search, i.e., where any person is searched for goods liable to confiscation or any document relating thereto, without having reason to believe that he has such goods or document secreted about his person, a customs officer may be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; or

If a customs officer arrests any person without having reason to believe that he has been guilty of an offence punishable under section 135, he may be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both; or

If a customs officer searches or authorises any other officer of customs to search any place without having reason to believe that any goods, documents or things of the nature referred to in section 105 are secreted in that place, he may be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

If any officer of customs, except in the discharge in good faith of his duty as such officer or in compliance with any requisition made under any law for the time being in force, discloses any particulars learnt by him in his official capacity in respect of any goods, he may be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Presumption of culpable mental state : As per section 138A of the Customs Act, in prosecution proceedings under the said Act for an offence under the said Act, the culpable (guilty conscience or *mens rea*) on the part of the accused person shall be presumed and it will be for the accused to prove that he had no deliberation with respect of alleged offence. When the presumption of culpable mental state is drawn under this provision, that presumption includes intention, motive, knowledge, belief as well as reason to belief. The presumption could be deemed as rebutted only if the proof is beyond reasonable doubt not merely when its existence is established by a preponderance of probability.

Prosecution: No prosecution proceedings can be launched in a Court of Law against any person under Customs Act, and no cognizance of any offence under sections 132 to 135 of the Customs Act, 1962 can be taken by any Court, except with the previous sanction of concerned Commissioner of Customs. Based upon the results of investigations and evidence brought on record, Commissioners of Customs apply their mind before sanctioning prosecution- after being satisfied that there are sufficient reasons justifying prosecution. Criminal complaint is thereafter filed in appropriate Court of law and followed up with a view to get expeditious orders / conviction.

Specific provisions: Adjudication and appellate remedies are measures, which sometimes may not be adequate to contain smuggling and evasion of custom duty. As an exemplary measure it becomes necessary in certain situations to initiate criminal proceedings and impose stiffer actions against the offenders. Apart from prosecution in a

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court of law the Government had introduced the COFEPOS ACT in 1974 to preventively detain such smugglers and foreign exchange racketeers. Sections 132 to 140 contain detailed provisions regarding the offences which are liable to prosecution in a criminal court of law, the cognisance of the offences, the procedure to try these offences and the presumption that can be had in such proceedings. These provisions are briefly discussed below:

12.11.1 False declaration, false documents, etc [Section 132]: Whoever makes, signs declaration, statement or document in the transaction of any business relating to the customs, knowing or having reason to believe that such declaration, statement or document is false in any material particular, shall be punishable with imprisonment for a term which may extend to 2 years, or with fine, or with both.

12.11.2 Obstruction of officer of Customs [Section 133] : If any person intentionally obstructs any officer of customs in the exercise of any powers conferred under this Act, such person shall be punishable with imprisonment for a term, which may extend to 2 years, or with fine, or with both.

12.11.3 Refusal to be X-rayed [Section 134]: Similar punishment is provided if any person refuses to be x-rayed.

12.11.4 Evasion of duty or prohibitions [Section 135]: If any person—

- (a) is in relation to any goods in any way knowingly concerned in misdeclaration of value or in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods; or
- (b) 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 or section 113, as the case may be; or
- (c) attempts to export any goods which he knows or has reason to believe are liable to confiscation under section 113; or
- (d) fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under this Act in connection with export of goods,

then,

Particulars	Punishment
(i) in the case of an offence relating to	
(A) any goods the market price of which exceeds one crore of rupees	Imprisonment for a term which may extend to 7 years and with fine

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(B) the evasion or attempted evasion of duty exceeding Rs.30 lakh	Imprisonment for a term which may extend to 7 years and with fine
(C) such categories of prohibited goods as the Central Government may, by notification in the Official Gazette, specify	Imprisonment for a term which may extend to 7 years and with fine
(D) fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to in clause (d), if the amount of drawback or exemption from duty exceeds Rs.30 lakh	Imprisonment for a term which may extend to 7 years and with fine
(ii) in any other case	Imprisonment for a term which may extend to 3 years, or with fine, or with both

However, in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment (mentioned in point (i) above) shall not be for less than 1 year.

If any person is convicted for a second time, he shall be punishable for the second and subsequent offence with imprisonment for a term which may extend to seven years and with fine.

