

F.No.394/68/2013-Cus (AS)
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
(Anti-Smuggling Unit)

New Delhi, the 23rd October , 2015

To

All Chief Commissioners of Customs,
All Chief Commissioners of Customs (Preventive),
All Chief Commissioners of Customs, Central Excise and Service Tax,
All Chief Commissioners of Central Excise and Service Tax,
All Chief Commissioners of Service Tax,
Chief Commissioner (AR), CESTAT,
All Directors General,
Webmaster, CBEC

Sir/Madam,

Subject – Guidelines for launching of prosecution in relation to offences punishable under Customs Act, 1962- reg.

Attention of the field formations is invited to the existing prosecution guidelines issued by the Ministry vide order **No.394/71/97-CUS (AS) dated 22.06.1999** revising the guidelines issued vide order No.711/16/84-CUS (AS) dated 21st May, 1990 and 20th February, 1992.

2. Since then, several significant changes have been effected in the Customs Act and other relevant enactments. Amendments and changes were made in section 135 of Customs Act, 1962 vide Finance Act, 2007 and Finance Act, 2013 relating to threshold limit/categorization of offences. Moreover, section 137 of Customs Act, 1962, has been amended and provisions of compounding of offences had been incorporated through Finance Act, 2004 and Finance Act, 2009. Amendments were made in section 104 of the Customs Act, 1962 through Finance Act, 2012 and Finance Act, 2013 wherein certain offences were made cognizable and non-bailable and certain other offences were kept as non-cognizable and bailable. Revised guidelines for arrest and bail were accordingly issued by the Ministry vide order No.394/68/2013-Cus (AS) dated 17th September, 2013.

3. Keeping in view the above changes, the following revised guidelines for prosecution in relation to offences punishable under Customs Act, 1962 are issued in supersession of the earlier guidelines on launching prosecution issued vide Ministry's letter No. 394/71/97-Cus (AS), dated the 22nd June, 1999.

4.1. Person liable to be prosecuted: As per the provisions of the Customs Act, 1962, prosecution may be launched against any person including legal person in respect of the offences covered under any of the sections namely 132,133,134, 135,135A or 136 of the Customs Act, 1962.

4.1.1. The decision for launching prosecution should be taken in cases which fulfil the requirement of the provisions of any of the sections 132,133,134, 135,135A or 136 of the Customs Act, 1962 after a careful consideration of the nature of offence, the role of the person concerned and evidence available to substantiate the guilty knowledge/mensrea.

4.2. Threshold limit for launching prosecution and exceptions:

4.2.1. Prosecution may be considered in the following categories of cases:

4.2.1.1. Baggage and Outright smuggling cases:

(i) Cases involving unauthorized importation in baggage / cases under Transfer of Residence Rules, where the CIF value of the goods involved is Rs. 20, 00,000/- (Rupees twenty lakh) or more;

(ii) Outright smuggling of high value goods such as precious metal, restricted items or prohibited items notified under section 11 of the Customs Act, 1962 or goods notified under section 123 of the Customs Act, 1962 or foreign currency where the value of offending goods is Rs.20,00,000 (Rupees twenty lakh) or more;

4.2.1.2. Appraising Cases/ Commercial Frauds:

(i) In cases related to importation of trade goods (i.e. appraising cases) involving-

(a) wilful mis-declaration in value/description;

(b) concealment of restricted goods or goods notified under section 11 of the Customs Act, 1962,

where CIF value of the offending goods is Rs. 1,00, 00,000 (Rupees one crore) or more;

(ii) In cases related to fraudulent availment of drawback or attempt to avail of drawback or any exemption from duty provided under the Customs Act 1962, if the amount of drawback or exemption from duty is Rs. 1,00, 00,000 (Rupees one crore) or more;

(iii) In cases related to exportation of trade goods (i.e. appraising cases) involving,-

(a) wilful mis-declaration in value / description ;

(b) concealment of restricted goods or goods notified under section 11 of the Customs Act, 1962

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where FOB value of the offending goods is Rs. 1,00,00,000/- (Rupees one crore) or more.

