

Document No. 1.1.7.2014

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**Detailed study on
Civil and Criminal Penalties
under the Customs Act,
Prosecution
and Compounding of Offences**

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Introduction:

In tune with international practice, the entry and exit of goods and passengers into and out of the country is regulated by law. The Customs Act, 1962 is the basic statute which governs and regulates the entry and exit of different categories of vessels, crafts, goods, passengers etc, into or outside the country. In addition to the Customs Act, the Customs Department also works to ensure compliance with various other national and international laws and regulations. It is the responsibility of the Customs to handle international traffic speedily and effectively while ensuring that all movement of goods and passengers across the national borders are in conformity with the laws of the land.

Essentially all goods brought into the country or taken outside the country must pass through authorized entry/exit points, be reported to Customs, and the importers/exporters must fulfill the prescribed legal and procedural requirements laid down under Customs Act, 1962 and allied laws including payment of the duties leviable, if any. Accordingly, the Customs Act lays down in detail provisions to deal with acts and omissions that violate the law, and provide for penalties that can be imposed by departmental authorities and punishments that can be imposed by courts of law. The law also empowers Customs officers to carry out searches, arrests and prosecution of persons involved in such offences. The Customs Act also lays down the procedural requirements to be followed while imposing the various penal provisions for violations so as to ensure that due process of law is followed before action is taken against offending goods, persons or conveyance involved in the violations.

Types of Punishments

The Customs Act envisages two types of punishments:

(a) Civil Liability: Penalty for violation of statutory provisions involving a penalty of money and confiscation of goods, which can be imposed by the departmental authorities. Chapters XIV of the Customs Act (Sections 111 to 127) deals with confiscation of goods and conveyances and imposition of penalties.

(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. Chapter XVI (Sections 132 to 140A) deals with other offences under the Act.

Statutory Provisions dealing with Confiscation of Goods and Conveyances:-

The provisions dealing with confiscation of goods and conveyances and imposition of penalty are contained in sections from 111 to 127 of the Customs Act, 1962. The provisions of the Customs Act, 1962 not only provide for confiscation of goods imported/exported illegally or attempted to imported/exported illegally, but it also provides for confiscation of conveyances used for carriage of smuggle goods; cover goods used to concealed smuggled goods; confiscation of sale proceeds of smuggled goods; confiscation of packages etc. The provisions of the Customs Act, 1962 dealing with confiscation of goods/conveyances/packages/cover goods are explained in the following paragraphs.

A. Improper Imports:

As per Section 111 of the Customs Act, 1962, the following goods brought in India from a place outside India are 'improperly imported goods' and are 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 S. 7 (a) 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 S. 7 (c) 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;*
- (f) any dutiable or prohibited goods required to be mentioned under the regulations in an import manifest or import report which are not so mentioned;*
- (g) 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;*
- (h) any dutiable or prohibited goods unloaded or attempted to be unloaded in contravention of the provisions of section 33 or section 34;*

- (i) *any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;*
- (j) *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;*
- (k) *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;*
- (l) *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;*
- (m) *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 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 transited with or without transshipment or attempted to be so transited 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.*

In brief, importing or attempting to import prohibited goods, avoiding duty payment, importing in violation of foreign trade policy, mis-declaring goods or violating rules regarding movement, storage, unloading or use of imported goods will make them liable for confiscation under Section 111 of the Customs Act, 1962.

B. Improper Exports:

As per Section 113 of the Customs Act, 1962, the following goods are 'goods attempted to be improperly exported' and are 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 S. 7 (c) 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;*
- (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;*
- (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 S.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 willful 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;

- (1) *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.*

C: Confiscation of Conveyances:

Section 115 of the Custom Act, 1962 provides for the grounds on which conveyances can be confiscated. It includes cases where the conveyance has been used for the purpose of concealing goods, or if goods are thrown overboard so as to evade seizure, or fails to stop or land in accordance with section 106 etc.

D. Confiscation of Packages

Under Section 118 of the Customs Act, 1962, where any goods imported or attempted to be exported in a package are liable to confiscation, the package and any other goods imported in that package shall also be liable to confiscation.

E. Confiscation of Cover Goods

Section 119 of the Customs Act, 1962 provides that any goods (excluding conveyance used a means of transport) used for concealing smuggled goods shall also be liable to confiscation.

