

Pre-Budget Memorandum

Suggestions on Decriminalisation of offences under Customs

1. The overall structure of criminal proceedings in the Customs law is outlined below:
 - ▶ Chapter XVI of the Customs Act, 1962 deals with offences and prosecution.
 - ▶ Section 135 prescribes the offences and term of imprisonment. The imprisonment term is dependent on the amount of duty evaded or benefit claimed. *(Refer A1 of Annexure I)*
 - ▶ Section 104 deals with power to arrest. Where any officer of customs (empowered by Principal Commissioner or Commissioner) has reason to believe that any person has committed an offence under specified sections, he may arrest such person. *(Refer A2 of Annexure I)*
 - ▶ Section 132 deals with prosecution of any person who makes or signs or uses any declaration or documents which he knows or has reason to believe is false in any material particular. *(Refer A3 of Annexure I)*
 - ▶ Section 137, *inter alia*, deals with compounding of offences. The ambit of compounding is restricted. *(Refer A4 of Annexure I)*
 - ▶ Section 138A provides for deemed presumption of culpable state of mind on part of accused for any offence and the burden is on the accused to prove the fact beyond 'reasonable doubt' that he had no such mental state with respect to alleged offence. *(Refer A5 of Annexure I)*
 - ▶ Section 132 deals with prosecution in case of obstruction of customs officer. *(Refer A6 of Annexure I)*
 - ▶ Section 154B deals with the extensive provision of publication of information in respect of tax defaulter in certain cases. *(Refer A7 of Annexure I)*

2. Submissions

It is to be noted that there are adequate penal provisions under the legislation which will provide adequate deterrence against evasion of duties.

Prosecution provisions should specifically exclude the following elements:

- The relative quantum of duty allegedly short paid or not paid vis a vis the overall business conducted is relevant (for example for large taxpayer a duty of INR 1 crore amount will constitute a miniscule amount vis a vis the total duty paid and may arise out of actual clerical errors as against the same amount related to small businesses). Any dispute that constitutes less than 10-15 percent of duties paid should not be considered for prosecution (the interest and other penal consequences are punitive enough)
- Classification or valuation or other technical disputes related to applicability of duty should not trigger prosecution
- Conduct such as alleged documentation errors, errors or delay in furnishing of information or tampering of evidences etc or subjective areas of misconduct such as obstructing or preventing an officer from discharging duties should not be subjected to the threat of prosecution. These provisions are draconian and can be abused. If at all these are to be applied, they should be sought to be applied under very specific and well-defined events

3. Executive summary of suggestions:

	Suggestions	Reference
3.1	<p><u>Prosecution and Arrest</u></p> <p>Provisions to be aligned with GST:</p> <p>The threshold limit of duty evasion and term of imprisonment should be aligned with GST law.</p> <p>Power to be exercised with adequate checks and balances and in rarest of rare cases:</p> <p>The prosecution, arrest and imprisonment should be initiated with adequate checks and balances, in the rarest of rare cases of hard, habitual and deliberate defaulters.</p> <p>Further, the prosecution provisions, which are currently dictated by absolute amount of default, should be made applicable only in cases where the amount of default exceeds a prescribed percentage of the total duty paid by such taxpayer say 10% i.e. i.e. only where commitment of an offence is significantly and materially high compared to the overall taxes paid.</p>	Para 4.1

	<p>Power to arrest to be exercised by CBIC or Principal Chief Commissioner:</p> <p>Instead of empowering any officer of customs, the Power to prosecute and arrest any person under the Customs law should be exercised by the Central Board of Indirect taxes and Customs (CBIC) or by the Principal Chief Commissioner.</p> <p>Further, the Government should issue clear and unambiguous guidelines required to be followed in case of arrest.</p>	
3.2	<p><u>False declaration, document etc.</u></p> <p>Shifting of onus to tax administration:</p> <p>The onus to prove that the person is knowing or having reason to believe that the declaration or document is false, may be put on the tax administration.</p> <p>Further, specific provisions should be included that prosecution should not be invoked in cases where the amount of duty allegedly sought to be evaded is less than 10% of the gross liability and where there is neutrality.</p>	Para 4.2
3.3	<p><u>Compounding of offences</u></p> <p>Expanding the scope of compounding:</p> <p>In order to reduce litigation and as a part of settlement mechanism, the provisions relating to compounding should not be restrictive and may be allowed for repetitive offences also.</p>	Para 4.3
3.4	<p><u>Culpable state of mind</u></p> <p>Onus to be on tax administration:</p> <p>The onus to prove commitment of offence with guilty mind, which is currently on the taxpayer, should be shifted to the tax administration.</p>	Para 4.4
3.5	<p><u>Obstructing officer in discharge of his duties</u></p> <p>Prosecution provision is not warranted and therefore, may be deleted.</p>	Para 4.5

	<p>The maximum term of imprisonment should be reduced to three months or a nominal fine, in line with the provisions under Indian Penal Code.</p> <p>Further, notwithstanding and without prejudice to the above suggestion, prosecution provisions should exclude procedural elements of conduct such as furnishing of information or appearances.</p>	
3.6	<p><u>Publication of information</u></p> <p>Adequate checks and balances need to be incorporated in the legislation for exercising the power to publish the names of tax defaulters.</p>	Para 4.6

4. Detailed discussion

Certainty and fair and benign prosecution provisions essential for 'Ease of Doing business'

“Ease of doing business” has been one of the biggest agenda of the present Government. The uncertainty in the legal processes and the time consumed by the courts in resolving disputes has been a major challenge in the ease of doing business. The fear of attracting criminal implications for small, minor and petty matters also act as deterrence for the investors, before undertaking any business activity or making investments. Decriminalization of such matters will essentially encourage such investors to undertake business activity and to make investments, without fearing of any criminal consequences.