4.2.2. Exceptions:

The above threshold limits would not apply in case of persons indulging habitually in such violations or where criminal intent is evident in ingenious way of concealment, where prosecutions can be considered irrespective of the value of goods/currency involved in such professional or habitual offenders, etc. provided the cumulative value of 3 or more such offences in past five years from the date of the decision exceeds the threshold limit (s) indicated at sub para 4.2.1 above respectively.

4.2.3. Special Cases relating to FICN, arms, ammunitions, wild life etc.:

The threshold limits mentioned in sub para 4.2.1 would also not apply in cases involving offences relating to items i.e. FICN, arms, ammunitions and explosives, antiques, art treasures, wild life items and endangered species of flora and fauna. In such cases, launching of prosecution should be considered invariably, irrespective of value of offending goods involved.

4.3. In respect of cases involving non-declaration of foreign currency by foreign nationals and NRIs (normally visiting India for travel/ business trips etc.) detected at the time of departure back from India, exceeding the threshold limits of Rs. 20 lakh as prescribed under sub-para (4.2) above, if it is claimed that the currency has been legally acquired and brought into India but not declared inadvertently, prosecution need not be considered as a routine. The status and business standing of the foreign nationals/ NRIs, the manner and place of recovery, corroborative evidence, if any to substantiate the claim of bonafide and proper acquisition but inadvertent non-declaration, and other attendant factors may be considered immediately and a decision taken whether the case involves criminal intent warranting launching of prosecution or not. Where the prosecution is not considered called for, the case can be adjudicated by the proper officer and suitable order for confiscation/ fine / penalty etc. passed.

4.4. It is mentioned that the quantum of punishment under section 135 of the Customs Act, 1962 is linked with the amount of imports duty/market price of offending goods/drawback amounts. However, the quantum of punishment in respect of the offences covered under remaining sections namely 132,133,134, 135A or 136 of the Customs Act, 1962 is not linked with the amount of imports duty/market price of offending goods/ineligible drawback amount. In these circumstances, the threshold limit for deciding on launching of prosecution under these sections may be taken as the value which is applicable for section 135 of the Customs Act, 1962 (refer to para 4.2 & 4.3).

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4.5. It is clarified that prosecution in respect of narcotic drugs and psychotropic substances may be launched as per the provisions of the NDPS Act, 1985.

4.6. Except in respect of cases covered by sub paras 4.2.1.2 and 4.2.2 above, in all other cases, prosecution may be launched after due sanction by the Commissioner /Principal Commissioner (Pr. Commr.) or Additional Director General (ADGRI) / Principal Additional Director General of Revenue Intelligence (Pr. ADGRI), as the case may be. Prior approval of the Chief Commissioner / Principal Chief Commissioner (Principal CC) or Director General / Principal Director General of Revenue Intelligence (Pr. DGRI), as the case may be, will be essential for launching of prosecution in respect of cases covered under sub paras 4.2.1.2 and 4.2.2 above.

5. The following aspects may also be kept in view while considering launching of prosecution for offences under the Customs Act, 1962:-

5.1. Prosecutions should not be launched as a matter of routine and/or in cases of technical nature, where the additional claim for duty is based solely on a difference of interpretation of the law. Before launching any prosecution, it is essential that the department should have sufficient evidence to prove that the person, individual or company, against whom prosecution is being considered, had guilty knowledge of the offence or had fraudulent intention of committing the offence, or in any manner possessed mens-rea which would indicate his guilt. It follows, therefore, that in the case of Public Limited Companies, prosecution should not be launched indiscriminately against all the Directors of the Company, but should be restricted to only such persons who have taken active part in committing, or have connived at, the offence relating to either of smuggling or of customs duty evasion or of mis-declaration of value, quantity etc. For this purpose, the Commissioner /Pr. Commr. or ADGRI / Pr. ADGRI should go through the relevant case file thoroughly and ascertain for themselves that the definite involvement of different partners/directors/executives/officials, against whom reasonable evidence about their involvement in the offence exists and should be proceeded against, while launching the prosecution.

6. **Stage for launching of prosecution:** Normally, prosecution may be launched immediately on completion of adjudication proceedings. However, prosecution in respect of cases involving offences relating to items i.e. FICN, arms, ammunitions and explosives, antiques, art treasures, wild life items and endangered species of flora and fauna may preferably be launched immediately after issuance of show cause notice.