F: Confiscation of Smuggled goods mixed with other goods

Section 120 of the Customs Act, 1962 provides that smuggled goods may be confiscated notwithstanding any change in their form, or their being in an inseparable mixture form with other goods.

G. Confiscation of sale proceeds of smuggled goods

Under Section 121 of the Customs Act, 1962, 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.

Statutory Provisions for Imposition of Monetary Penalty

The Statutory Provisions providing for imposition of monetary Penalty on the importer/exporters and other offenders are as explained in the following paragraphs.

A: Penalties in respect of improper importation of goods:

Section 112 of the Customs Act, 1962, lays down the penalty for improper importation of goods. The penalty prescribed varies according to the gravity of the offence. Under Section 112, penalties, which may be imposed, for different types of offences have been tabulated in the Table I, given below.

Table I

Nature of offence	Penalty under Section 112 of CA, 1962.
(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	penalty not exceeding the value of the goods or Rs.5,000/-, whichever is the greater;
(ii) In the case of dutiable goods, other than prohibited goods	penalty not exceeding the duty sought to be evaded on such goods or Rs.5,000/-, whichever is the greater;
(iii) In the case of goods in respect of which the value declared is higher than the value thereof	penalty not exceeding the difference between the declared value and the value thereof or Rs.5,000/-, whichever is the greater;
(iv) In the case of goods falling both under (i) and (iii) above	penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or Rs.5,000/-, whichever is the highest; and
(v) In the case of goods falling both under clauses (ii) and (iii) above	penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or Rs.5,000/-, whichever is the highest.

B: Penalties in respect of improper exportation of goods:

Sections 114 of the Customs Act, 1962, lays down the penalty for improper exportation of goods. The penalty prescribed varies according to the gravity of the offence. Under Section 114, penalties, which may be imposed, for different types of offences have been tabulated in the Table I, given below.

Table II

Nature of offence	Penalty under Section 114 of the Customs Act, 1962.
(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	Penalty not exceeding three times the value of the goods as declared by the exporter or the value as determined under the Act, whichever is the greater;
(ii) In the case of dutiable goods, other than prohibited goods	Penalty not exceeding the duty sought to be evaded on such goods or Rs.5,000/-, whichever is the greater; and
(iii) In the case of any other goods	Penalty not exceeding the value of the goods as declared by the exporter or the value as determined under the Customs Act, whichever is greater.

C. Imposition of Mandatory Penalty

Section 114A of the Customs Act, 1962 provides for imposition of mandatory penalty in cases of non-levy/short-levy of duty or interest or erroneous refunds by reason of collusion or any wilful mis-statement or suppression of facts. In such cases, the person who is liable to pay the duty or interest, as determined under section 28 (8) of the Customs Act, 1962 is also be liable to pay a penalty equal to the duty or interest so determined. If such amount, along with interest and penalty, is paid within 30 days, the penalty gets 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, is taken into account for the purpose of mandatory penalty under Section 114A.

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 has been paid.

In case, penalty has been levied under the Section 114A, then no penalty can be levied under Sections 112 or 114 of the Customs Act, 1962.

D. Penalty for Knowingly or Intentionally using False or Incorrect Material

Section 114AA of the Customs Act, 1962 lays down that where a person knowingly or intentionally uses false and incorrect material, in the transaction of any business for the purposes of this Act, he shall be liable to a penalty not exceeding five times the value of goods.

E. Penalty on Person In charge of Conveyance

In terms of **Section 116** of the Customs Act, 1962, if any goods loaded in a conveyance for importation into India, or any goods transhipped under the provisions of the said 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 satisfaction of the Assistant/Deputy Commissioner of Customs, the person-in-charge of the conveyance is liable to the following penalty as mentioned in Table III:

Table III

(i) In the case of goods loaded in a conveyance for importation into India or goods transhipped under the provisions of the Customs Act, 1962	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; and
(ii) In the case of coastal goods	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.
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F. Penalty for other Convention of Provisions for which no express penalty prescribed.

Section 117 of the Customs Act, 1962 is a covering provision which lays down that for any other contravention of the Customs Act for which express penalty has not been provided elsewhere, the person liable can be charged with a penalty not exceeding one lakh rupees.