Any move towards ease of doing business and decriminalising offences would prevent harassment and will be welcomed by the trade and industry.

Initiation of criminal actions due to minor offences and/or non-compliances results into increase in the pendency and huge backlog of cases. There may be instances where such non-compliance may be inadvertent omission, negligence and such matters can also be put to an end by imposing fines and penalties. Under such circumstances, commencement of criminal proceedings may not be considered as prudent and the matter can be effectively disposed-off, without taking it to the courts.

Customs law contains specific provisions which deal with different kind of offences, triggering punishment by way of prosecution, arrest and imprisonment along with fine. The imprisonment term is based on the absolute amount of duty evaded.

In the past, Courts have ruled that prosecution proceedings are supposed to be initiated only where the intention of the importer is very blatantly and habitually *malafide*. Non-compliance of provisions by taxpayer may not always be intentional but can be due to misinterpretation of law. Therefore, duty evasion generally should not include the following cases:

- (i) genuine wrong classification of goods or services;
- (ii) valuation;
- (iii) issues involving interpretation of law;
- (iv) matters where duty amount is insignificant or non-material, and
- (v) those where there is no loss to the Revenue (revenue neutral);
- (vi) furnishing of wrong information due to clerical errors

At the outset, it is suggested that the punitive measures in the form of prosecution and imprisonment, which are in addition to other deterrent provisions like interest and penalty, should not be invoked.

4.1 Prosecution and Arrest

In case where a person evades duty or fraudulently claims drawback or obtains any duty credit scrips by fraud and the amount involved is more than INR 50 lakhs, he shall be punishable with imprisonment up to 7 years.

In cases other than above, the person shall be punishable with imprisonment up to 3 years.

If an officer of customs (empowered by the Principal Commissioner of Customs or Commissioner of Customs) has reason to believe that any person has committed an offence punishable under specified sections, he may arrest such person.

Suggestion:

1. The threshold limit of duty evasion and term of imprisonment should be aligned with GST law.
2. Prosecution should be restricted only to cases where there is an intention to evade tax. Thus, cases like genuine wrong classification of goods or services, valuation and those where there is no loss to the Revenue (revenue neutral) should be excluded from the provisions of section 135.
3. The prosecution, arrest and imprisonment should be initiated with adequate checks and balances, in the rarest of rare cases of hard, habitual and deliberate defaulters.
4. The prosecution provisions, which are currently dictated by absolute amount of default, should be made applicable only in cases where the

amount of default exceeds a prescribed percentage of the total duty paid by such taxpayer i.e. only where commitment of an offence is significantly and materially high compared to the overall duties paid.

For instance, a large taxpayer who pays custom duties of say, INR 10,000 crore annually, may not have any intent to evade duty of INR 1 crore. This non- payment of duty may be due to various genuine reasons.

Thus, in such cases, the applicability of provisions should not be based on absolute amount of duty default but should be basis some percentage (which should be material) of duty paid by the person.

In other words, the term of imprisonment should be dependent on evasion amount being the percentage (to be prescribed) of duty paid.

Duty evaded (as a percentage of total duty outflow in a year)	Imprisonment term
10% or more but less than 25%	1 year
25% or more but less than 50%	3 years
50% or more	5 years

5. Instead of an officer empowered by Principal Commissioner or Commissioner, the power to arrest should lie with Principal Chief Commissioner of Customs or CBIC.
6. Further, the Government should issue clear and unambiguous guidelines required to be followed in case of arrest.

4.2 False declaration, documents

There can be cases, for instance, Free Trade Agreement, where businesses and their authorized signatories may have a genuine belief that the Certificate of Origin provided by the exporter is legitimate. Imprisonment in such cases may be punitive to businesses.

Suggestion:

The onus to prove that the person is knowing or having reason to believe that the declaration or document is false, may be put on the tax administration.

Further, offence provision may be invoked only in cases where the amount of duty intended to be evaded is significantly high if compared to total duty outflow of the taxpayer, say more than 10% of the total duty.

4.3 Compounding of offences

An offence may be compounded under Customs. However, there are certain restrictions prescribed for category of persons which can apply for compounding like second time offenders etc.

Suggestion:

In order to reduce litigation and as a part of settlement mechanism, the provisions relating to compounding should not be restrictive and may be allowed for repetitive offences also.