6.1. Further, in following cases investigation may be completed in time bound manner preferably within **six months** and adjudication may be expedited to facilitate launching of prosecution. These cases are:

- (a) In case where arrest has been made during investigation (for commercial fraud cases as well as outright smuggling cases) or in the case of a habitual offender.
- (b) In case where arrest has not been made but it relates to outright smuggling of high value goods such as precious metal, restricted items or prohibited items notified under section 11 or goods notified under section 123 of the Customs Act, 1962 or foreign currency where the value of goods is Rs. 20, 00,000 (Rupees twenty lakh) or more.

6.2. In a recent judgement passed by Hon'ble Supreme Court of India in the case of Radhe Shyam Kejriwal [2011(266)ELT 294 (SC)], the Apex court had, inter alia, observed that (i) adjudication proceedings and criminal proceedings can be launched simultaneously; (ii) decision in adjudication proceedings is not necessary before initiating criminal prosecution; (iii) adjudication proceedings and criminal proceedings are independent of each other in nature and (iv) the findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution. In view of aforesaid observations of Hon'ble Supreme Court, it is reiterated that if the party deliberately delays completion of adjudication proceedings, prosecution may be launched even during the pendency of the adjudication proceedings, where offence is grave and qualitative evidences are available.

6.3. Prosecution need not be kept in abeyance on the ground that the party has gone in appeal/revision. However, in order to ensure that the proceeding in appeal/revision are not unduly delayed because the case record are required for purpose of prosecution, a parallel file containing copies of the essential documents relating to adjudication should be maintained.

6.4. The Superintendent in charge of adjudication section should endorse copy of all adjudication orders to the prosecution section. The Superintendent in charge of prosecution section should monitor receipt of all serially numbered adjudication orders and obtain copies of adjudication orders of missing serial numbers from the adjudication section every month.

7. Procedure for launching prosecution:

7.1. In all such cases, where prior approval of Chief Commissioner/Principal CC or DGRI / Pr. DGRI is necessary for launching prosecution, an investigation report for the purpose of launching prosecution (as per Annexure- I), should be carefully prepared and signed by the Assistant Commissioner / Assistant Director concerned. The investigation report, after careful scrutiny (for incorporation of all relevant facts) should be endorsed by the Commissioner/ Pr. Commr. or ADGRI/ Pr. ADGRI. The Chief Commissioner/Principal CC or DGRI / Pr. DGRI should ensure that a decision about launching of prosecution or otherwise, is taken after careful

analysis of evidence available on record and communicated to the Commissioner / Principal CC or ADGRI / Pr. ADGRI within a month of the receipt of the proposal.

7.2. In all other cases, where prior approval of Chief Commissioner/Principal CC or DGRI / Pr. DGRI is not required, the decision about launching of prosecution or otherwise should be taken by the Commissioner/ Pr. Commr. or ADGRI / Pr. ADGRI after careful application of mind and analysis of evidence brought on record. This should be completed within a month of adjudication of the case (unless it is decided to go for prosecution even prior to adjudication in certain category of cases mentioned at para 6 above).

7.3. Prosecution should not be filed merely because a demand has been confirmed in the adjudication proceedings particularly in cases of technical nature or where interpretation of law is involved. One of the important considerations for deciding whether prosecution should be launched is the availability of adequate evidence. The standard of proof required in a criminal prosecution is higher as the case has to be established beyond reasonable doubt whereas the standard of proof in adjudication proceedings is decided on the basis of preponderance of probability. Therefore, even cases where demand is confirmed in adjudication proceedings, evidence collected should be weighed so as to likely meet the test of being reasonable doubt for recommending & sanctioning prosecution. Decision should be taken on case- to- case basis considering various factors, such as, gravity of offence, quantum of duty evaded and the nature as well as quality of evidence collected.