Procedure for Adjudication of Confiscations and Penalties:

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 Show Cause Notice under Section 124, the persons concerned are required to be given opportunity of representation in writing and personal hearing in the matter. The adjudication authority is then required to pass final order taking due note of all evidences brought on record. Generally, '*mens rea*' is not required to be proof for the imposition of penalty (except under section 114A and 114AA) under the provisions of the Customs Act. The amount of penalty depends on the gravity of the offence and is to act as a deterrent for the future.

Section 122 talks about adjudication of confiscations and penalties and prescribes limits of confiscation or penalty according to monetary value of goods that are confiscated. The details are given in the table IV:

Table IV

Officer empowered to adjudicate	Monetary value of goods that are confiscated
Commissioner of Customs or a Joint Commissioner of Customs	No limit
Assistant Commissioner of Customs or	does not exceed two lakh rupees

Deputy Commissioner of Customs	
Gazetted Officer of Customs lower in rank than an Assistant Commissioner of Customs or Deputy Commissioner of Customs	does not exceed, ten thousand rupees

Other Relevant Provisions of the Customs Act, 62

Section 122 A of the Customs Act, 1962 speaks about the adjudication procedure wherein the Act formally recognises the principle of natural justice of '*audi alteram partem*' i.e. no party shall be condemned unheard. Thus, if a party so desires it shall be heard. It also allows for no more than three adjournments during hearings.

Section 123 talks about 'Burden of proof' whenever seizure of smuggled goods is made. In consonance with general legal provisions the burden of proof lies on either the party from whose possession the goods were seized or the party who claims ownership of such goods.

Section 124 includes a crucial component of procedure i.e, the issuance of show cause notice before confiscation of goods. This has to be done by an officer not below the rank of an assistant commissioner and the owner of the goods or such a person should be given an opportunity to make a representation in writing within specified reasonable time. The SCN notice can also be oral.

Section 125 gives the discretion to the customs officer to levy and collect fine in lieu of confiscation, provided that such fine shall not exceed market price of the goods confiscated / less than the duty chargeable thereon. Thus, whenever the goods confiscated are not prohibited goods, an option is to be given under this section to pay a fine known as 'redemption fine' of quantum as the adjudicating authority deems fit, in lieu of the confiscation. Prohibited goods are required to be confiscated absolutely.

Section 126 provides that upon confiscation, property lies in the Central Government. Further, Section 127 specifies that award of any confiscation or penalty is exclusive and does not interfere with infliction of any punishment under chapter XVI of the Act or any other law.

Offences under Chapter XVI of the Customs Act, 1962:

'Offences' mean acts or omissions made punishable by law. Unlike civil penalties, which can be adjudged in departmental adjudication, offences are to be tried in a criminal court and punishments can be granted only after regular prosecution and trial. The following are the different offences under the Customs Act.

- Under Section 132, if a person knowingly makes, signs or uses, or causes to be made, signed or used, any false declaration, statement or document in the transaction of any business relating to the customs, he shall be punishable with imprisonment for a term which may extend to 2 years, or with fine, or with both.
- Section 133 provides that if any person intentionally obstructs any officer of customs in the exercise of his official powers, such person shall be punishable with imprisonment for a term, which extend to 2 years, or with fine, or with both.
- Under Section 134, 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, he shall be punishable with imprisonment for a term which may extend to 6 months, or with fine, or with both.
- Section 135 contains the main penal provision in the Act - evasion of duty and prohibitions. It has been substantially amended in 2007. It deals with the following offences:
 - (a) mis-declaration of value or fraudulent evasion or attempt at evasion of any duty or of any prohibition;
 - (b) acquiring possession of or carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with smuggled goods;
 - (c) attempting to export any goods liable to confiscation under Section 113;
or

(d) fraudulently availing of or attempting to avail of drawback or any exemption from duty provided under the Act in connection with export of goods.

- Section 135 lays down two separate punishments.

(i) Where the market price of the goods exceeds one crore of rupees, or the evasion or attempted evasion of duty exceeds thirty lakh of rupees; or the goods fall into such categories of prohibited goods as notified by the Central Government or in case of fraudulent availing of drawback, if the amount of drawback or exemption from duty exceeds thirty lakh of rupees, the person is liable to be punished with imprisonment for a term extending up to seven years and with fine. 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.

(ii) In other cases, the term of imprisonment may extend up to three years, or with fine, or with both. In case of repeat offenders, imprisonment may extend to seven years. In this case also, the minimum sentence of one year is to be given, unless justified by special and adequate reasons. The section also specifies what shall not be considered a special and adequate reason.