The following shall not be considered as special and adequate reasons for awarding sentence of imprisonment for less than one year:

1. the accused is convicted for the first time
2. the accused has been ordered to pay a penalty
3. the accused was not the principal offender and was a secondary party to the commission of the offence
4. the age of the accused.

12.11.5 Preparation [Section 135A]: If a person makes preparation to export any goods in contravention of the provisions of this Act, and if not prevented the offence would be committed, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

12.11.6 Offences by officers of customs [Section 136]: There are hardly any decisions under this provision. AIR Manual reports only two cases, out of which, one has resulted in acquittal before Supreme Court.

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The section provides that if any officer of customs enters into or acquiesces in any agreement to do, abstains from doing, permits, conceals or connives at any act or thing whereby any fraudulent export is effected or any duty of customs is evaded, he shall be punishable with imprisonment for three years, or with fine, or with both.

12.11.7 Offences by companies [Section 140]: Every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Explanation to sub-section (2) defines “company” as a body corporate and includes a firm or other association of individuals.

12.11.8 Cognizance of offences [Section 137]: No court shall take cognizance of:

- (a) any offence under section 132, section 133, section 134 or section 135 or section 135A except with the previous sanction of the Commissioner of Customs.
- (b) any offence under section 136
 - where the offence is alleged to have been committed by an officer not lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Central Government.
 - where the offence is alleged to have been committed by an officer of lower in rank than Assistant Commissioner of Customs, except with the previous sanction of the Commissioner of Customs.

12.11.9 Compounding of Offences

Sub-section (3) of section 137 provides for compounding of offences, either before or after the institution of prosecution, by Chief Commissioner of Customs on payment of the *prescribed* compounding amount *in the prescribed manner*. Such amount shall be paid to the Central Government by the person accused of the offence. Section 156 empowers Central Government to make rules for specifying the amount to be paid for compounding *and the manner of compounding* of offences under section 137.

However, in the case of following persons the provisions relating to compounding of offences will not apply: -

- (a) *a person who has been allowed to compound once in respect of any offence under sections 135 and 135A;*
- (b) *a person who has been accused of committing an offence under this Act which is also an offence under any of the following Acts, namely:—*
 - (i) *the Narcotic Drugs and Psychotropic Substances Act, 1985;*
 - (ii) *the Chemical Weapons Convention Act, 2000;*
 - (iii) *the Arms Act, 1959;*
 - (iv) *the Wild Life (Protection) Act, 1972;*

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- (c) a person involved in smuggling of goods falling under any of the following, namely:—
- (i) goods specified in the list of Special Chemicals, Organisms, Materials, Equipment and Technology in Appendix 3 to Schedule 2 (Export Policy) of ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under section 5 of the Foreign Trade (Development and Regulation) Act, 1992;
 - (ii) goods which are specified as prohibited items for import and export in the ITC (HS) Classification of Export and Import Items of the Foreign Trade Policy, as amended from time to time, issued under section 5 of the Foreign Trade (Development and Regulation) Act, 1992;
 - (iii) any other goods or documents, which are likely to affect friendly relations with a foreign State or are derogatory to national honour;
- (d) person who has been allowed to compound once in respect of any offence under this Chapter for goods of value exceeding rupees one crore;
- (e) person who has been convicted under this Act on or after 30.12.2005.

12.11.10 Presumption of culpable mental state [Section 138A]: In any prosecution for an offence under this Act, which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state. Culpable mental state includes intention, knowledge of a fact and belief in, or reason to believe, a fact.

12.11.11 Admissibility of micro films, etc as evidence [Section 138C]: The following are deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder, without further proof or production of the original:

1. a micro film of a document or the reproduction of the image; or
2. a facsimile copy of a document; or
3. computer printout.

12.11.12 Presumption as to documents in certain case [Section 139]: Where any document

- is produced by any person or has been seized from the custody, under this Act or any other law
- has been received from any place outside India in the course of investigation of any offence under this Act,

the same shall be presumed, unless the contrary is proved, to be admissible.

12.11.13 Offences to be tried summarily [Section 138]: Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this Chapter (ie., Chapter XVI) may be tried summarily by a Magistrate. However, the exceptions are:

Provisions Relating to Illegal Import, Confiscation, Penalty & Allied Provisions 12.29

1. Offence under clause (i) of sub-section (1) of section 135
2. Offence under sub-section (2) of section 135.

Customs Act is a special enactment. This section provides for summary trial of all offences under the Act. Therefore, the provisions of section 262 of Cr.P.C., which allows trial as warrant case of all offences punishable with imprisonment more than 2 years is inapplicable to the offences under this Act. [*Ruli Ram and Ors vs. ACCE, 1987 (30) ELT 657 (HP)*].