7.4. It is reiterated that in order to avoid delays, Commissioner / Pr. Commr. or ADGRI / Pr. ADGRI / adjudicating authority should indicate, at the time of passing the adjudication order itself as to whether he considers the case fit for prosecution, so that it could be further processed for launching prosecution. Where at the time of adjudication proceedings, no view has been taken on prosecution by the adjudicating authority, the adjudication section shall resubmit the file within 15 days from the days of issue of adjudication order to the adjudicating authority/Commissioner to take a view of prosecution. Where the prosecution is proposed before the adjudication of the case, Commissioner /Pr. Commr. Or ADGRI / Pr. ADGRI shall record the reason for the same and the adjudicating authority shall be informed of the decision so that there is no need for him to examine the case subsequently from the perspective of prosecution.

7.5. It is observed that the delays in the Court proceedings occur due to the non-availability of records required to be produced before the Magistrate. As a matter of practice, whenever a case is taken up for seeking the approval for launching prosecution, an officer should be nominated/designated, who shall immediately take charge of all documents, statements and other exhibits, that would be required to be

produced before a Court. The list of exhibits etc. should be finalised in consultation with the Public Prosecutor at the time of drafting of the complaint. Such exhibits should be kept in the safe custody. Where a complaint has not been filed even after a lapse of three months from the receipt of sanction for prosecution, the reason for delay shall be brought to the notice of Chief Commissioner/Principal CC or DGRI / Pr. DGRI by the Commissioner /Pr. Commr. or ADGRI / Pr. ADGRI, as the case may be, who are responsible in the case for ensuring the timely filing of the complaint.

8. Publication of names of persons convicted under Customs Act,1962

Section 135-B of the Customs Act, 1962, grants the power to publish name/place of business etc. of persons convicted under the Act by a Court of law. It is observed that this power is being exercised very sparingly. In all cases in respect of all persons, who are convicted under the Customs Act, 1962 the department should make a prayer to the Court to invoke this section.

9. Monitoring of Prosecution

9.1. It is emphasized that prosecution, once launched, should be vigorously followed. The Commissioner /Pr. Commr. or ADGRI / Pr. ADGRI should monitor cases of prosecution at monthly intervals and take the corrective action wherever necessary to ensure that the progress of prosecution is satisfactory.

9.2. For monitoring of prosecution cases, a Prosecution Cell should be created in each Commissionerate under the supervision of Additional/Joint Commissioner. In case of Directorate of Revenue Intelligence, an Additional/ Joint Director in headquarter/each zonal unit should supervise the prosecution work relating to headquarters or respective zonal unit, as the case may be.

9.3. For keeping track of prosecution cases launched by the Commissionerate, a prosecution register in the format enclosed as Annexure-II to this Circular should be maintained in the Prosecution Cell of each Commissionerate. The register should be updated regularly and inspected by the Principal Commissioner/ Commissioner at least once in every quarter of the Financial Year. For keeping track of prosecution cases launched by DRI, prosecution register in the similar format as Annexure-II should be maintained in the Zonal Unit / Hqrs of DRI pertaining to those prosecution cases and similar regular monitoring to be carried out by ADGRI/ Pr. ADGRI concerned.

10. Appeal against Court order in case of inadequate punishment/acquittal:

10.1. Commissioner / Pr. Commr. responsible for the conduct of prosecution or ADGRI / Pr. ADGRI (in respect of cases booked by DGRI), should study the

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judgement of the Court and, where it is found that the accused person have been let off with light punishment than what is envisaged in the Customs Act, 1962 or has been acquitted despite the evidence being strong, the question of filing appeals under law should be considered within the time period.

10.2. The case of acquittal by the Court can be appealed against in terms of section 378(4) of Cr. P.C. by the complainant. In these cases approval of the Chief Commissioner/Principal CC or DGRI / Pr. DGRI as the case may be should be obtained before filling appeal.