- Section 135A: - If a person makes preparation to export any goods in contravention of the provisions of the Act, and where such preparation crosses the line of culpability, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.
- Under Section 135B, after final disposal of the case and exhaustion of all appellate remedies, the court has the power to publish the name, place of business, etc of persons convicted under the Act nature of the contravention, the fact that the person has been so convicted and such other particulars etc, at the expense of such person in such newspapers or in such manner as the court may direct.
- Section 136 enumerates offences by officers of customs. 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 leviable on any goods, or any prohibition is or may be evaded, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both. In case of search or arrest of person without having

reason to believe contravention of the law, he shall 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. In case of disclosure of information learnt by an officer in his official duty, except in the discharge in good faith of his official duty, he shall 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.

Procedure for prosecution of offences:

Section 137: Cognizance of offences:

In law, there is a distinction between cognizable and non cognizable offences, wherein the former is one where the Police officer can arrest without a warrant from a Magistrate. Under this section, the court may not take cognizance, the following offences, except with previous sanction:

Offences	Authority from whom previous sanction is required
Offences under section 132, 133, 134	Commissioner of Customs
Offences under section 136	the Central Government/ Commissioner of Customs

- Section 138 lays down that except offences under section 135 related to evasion of duty or prohibitions, all the other offences shall be tried summarily by a Magistrate, notwithstanding the procedure prescribed in Cr P C.
- Under Section 138A of the Customs Act, 1962, in any prosecution for an offence which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state, and that it shall be a defence for the accused to prove that he had no such mental state. For the culmination of any crime there are two necessary components, *mens rea* i.e, guilty state of mind and *actus reus*, the resulting act itself. Normally the presence of both is required to be shown for conviction. However, in order to ease trial in cases under the Customs Act, particularly since these are offences related to tax evasion, the court presumes culpable mental state unless proved otherwise. It is further clarified that a fact is said

to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

- Section 138B speaks of relevancy of statements made and signed before a Gazetted Officer may be used in court proceedings when the person making the statement is dead or not to be found or his presence cannot be obtained without delay or expense.
- Section 138C talks about admissibility of micro films, facsimile copies of documents and computer print outs as documents and as evidence. Such provisions are provided for in the Indian evidence Act and these are further tweaked to suit the Customs Act.
- Section 139 speaks of another evidentiary provision about presumption of documents in certain cases when produced by the prosecution as evidence against the defendant unless the contrary is proven.
- Section 140 deals with Offences by companies, wherein every person who was in charge of the affairs of the company would be held liable to be proceeded against and punished accordingly. Unless such person proves that the offence was committed without his knowledge or he exercised due diligence to prevent commission of such offence

Arrest:

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, 1962 provides for criminal prosecution in a Court of law. Prosecution action can also be taken for providing false documents/declaration to the Customs and for obstructing Customs officers in their work. Any person guilty of serious offence under Customs Act which is punishable under Section 132, 133, 135, 135A and 136 of the said Act, can be arrested by a Customs officer authorized in this behalf, as provided under Section 104(1) of the said Act. Under the law, the person being arrested is entitled to be informed of the grounds for such arrest. Also, every arrested person has to be taken without unnecessary delay to the nearest Magistrate.

The Customs Act does not contain any provision regulating the manner in which an arrested 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. The power to

remand an arrested person to judicial custody vests in the Magistrate by virtue of Section 165 of the Cr. P. C. Though under Section 104 of the Customs Act, 1962, Commissioners of Customs are empowered to delegate to an officer of Customs by general or special order, powers of arrest of persons guilty of offence punishable under Section 135 of the said Act, extreme circumspection and care is to be exercised at senior level in exercising these powers and ordering arrests. Arrest should be resorted to only in cases of sufficient grave nature.

Persons involved in Customs related offence cases who may be liable to prosecution should not be arrested in routine unless exigencies of certain situations demand their immediate arrest. At times, prior to prosecution, arrests (s) may be necessary to ensure proper investigations and penal action against the persons (s), as otherwise the person involved in the offence may hamper investigations or disappear from the scene/area – such as in cases involving outright smuggling by Sea/Air/Land route.