4.4 Removal of deemed presumption of culpable state of mind

There is a deemed presumption of culpable state of mind on part of accused for any offence under the Act and the burden of proof is on the accused to prove the fact beyond 'reasonable doubt' that he had no such mental state with respect to alleged offence. This is a very onerous provision and creates opportunities for using the provisions against the taxpayer.

Suggestion:

Considering the paradigm shift desired in tax administration through decriminalisation of tax defaults, the provision should be deleted and the onus should be shifted to the tax administration to prove that the offence was committed with guilty mind. This will ensure that prosecution is invoked only in hard cases of grave default.

4.5 Obstructing or preventing officer in discharge of his duties

Such offence was not punishable by prosecution under Excise and Service tax. Under the Indian Penal Code, 1860, the offence of obstructing any public servant in the discharge of his public functions is punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both (*Refer B1 of Annexure I*). Under Customs law, it is punishable with imprisonment for a term which may extend to two years or with fine or with both.

Suggestion:

Prosecution provision is not warranted and therefore, may be deleted.

Without prejudice to above, the maximum term of imprisonment should be reduced to three months or a nominal fine, in line with the provisions under Indian Penal Code.

Further, notwithstanding and without prejudice to the above suggestions, prosecution provisions should exclude procedural elements of conduct such as furnishing of information or appearances.

4.6 Publication of information in respect of persons in certain cases

Publication of the taxpayer details have a significant impact on the organisation. In the past, it is seen that even unfounded rumours have damaged the reputation of the organisation to a considerable extent.

Suggestion:

Such powers should be exercised in rarest of rare cases only. Also, adequate checks and balances need to be incorporated in the legislation to ensure that such powers are exercised in cautious manner.

A. Customs Act, 1962

A1. Section 135 – Evasion of duty and prohibitions

A person committing the offences relating to following shall be punishable with imprisonment up to 3 years:

- ▶ misdeclaration of value or fraudulent evasion of duty
- ▶ acquires possession of or concerned in carrying, removing, depositing etc. of goods which he knows or has reason to believe are liable to confiscation
- ▶ attempts to export good which he knows or has reason to believe are liable to confiscation
- ▶ fraudulently availing drawback or exemption from duty in connection with export of goods;
- ▶ fraudulently obtaining and utilizing scrips or authorisation or license issued under FTP

However, the term of imprisonment can be up to 7 years where the offence relates to:

- ▶ goods whose market price exceeds INR 1 crore
- ▶ notified prohibited goods;
- ▶ evasion or attempted evasion of duty exceeding INR 50 lakhs;
- ▶ fraudulently availing drawback or exemption from duty in connection with export of amount exceeding INR 50 lakhs;
- ▶ fraudulently obtaining and utilizing scrips or authorisation or license issued under FTP for payment of duty exceeding INR 50 lakhs.

For second and every subsequent offence, the person shall be punishable with imprisonment up to 7 years.

A2. Section 104 – Power to arrest

An officer of customs empowered by general or special order of the Principal Commissioner of Customs or Commissioner of Customs may arrest a person if he has reason to believe that such person has committed an offence under:

- ▶ section 132 – false declaration, documents etc.
- ▶ section 133 – Obstruction of officer of customs
- ▶ section 135 – Evasion of duty or prohibitions
- ▶ section 135A - Preparation

Cognizable and Non-Bailable

Notwithstanding anything contained in Code of Criminal Procedure, 1973, any offence relating to the following shall be cognizable and non-bailable:

- ▶ notified prohibited goods;

- ▶ evasion or attempted evasion of duty exceeding INR 50 lakhs;
- ▶ fraudulently availing drawback or exemption of amount exceeding INR 50 lakhs;
- ▶ fraudulently obtaining and utilizing scrips or authorisation or license issued under FTP for payment of duty exceeding INR 50 lakhs.

All other offences under Customs shall be non-cognizable and bailable.

A3. Section 132 - False declaration, false documents, etc.

Any person, who 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, shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

A4. Section 137 (3) – Compounding of offences

Any offence may, either before or after the institution of prosecution, be compounded by the Principal Chief Commissioner or Chief Commissioner on payment, by the person accused of the offence of compounding amount.

Compounding provision is not applicable in certain cases which, *inter alia*, includes:

- ▶ A person who has been allowed to compound once (for certain offences)
- ▶ A person accused of committing an offence under Customs law which is also an offence under the other specified laws
- ▶ A person involved in smuggling of specified goods

A5. Section 138A – Presumption of culpable mental state

The court shall presume the existence of such mental state unless the accused proves the fact (beyond reasonable doubt) that he had no such mental state with respect to the act charged as an offence in that prosecution.

A6. Section 133 - Obstruction of officer of customs

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 [two years], or with fine, or with both.

A7. Section 154B – Publication of information

If the Central Government is of the opinion that it is necessary or expedient in the public interest to publish the name of any person and any other particulars relating to any proceedings or prosecution in respect of such person, it may cause to be published such name and particulars in such manner as it thinks fit.

In the case of firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries and treasurers or managers of the company, or the members of the association, as the case may be, may also be published.

B. Indian Penal Code, 1860

B1. Section 186 – Obstructing public servant in discharge of public functions

Whoever voluntarily obstructs any public servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.