11. Procedure for withdrawal of prosecution

11.1. Procedure for withdrawal of sanction order of prosecution

In cases where prosecution has been sanctioned but not filed and new facts or evidences have come to the notice of the Commissionerate or the DGRI which warrant review of the sanction for prosecution, it should be immediately brought to the notice of the sanctioning authority. After considering the new facts and evidences the sanctioning authority may recommend withdrawal of sanction order to the next higher authority. In case Commissioner / Pr. Commr. or ADGRI / Pr. ADGRI is the sanctioning authority, the recommendation will be submitted to Chief Commissioner / Principal CC or DGRI / Pr. DGRI. The recommendation will be submitted to the Board (Member of Policy Wing concerned) in such cases where sanctioning authority is Chief Commissioner / Principal CC or DGRI / Pr. DGRI. All past cases where filing of prosecution is pending beyond three months of the sanction for prosecution shall be reviewed in the light of these instructions and necessary action taken to either file complaint expeditiously or to propose withdrawal of sanction.

11.2. Prosecution for withdrawal of Complaint already filed for prosecution

11.2.1. In cases where the complaint has already been filed in the court, it will be up to the court to decide whether or not to pursue prosecution in terms of section 257 and 321 of Cr. P.C, 1973. If the order for withdrawal has been given by a court, the prosecution can be withdrawn by the Assistant/ Deputy Commissioner or Assistant/Deputy Director after getting a formal order from the Chief Commissioner/ Principal CC or DGRI/ Pr. DGRI as the case may be.

11.2.2. As per decision of Hon'ble Supreme Court in the case of Radhe Shyam Kejriwal [2011(266) ELT 294 (SC)]:

(a) the findings in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue, and

(b) in case of exoneration, however, on merit where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of

<http://abcaus.in> cannot be allowed to continue, underlying principle being the higher standard of proof in criminal cases.

11.2.3. In respect of cases covered under clause (b) above, the Chief Commissioner / Principal CC or DGRI/ Pr. DGRI would ensure moving an application through Public Prosecutor in the court for withdrawal of prosecution in accordance with law. The withdrawal can only be effected with the approval of the court.

12. Compounding of offence:

Section 137 of Customs Act, 1962 provides for compounding of offences by the Chief Commissioner. The provisions regarding compounding of offence should be brought to the notice of person being prosecuted and such person be given an offer of compounding by the Commissioner / Pr. Commr. or ADGRI / Pr. ADGRI as per Circular No. 54/2015-Cus. dated 30.12.2005.

13. Prosecution Register and dissemination of information

13.1. A Prosecution Register in the form as Annexed to this circular should be maintained in the prosecution cell of the Commissionerate headquarters/Custom House / DRI formations. Wherever the prosecution is compounded under section 137 of CA'62 by the Chief Commissioner, suitable endorsement may be kept in the prosecution register.

13.2. It may be mentioned that offences under section 132 and 135 of the Customs Act, 1962 are scheduled offences under the Prevention of Money Laundering Act, 2002(PMLA). In Customs' prosecution cases warranting action under PMLA, instructions have been issued vide F. No.394/51/2009-Cus (AS) dated 14.09.2009 for monthly reporting of such cases to the Directorate of Enforcement in the prescribed format. Once cognizance of complaint in respect of offence under section 132 and 135 of CA'62 filed by the Department is taken by the court, and reference has been made to the Directorate of Enforcement for taking action under PMLA, suitable remarks should be made in the prosecution register. In case, the prosecution under PMLA is separately proposed to be launched by the Directorate of Enforcement, and intimation is received to that effect in the prosecution unit of the Commissionerate/ DRI, suitable entry should be kept in the register for appropriate liaison with the Directorate of Enforcement and further action as per the direction of Special Court.

13.3. Further instructions have been issued vide F. No. 394/124/2011-Cus (AS) dated 17.07.2012 clarifying that all offences under Customs Act, 1962 shall be within the ambit of 'Plea Bargaining' and any application for the same shall be dealt with as per the provisions in Chapter XXIA of Code of Criminal Procedure. Wherever 'Plea Bargaining' as per the provisions of chapter XXIA of Cr Pc is permitted by the competent court, necessary endorsement may be made in the

<http://abcaus.in> prosecution register for proper record and monitoring. Similar record may be kept in respect of appeal against court order and / or withdrawal of prosecution as detailed in para 10 to 12 above.

13.4. The field formations should upload/update the information regarding prosecution initiated in the Management Information System (MIS) under prescribed Proforma.

14. Inspection of prosecution work:

Director General (Inspection) and Chief Commissioners/Principal CCs, while carrying out inspection of the Commissionerates/Custom Houses, should specially check all the above mentioned points, and make a mention about implementation of the guidelines in their Inspection Reports.