In all commercial fraud cases in relation to regular imports or exports, before arresting any person(s) the Commissioner/ADG concerned should be approached by the Investigating Officer and the Commissioner/ADG should be personally satisfied that there are sufficient grounds warranting arrest of the person(s). These grounds/reasons should also be recorded by the concerned Commissioner/ADG in writing on file before the arrest is ordered and effected by the proper officer.

As far as possible, in other than commercial fraud cases warranting prosecution under Section 135 of the said Act, where arrest is considered necessary prior clearance and approval for arrest may be taken from Commissioners/ADGs. However, there could be situations, for example in outright smuggling cases in remote areas (and sometimes even in town seizure or international passenger clearance offence cases) where it may not be administratively possible to get prior permission of concerned Commissioner/ADG before effecting arrest. In such cases, the decision to arrest a person in accordance with the guidelines - taking due note of the offence against the person which has come to light in investigations carried out, should be taken at the minimum level of the concerned Assistant Commissioner/Assistant Director – recording the reasons in writing. Further, in such cases, the concerned Assistant Commissioner/Assistant Director or other higher officer (lower than Commissioner/ADG) who has ordered arrest, should immediately after arrest furnish a report incorporating reasons for arrest, to the jurisdictional Commissioner/ADG and his satisfaction for the arrest made should also be kept on record in writing. [Refer CBEC Instruction issued from F.No.394/71/97-Cus (AS), dated 22-6-1999]

Non-bailable or cognizable offences:

The offences under the Customs Act can be broadly categorized in two categories – non-bailable or cognizable offences and bailable or non-cognizable offences. Non-bailable or cognizable offences are those that are punishable with imprisonment for a term of more than 3 years. Further, Section 135(1) provides for imprisonment for a maximum term of 7 years and with fine to any person who is, in the context of any goods which he knows or has reason to believe are liable to confiscation under Sections 111 or 113 of the said Act:

- (a) Involved, in relation to any goods, or
- (b) Anyway knowingly concerned in mis-declaration of value, or
- (c) In any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under the said Act or any other law for the time being in force with respect to such goods, or
- (d) 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 or
- (e) Attempts to export any goods or
- (f) Fraudulently avails of or attempts to avail of drawback or any exemption from duty provided under the said Act in connection with export of goods.

Section 135 provides the following punishments to the person held liable for offences mentioned therein:

I. Imprisonment for a term not exceeding 7 years (and in any case ordinarily not less than 1 year) in the case of an offence relating to:

- a) Any goods the market price of which exceeds Rs.1 crore; or
- b) The evasion or attempted evasion of duty exceeding Rs.30 lakhs; or
- c) Such categories of prohibited goods as the Central Government may, by notification, specify; or

- d) Fraudulently availing of or attempting to avail of drawback or any exemption from duty referred to above, if the amount of drawback or exemption from duty exceeds Rs.30 lakhs.

II. In any other case, with imprisonment for a term not exceeding 3 years.

If any person convicted of an offence under Section 135(1) (or of Section 136(1) which applies to Custom 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 with imprisonment for a term which may extend to 7 years and with fine.

Bailable or non-cognizable offences:

The offences punishable with imprisonment for a term of less than 3 years or only fine are covered in the category of bailable or non-cognizable offences. These offences are as follows:

- (a) Section 132
- (b) Section 133
- (c) Section 134
- (d) Section 135: In all offences under the Customs Act other than those mentioned under 'non-bailable or cognizable offences' above, the punishment for imprisonment may extend to a term of three years, or with fine, or with both. However, under Section 135(1)(i), in the absence of special and adequate reasons to the contrary to be recorded in the judgment or the court, such imprisonment shall not be for less than 1 year.
- (e) Section 135A

Guidelines for arrest and bail:

Vide Circular No. 38/2013-Customs, dated 17.9.2013, the CBEC issued detailed guidelines for arrest. The salient features of the same are as under:-

All offences are bailable other than the categories of offences punishable under section 135 of the Act *ibid*, which are classified as non-bailable. These are offences relating to:

- (a) evasion or attempted evasion of duty exceeding fifty lakh rupees; or

- (b) prohibited goods notified under section 11 of the Customs Act, 1962 (as amended) which are also notified under sub-clause (C) of clause (i) of sub-section (l) of section 135 of the Customs Act, 1962 (as amended); or
- (c) import or export of any goods which have not been declared in accordance with the provisions of this Act and the market price of which exceeds one crore rupees; or
- (d) fraudulently availing of or attempt to avail of drawback or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees.