Self-examination questions

1. Discuss briefly the provisions in respect of mandatory penalty for short-levy or non-levy of duty in certain cases.
2. Explain the provisions in respect of confiscation of a conveyance under section 115 of the Customs Act, 1962.
3. M/s. Shree Ram Traders had imported certain goods and got them cleared for home consumption. Later, the Department found that the goods had been imported in contravention of Import Control Act and Import Control Order. Consequently, the goods were confiscated under section 111(d) of the Customs Act and a penalty under section 112 of the Act was levied.

You are required to examine the case and offer your views.

4. Pranjal had imported certain goods. Due to some technical problems he had to pay the redemption fine. Later on, he decides to abandon the goods. So, he claims the refund of redemption fine being paid by him. Is his claim tenable in law? Discuss.
5. Two trucks are intercepted by the Customs Department. The officers of the Customs Department conduct search of the vehicle in the presence of witnesses and it is found that one of the trucks has a secret compartment and 175 Kgs. of heroine and 39 Kgs. of opium of foreign origin are concealed in that chamber. During the course of investigation, the statement of 'P', the registered owner of the vehicle, is taken under section 108 of the Customs Act and 15 witnesses are examined. However, 'P' completely denies his culpability in the crime. He contends that though the vehicle is registered in his name but he has sold the truck much before the contraband goods are recovered therefrom.

You are required to examine the situation with the help of case law, if any.

Answers

3. The facts of the case are similar to the case of *Bussa Overseas & Properties P. Ltd. v C.L. Mahar, Asstt. C.C., Bombay 2004 (163) E.L.T. 304 (Bom.)* wherein the Bombay High Court observed that once goods are cleared for home consumption they cease to be imported goods as defined in section 2(25) of the Customs Act and as per section 111(d)

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only 'imported' goods could be confiscated. Hence, power to confiscate the goods, after their clearance for home consumption, could be exercised only in cases where the order of clearance is revised and cancelled.

Therefore, in the given case the confiscation of the goods by the Department is illegal.

Section 112 (a) provides that any person who in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such act, is liable to a penalty. The High Court held that the power to impose penalty could be exercised not only when the goods are available for confiscation but when such goods are liable to confiscation. The Court held that the expression 'liable to confiscation' clearly indicates that the power to impose penalty can be exercised even if the goods are not available for confiscation. The mere fact that the importers secured such clearance and disposed of the goods and thereafter goods are not available for confiscation cannot divest Customs Authorities of the powers to levy penalty under section 112 of the Act.

Following the judgment of the High Court, penalty levied by the Department in the given case is correct in law.

4. The facts of the case are similar to that of *Purfina Chemicals Pvt. Ltd. v. CEGAT Madras 2004 (167) E.L.T. 145 (Mad.)*. The High Court, in this case, asserted that provisions of section 125 of the Customs Act give an option to the importer to either allow the goods to be confiscated or pay redemption fine in lieu of confiscation. Therefore, the redemption fine becomes leviable only in lieu of confiscation. The High Court observed that in this case the importer had abandoned the goods and thus, there remained no scope for confiscation of the same. Therefore, it was held by the High Court that the fine should be refunded.

Applying the ratio of this decision in the given case, it can be said that Pranjal can claim the refund of the redemption fine.

5. The facts of the case are similar to the facts of the case of *Balwinder Singh v. Asstt. Commissioner, Customs & Central Excise 2005 (181) E.L.T. 203 (S.C.)*. In this case, the Supreme Court stated that the registered owner of the vehicle was convicted solely for the reason that he was the registered owner of the vehicle. There was no evidence to prove that he knowingly allowed any person to use the vehicle for any illegal purpose. There was also no evidence to prove the conspiracy set up by the prosecution. The Apex Court held that though the articles were recovered from the truck, there was no evidence to show that the appellant had any control over the vehicle nor was he in possession of those drugs. Therefore, the registered owner of the vehicle was acquitted of all charges framed against him.

In the given case also, there is no evidence against 'P', the registered owner of the vehicle, and thus he shall not be prosecuted.