15. Transitional Provisions:

All cases, where sanction for prosecution is accorded after the issue of this circular, shall be dealt in accordance with the provisions of this circular irrespective of the date of the offence. Cases where prosecution has been sanctioned but no complaint has been filed before the magistrate shall also be reviewed by the prosecution sanctioning authority in light of the provisions of this circular.

16. Where a case is considered suitable for launching prosecution and where adequate evidence is forthcoming, securing conviction largely depends on the quality of investigation. It is, therefore, necessary for senior officers to take personal interest in investigations of important cases of smuggling/duty evasion and also in respect of cases having money laundering angle and to provide guidance and support to the investigating officers.

17. It has also been noticed that the officers posted for prosecution work do not have proper training. The Director General, National Academy of Customs Excise and Narcotics (NACEN), Faridabad, should therefore, organize separate training courses on prosecution/arrests etc. from time to time and also should incorporate a series of lectures on this issue in the courses organized for anti-smuggling. The Commissioner / Pr. Commr. or ADGRI / Pr. ADGRI should judiciously sponsor officers for such courses.

18. The field formations are hereby directed to circulate these guidelines to all the formations under their charge. Difficulties, if any, in implementation of the aforesaid guidelines may be brought to the notice of the Board.

19. Please acknowledge receipt of this circular.

Yours faithfully,

Enclosure: As above

(A.C.MALLICK)
Under Secretary to the Govt. of India

INVESTIGATION REPORT FOR THE PURPOSE OF LAUNCHING
PROSECUTION AGAINST _____

COMMISSIONERATE _____/Divisions

1. Name & address of the person (s) including legal persons.
2. Nature of offence including commodity :
3. Charges :
4. Date/Period of offence :
5. Amount of duty Evasion/value of contraband goods involved :
6. Particulars of persons proposed to be prosecuted :
 - (a) Name
 - (b) Father's name
 - (c) Age _____ Sex _____
 - (d) Address
 - (e) Occupation
 - (f) Position held in the company/firm
 - (g) Role played in the offence
 - (h) Material evidence available against the accused (Please indicate separately documentary and oral evidence)
 - (i) Action ordered against the accused in adjudication proceedings
7. Brief note as to why prosecution is recommended

Place:

Date:

(Deputy/Assistant Commissioner)
Or (Deputy/Assistant Director)

8. I have carefully examined the investigation report and find it in order for filing criminal complaint under section (s) (-----) of Customs Act, 1962.

Commissioner/ Pr. Commr.
Or ADGRI/ Pr. ADGRI

NOTE

- (A) The proposal should be made in the above form in conformity with the guidelines issued by the Ministry. With regard to column 3 above, all the charging sections in the Customs Act, 1962 and other allied Acts should be mentioned. If the provision for conspiracy as under section 120-B of IPC is sought to be invoked, this fact should be clearly mentioned. With regard to S.NO 6, information should be filed separately for each person sought to be prosecuted .
- (B) A copy of the show cause notice as well as the order of adjudication (where applicable) should be enclosed with this Report. If any appeal has been filed against the adjudication order, this fact should be specifically stated.
- (C) Where prosecution is being recommended even prior to completion of adjudication, as per guidelines, brief reasons therefore be also indicated in the brief note mentioned at Sl. No. 7 above.

FORMAT OF PROSECUTION REGISTER

Sl. No.	Case investigated by	Division / preventive unit/ appraising group/ DRI(Hqr.)/ Zonal Unit	File no.	Criminal complaint no.	Date of detection/ seizure	Name of accused person being prosecuted and address	Register no.	Nature of offence
1	2	3	4	5	6	7	8	9

Amount of duty / seizure/value confirmed & O-I-O No.	Period of evasion	Date of sanction of prosecution	Date of filling of complaint	Date of taking cognisance by court	Name of counsel
10	11	12	13	14	15

Date of judgement	Appeal status-date/ court in which filed	Date of hearing	Date of referral to Directorate of Enforcement	Remarks/signature with name and date (Officer filing the complaint)
16	17	18	19	20