This is in effect from 10.5.2013 vide amendment in the Finance Act, 2013

Bail -Matter of Right

As afore-stated, offences under the Customs Act fall in two categories i.e. (i) bailable; or (ii) non-bailable.

The guidelines related to arrest clearly point that the power to arrest is to be exercised with restraint as it impinges on the liberty of a person in cases where a Commissioner of Customs or Additional Director General has reason to believe on basis of information or suspicion that such person has committed an offence under the Act punishable under the sections 132 or 133 or 135 or 135A or 136 of the Customs Act.

Persons involved should not be arrested unless the exigencies of certain situations demand their immediate arrest. These situations may include circumstances:

- (i) to ensure proper investigation of the offence;
- (ii) to prevent such person from absconding;
- (iii) cases involving organised smuggling of goods or evasion of customs duty by way of concealment;
- (iv) masterminds or key operators effecting proxy/ benami imports/exports in the name of dummy or non-existent persons/IECs, etc.

The decision to arrest should be taken in cases which fulfil the requirement of the provisions of Section 104 (1) of Customs Act, 1962 and after considering the nature of offence, the role of the person involved and evidence available.

While the Act does not specify any value limits for exercising the powers of arrest, the circular clarifies that arrest in respect of an offence, categorized as bailable offence, should be effected only in exceptional situations which may include:

- (a) Outright smuggling of high value goods such as precious metal, restricted items or prohibited items or goods notified under section 123 of the Customs Act, 1962 or foreign currency where the value of offending goods exceeds Rs. 20 lakh.
- (b) In a case related to importation of trade goods (i.e. appraising cases) involving wilful mis-declaration in description of goods /concealment of goods/goods covered under section 123 of Customs Act, 1962 with a view to import restricted or prohibited items and where the CIF value of the offending goods exceeds Rs. 50 lakh.

Guidelines for Arrest

There is no prescribed format for arrest memo but an arrest memo must be in compliance with the directions in *D.K Basu v. State of West Bengal*¹. The arrest memo should include:

- brief facts of the case
- details of the person arrested;
- list of evidence against the person;
- relevant Section (s) of the Customs Act, 1962 or other laws attracted to the case and to the arrestee;
- the grounds of arrest must be explained to arrestee and this fact noted in the arrest memo;
- a nominated person (as per details provided by arrestee) of the arrestee should be informed immediately and this fact also may be mentioned in the arrest memo;
- the date and time of arrest may be mentioned in the arrest memo and the arrest memo should be given to person arrested under proper acknowledgement;
- a separate arrest memo has to be made and provided to each individual/arrestee.

Modalities to be complied at the time of arrest and afterwards

Further, there are certain modalities that should be complied with at the time of arrest and pursuant to an arrest, which include the following:

¹ 1997 (1) SCC 416 (see para 35).

- Female offender should be arrested by or in the presence of woman Customs officers.
- Medical examination of an arrestee should be conducted by a medical officer in the service of Central or State Government and in case such medical officer is not available, by a registered medical practitioner soon after the arrest is made. If an arrested person is a female then such an examination shall be made only by, or under supervision of a female medical officer, and in case such female medical officer is not available, by a female registered medical practitioner.
- It shall be the duty of the person having the custody of an arrestee to take reasonable care of the health and safety of the arrestee.

Further, in every case of arrest effected in accordance with the provisions of section 104 (1) of the Customs Act, 1962, there should be immediate intimation to the jurisdictional Chief Commissioner or DGRI, as the case may be.

Provisions related to bail

In regard to the grant of bail and terms of bail, a person arrested for a non-bailable offence should be produced before concerned Magistrate without unnecessary delay in terms of provisions of Section 104 (2) of the Act.

Under sub-section (3) of section 104, an officer of Customs (arresting officer) has the same powers as an officer in charge of a Police Station under the Cr.P. C. Thus, a Customs officer (arresting officer) is bound to release a person on bail for offences categorized as bailable under the Customs Act, 1962.

