Circular No. 10/2008-Customs

F.No.401/7/2004-Cus.III(Pt.)

Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs

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New Delhi, dated 30th June, 2008.

To

All Chief Commissioners of Customs.

All Chief Commissioners of Customs & Central Excise.

All Commissioners of Customs

All Commissioners of Customs & Central Excise.

All Directorates-General/Directorates under CBEC.

The Comptroller & Auditor General of India.

Sir / Madam,

Subject: - Instructions regarding Section 28 BA of the Customs Act, 1962.

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I am directed to refer to the Section 28 BA of the Customs Act, 1962 (hereinafter referred to as "the Act") inserted by the Taxation Laws (Amendment) Act, 2006, with effect from 13.7.2006. This section provides for provisional attachment of property for the purpose of protecting the interests of revenue during the pendency of any proceedings under Section 28 or Section 28B of the Act.

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2. In this connection the Law Ministry has advised that suitable guidelines should be issued to implement Section 28BA of the Act. The following guidelines are, therefore, issued to maintain uniformity in its implementation by field formations.

(i) The proceedings for provisional attachment can be initiated only after issue of Show Cause Notice (SCN) under Section 28 or 28B of the Act.

(ii) During the pendency of the proceedings under Section 28 or 28B of the Act, if the proper officer is of the opinion that, in order to protect the interests of revenue, it is necessary to attach the property of the noticee, he shall prepare a proposal in the format prescribed in the Annexure hereto, and forward the same to the jurisdictional Commissioner of Customs for his approval, except in cases where the proceedings under Section 28 or 28B of the Act are pending before such Commissioner of Customs, in which case he shall himself make the order of attachment, in accordance with the procedure set out in sub-para (iv) below.

(iii) It is important to note that there should be sufficient justification to hold a view that the provisional attachment of property is necessary to protect the interests of revenue. The remedy of attachment being, by its very nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution. The grounds on which the proper officer entertains the reasonable belief that the noticee would dispose of, or remove, the property and the source of his information, if any, should be clearly stated while seeking the previous approval of the Commissioner of Customs. Normally, the proposal to be made to the Commissioner of Customs should be forwarded within one month's period of the issue of SCN. It may also be noted that appropriate disciplinary action shall be initiated against the officers who may be found to exercise the powers of provisional attachment of property frivolously and without sound reasons. [Recommendation of the Standing Committee on Finance (Fourteenth Lok Sabha) in its 27th Report.]

(iv) The Commissioner of Customs, on receipt of proposal, or on his own, if he is satisfied that circumstances of the case justify provisional attachment, may serve a notice for provisional attachment on the person on whom notice is served under Section 28 or 28B of the Act, requiring such person to make

submissions, in writing or in person or both, within thirty days of the receipt of the notice as to why should the property belonging to such person, and as may be specified in the notice, be not provisionally attached. The said notice should also specify the condition that the noticee should not sell, transfer, mortgage, charge, lease or otherwise alienate or encumber the property specified in the notice, till the decision of the said notice is communicated to him by serving of an order. In case of proposal for provisional attachment of immovable property, the notice should also be sent to the concerned registration authorities with a direction not to allow any sale, transfer, mortgage etc., of the said property.

(v) After due consideration of the materials before him, and after hearing the person, if such person so desires, the Commissioner of Customs may grant approval to the provisional attachment of the property and the proper officer before whom the proceedings under Section 28 or 28B of the Act are pending, may, by order in writing, attach the said property. The Commissioner shall grant such approval, or where proceedings under Section 28 or 28B of the Act are pending before him, order the attachment of the property within 15 days of holding the personal hearing. A copy of the order of provisional attachment should be served by the proper officer in the same manner as prescribed under Section 153 of the Customs Act, 1962.

(vi) The following types of cases may be considered for provisional attachment of property:-

(a) Import or export of goods, including an attempt thereof, involving evasion of duty or grant of ineligible export incentives including drawback;

(b) Claim for or grant of refund of Customs duty in a fraudulent manner, fraudulent availment of or attempt to fraudulently avail of drawback or other export incentives or any exemption from duty.