Thus, release on bail must be offered to a person arrested in respect of bailable offence and bail bond accepted for bailable offence. The amount of bail bond/ surety for bailable offences should not be excessive and the bail conditions should be informed by the arresting officer in writing to the arrestee and also informed on telephone to the nominated person (as per details provided by the arrestee) and the arrestee should be also allowed to talk to nominated person. If the conditions of the bail are fulfilled by the arrestee, he shall be released by the officer concerned on bail forthwith. The arresting officer may, and shall if such a person is indigent and unable to furnish surety, instead of taking bail from such person, discharge him or her executing a bond without sureties for his appearance as provided under Section 436 of Cr.P.C. However, only in cases where the conditions for granting bail are not fulfilled, the arrestee shall be produced before the appropriate Magistrate without unnecessary delay and within twenty-four (24) hours of arrest.

Only in the event of circumstances preventing the production of the arrestee before a Magistrate without unnecessary delay, the arrestee may be handed over to nearest Police Station for his safe custody during night, under proper Challan, and produced before the Magistrate on the next day, and the nominated person of the arrestee may be also informed accordingly.

Chief Commissioners/DGRI is required to send a report on every arrest to the concerned Member within twenty-four (24) hours of the arrest. To maintain an all India record of arrests made under the Customs Act, 1962, a monthly report of all persons arrested in the Zone is required to be sent by the Chief Commissioner to DRI (Hqrs) in the format prescribed month and the same is required to be compiled and sent to Anti-Smuggling Unit, CBEC every month, zone-wise.

Compounding of Offences under the Customs Act

As per the Black's Law Dictionary, "compound" means "to settle a matter by a money payment, in lieu of other liability". That is, it is a settlement mechanism, by which, one is given an option to pay money in lieu of prosecution, thereby avoiding a prolonged litigation. Usually, only a competent criminal court can impose fine or imprisonment; however, the offender may agree to pay 'composition amount' instead of going to court. The order for paying such composition money can be made by quasi-judicial authorities, and this act of the quasi-judicial authority is referred to as compounding of offences.²

Datey explains the meaning of compounding as such:

*"'Compounding' means that the accused and the complainant have come to terms and the dispute between the parties has been settled amicably or adjusted by agreement and the complainant agrees not to prosecute the accused. If the case is pending, the accused and the complainant then make a joint application to the Court that the parties have come to terms and the case may not be proceeded with."*³

Compounding can be done either before or after the institution of prosecution; as opposed to settlement, which can be done only before and not after the institution of prosecution. Upon payment of the composition amount, prosecution will not be launched; in case, prosecution has been launched, it will be withdrawn.

² V. S. Datey, *Indirect Taxes Law And Practice*, Taxmann Publications, New Delhi, (2012) at pp. 625-6.

³ *Ibid*, p. 626.

Rationale of compounding

Compounding presents an opportunity for a compromise or agreement upon the commission of an offence. The purpose of compounding of offences against payment of compounding amount is to prevent litigation and encourage early settlement of disputes.

Legal provisions relating to compounding

Section 137 (3) of the Customs Act:

Under Section 137 (3), any offence under the Act can be compounded by Chief Commissioner of Customs, on payment of 'compounding amount' to the Central Government; **except** in the following cases defined in the five provisos to the section:

- (a) A person who has been allowed to compound once in respect of any offence under sections 135 and 135A⁴
- (b) Offences under Narcotics Drugs and Psychotropic Substances Act, Chemical Weapons Convention Act, Wildlife Protection Act, and Arms Act;
- (c) A person involved in smuggling of goods under:
 - (i) Special Chemicals, Organisms, Materials, Equipments and Technologies (SCOMET), as specified in Appendix-3 to Schedule 2 of ITC (HS);
 - (ii) Prohibited items for import or export as specified in the ITC (HS) Classifications of Export and Import items, 2004-09 issued under section 3 of the Foreign Trade (Development and Regulation) Act, 1992;
 - (iii) Any good or document likely to affect friendly relations with a foreign State or could be derogatory to national honour;
- (d) A person who has been allowed to compound once in respect of any offence for goods under this Chapter for goods of value exceeding rupees one crore;

⁴ Circular No. 54/2005-Customs, dated 30.12.2005 classifies offences for the purpose of compounding as: (i) technical offences; and (ii) substantive or non-technical offences for the purpose of compounding. 'Technical offences' are those that can be compounded more than once and would be accorded a more liberal treatment. However, 'Substantive or non-technical offence' are offences, where it has been decided not to allow compounding for the second time. In this context, 'substantive or non-technical offence' would mean offences covered under section 135 and 135A of the Customs Act. 'Technical offence' would mean offences covered under section 132, 133 and 134 of the Customs Act. Accordingly compounding for substantive offence shall be allowed only once.

- (e) A person who has been convicted under Customs Act on or after 30 December 2005;

Procedure for compounding

The procedure for compounding of offences under Customs Act has been prescribed in Customs (Compounding of Offences) Rules, 2005. The relevant circulars and notifications include:

- Circular No. 54/2005-Cus dated 30.12.2005 (*superseded* by Circular No. 29/2009-Cus);
- Circular No.20/2008-Cus dated 2.12.2008;
- Notification No.118/ 2008-Customs (NT) dated 12.11.2008;
- Circular No. 29/2009-Cus dated 15.10.2009

Procedure:

- The application to compounding can be made either before the prosecution is initiated or while it is pending.
- Since the filing of application under compounding rules is the individual option of the person to avoid prosecution, other persons involved in the case/ offence and who have not filed the application would not be given immunity from prosecution; and they would face regular proceedings of the department for adjudication/ prosecution/ appeal.⁵
- Under Rule 3, the application should be made in a prescribed form to the 'compounding authority', that is, the jurisdictional Chief Commissioner. If the offence has been committed at more than one place, the compounding authority shall be the Chief Commissioner having jurisdiction over such place where value of goods seized or duty evaded/attempted to be evaded is more than others.
- According to Rule 4(1), after the application is made, compounding authority shall call report from the jurisdictional Commissioner who will be the 'reporting authority'. This report shall be sent within one month.
- After receipt of the report, compounding authority will either allow the application by prescribing the compounding amount and granting immunity from prosecution, or reject the application. The compounding amount shall be decided as per the limits prescribed in Rule 5:

⁵ Para 5 (iii) of Circular No. 29/2009-Cus dated 15.10.2009

Sl.No.	Offence	Compounding amount
1.	Section 132	Rs. 50000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
2.	Section 133	Rs. 50000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
3.	Section 134	Rs. 50000 for the first offence and to be increased by hundred per cent of this amount for each subsequent offence.
4.	Section 135 (1) (a)	Upto ten per cent of the amount of market value of the goods, subject to a minimum of one lakh rupees.
5.	Section 135 (1) (b)	Upto five per cent of the amount of market value of the goods, subject to a minimum of one lakh rupees.
6.	Section 135(1) (c)	Upto ten per cent of the amount of market value of the goods, subject to a minimum of one lakh rupees.
7.	Section 135(1) (d)	Upto ten per cent of the amount of market value of the goods, subject to a minimum of one lakh rupees.
8.	Section 135A	Upto five per cent of the amount of market value of the goods, subject to a minimum of one lakh rupees.

- Immunity from prosecution will be given only if the compounding authority is satisfied that the applicant has cooperated in the proceedings before him and has disclosed all facts pertaining to the case, and subject to the conditions specified in Rule 6.
- Such immunity from prosecution can be withdrawn in certain cases, as outlined in Rule 7. There are two such occasions- a) if compounding amount is not paid or condition subject to which immunity was granted have not been complied with; b) if it is found that appellant had concealed particulars or material or had given false

evidence. Withdrawal of such immunity entails institution or continuity of prosecution.

- **Principle of disclosure:** Circular No. 29/2009-Cus dated 15.10.2009 underscores the “principle of disclosure” that governs compounding of offences. The circular reiterates the 2008 decision of Supreme Court in *Union of India v. Anil Chanana*⁶ in this regard. The basic rule of disclosure, underlying Section 137(3) read with Rule 6 is that if there are demonstrable contradictions or inconsistencies or incompleteness in the case of the applicant, then the application for compounding cannot be entertained.
- **Rejection of application** can be made only after opportunity of hearing is given (Rule 4(3)). However, as specified in the proviso to 4(3), application for compounding shall not be allowed unless the duty, penalty and interest liable to be paid has been paid in the concerned case.
- According to Rule 4(6), on receipt of the order, the applicant shall pay the compounding amount within 30 days and submit proof of payment. If court rejects the application, amount paid will be refunded, otherwise not.
- Under Rule 4 (7), compounding is purely the discretion of the compounding authority; in other words, compounding is not a right.
- Rule 2(b) which defines “applicant” excludes officers of customs as applicants for compounding. Therefore, customs officers are not entitled to utilise compounding provisions.

⁶ (2008) (222) ELT 481 SC.