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(vii) The provisional attachment of property shall be resorted to only in a case where the duty or export incentives including drawback, alleged to be involved in the above specified offences is more than Rs.25 lakhs (Rs. Twenty five lakhs).

(viii) Period of Attachment :

(a)The order of provisional attachment of property shall be operational for a period of six months from the date on which the order is served on the noticee. However, the Chief Commissioner of Customs may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, but the total period of extension shall not, in any case, exceed two years.

(b)The order of provisional attachment shall cease to have effect if the noticee pays the entire duty amount along with interest.

(ix) Types of property which can be attached :

(a) Personal property of a sole proprietor or of partners of a firm, importer or exporter shall not be attached. Personal property means any movable or immovable property which is in the personal use of the sole proprietor or partner or importer or exporter. However, immovable property/ properties which is/ are used for any commercial purpose may be provisionally attached.

(b) Movable property should be attached only if the immovable property available for attachment is not sufficient to protect the interests of revenue.

It should also be ensured that such attachment does not hamper normal business of manufacturer importer/ exporter or assessee. This would mean that raw materials and inputs required for production or finished goods, in case of manufacturer importer/ exporter should not be attached by the department.

(x) Attachment not to be excessive: Provisional attachment by arrest or distrain of the property shall not be excessive, that is to say, the property provisionally attached shall be of value as nearly as may be equivalent to that of the amount demanded in the proceedings under Section 28 or Section 28B of the Act.

(xi) Attachment between Sunrise and Sunset: The provisional attachment of the property of the concerned person by arrest or distrain shall be made after sunrise and before sunset and not otherwise.

(xii) Inventory: After provisional attachment of the property, the Proper Officer shall prepare an inventory of the property attached and specify in it the place where it is lodged or kept and shall hand over a copy of the same to the defaulter or the person from whose charge the property is distrained.

(xiii) Private alienation to be void in certain cases: (i) where a notice has been served on a person for provisional attachment, the person on whom such notice has been served or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the written permission of the Commissioner of Central Excise.

(ii) Where a provisional attachment has been made, any private transfer or delivery of the property attached or of any debt, dividend or other moneys contrary to such provisional attachment, shall be void as against all claims enforceable under the provisional attachment.

(xiv) Share in property: Where the property to be provisionally attached consists of the share or interest of the concerned person in property belonging to him and another as co-owners, the provisional attachment shall be made by a notice to the concerned person prohibiting him from transferring the share or interest or charging it in any way.

(xv) Property exempt from attachment: (i) All such property as is by the Code of Civil Procedure, 1908 (5 of 1908), exempted from attachment and sale for execution of a decree of a Civil Court shall be exempt from provisional attachment.

(ii) The decision of the Commissioner of Customs as to what property is so entitled to exemption shall be final.

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4. Trade & field formations may please be informed suitably.
5. Hindi version will follow.

Yours faithfully,

(Aseem Kumar)
Under Secretary to the Government of India

Copy to:

1. PPS to Chairman (CBEC)
2. All Members (CBEC)
3. All sections under CBEC.

Annexure

Proforma for forwarding the proposal for provisional attachment of property to the Commissioner of Customs:

1. Name and address of the importer/exporter/assessee/person:

2. Division and Commissionerate:

3. IEC No. and Central Excise Registration No.(if any):

4. Constitution of assessee:
   [Proprietorship/partnership/Private Ltd /Public Ltd/ Other (specify)]

5. Details of show cause notice:
   (i) SCN No. & date, Issuing authority
   (ii) Brief facts of the case
   (iii) Duty demanded in the SCN

6. Details of the offence cases in last five years for Customs, Central Excise and Service Tax:

7. Details of arrears of duties/ taxes pending realisation for Customs, Central Excise and Service Tax:

8. Reasons for provisional attachment of property:

9. Full details of property proposed to be provisionally attached:

10. Value of property proposed to be provisionally attached:

11. Comments, if any:

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Signature & Name of AC/DC

Date:

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