

F. No. 96/54/2014-CX.1

Government of India

Ministry of Finance

Department of Revenue

Central Board of Excise & Customs

New Delhi, dated the 23<sup>rd</sup> October, 2015

To

Principal Chief Commissioner/ Chief Commissioner of Central Excise (All),

Principal Chief Commissioner/ Chief Commissioner of Central Excise and Service Tax (All),

Madam/ Sir,

**Sub: Central Excise Guidelines for launching of Prosecution under the Central Excise Act, 1944 and Finance Act, 1994 regarding Service tax-reg.**

I am directed to refer to following circulars/instructions issued by the Board regarding guidelines for launching of prosecution under the Central Excise Act, 1944 and the Finance Act, 1994:

1. Circular No. 15/90-CX.6 dated 09.08.1990 issued from F. No. 218/7/89-CX.6.
2. Circular No. 30/30/94-CX dated 04.04.1994 issued from F. No. 208/20/93/CX.6.
3. Letter F. No. 208/31/97-CX.6 dated 04.04.1994 regarding enhancement of monetary limit.
4. Circular No. 35/35/94-CX dated 29.04.1994 issued from F. No. 208/22/93-CX.6.
5. Letter F. No. 203/05/98-CX.6 dated 06.04.1998 regarding making DG, CEI competent authority to sanction prosecution in respect of cases investigated by DGCEI.
6. Letter F. No. 208/05/98-CX.6 dated 20.10.1998.
7. Letter F. No. 208/21/2007-CX.6 dated 15.06.2007.
8. Circular no 140/9/2011-Service Tax dated 12-5-2011.

2. In supersession of these instructions and circulars, following consolidated guidelines are hereby issued for launching prosecution under the Central Excise Act, 1944 and the Finance Act, 1994.

### **3. Person liable to be prosecuted**

3.1 Whoever commits any of the offences specified under sub-section (1) of Section 9 of the Central Excise Act, 1944 or sub-section (1) of section 89 of the Finance Act, 1994, can be prosecuted. Section 9AA (1) of Central Excise Act, 1944 provides that where an offence under this Act has been committed by a company, every person who, at the time offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Section 9AA (2) of Central Excise Act, 1944 provides that where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation to Section 9AA provides that (a) Company means anybody corporate and includes a firm or other association of individuals and (b) director in relation to a firm means a partner of the firm. These provisions under Section 9AA of Central Excise Act, 1944 have been made applicable to Service Tax also vide Section 83 of the Finance Act, 1994.

### **4. Monetary limits: Central Excise and Service Tax**

4.1 **Monetary Limit** : In order to optimally utilize limited resources of the Department, prosecution should normally not be launched unless evasion of Central Excise duty or Service Tax, or misuse of Cenvat credit in relation to offences specified under sub-section (1) of Section 9 of the Central Excise Act, 1944 or sub-section (1) of section 89 of the Finance Act, 1994 is equal to or more than **Rs. One Crore**.

4.2 **Habitual evaders**: Notwithstanding the above limits, prosecution can be launched in the case of a company/assessee habitually evading tax/duty or misusing Cenvat Credit facility. A company/assessee would be treated as habitually evading

tax/duty or misusing Cenvat Credit facility, if it has been involved in three or more cases of confirmed demand (at the first appellate level or above) of Central Excise duty or Service Tax or misuse of Cenvat credit involving fraud, suppression of facts etc. in past five years from the date of the decision such that the total duty or tax evaded or total credit misused is equal to or more than **Rs. One Crore**. Offence register (335J) may be used to monitor and identify assessees who can be considered to be habitually evading duty.

4.3 Sanction of prosecution has serious repercussions for the assessee and therefore along with the above monetary limits, the nature of evidence collected during the investigation should be carefully assessed. The evidences collected should be adequate to establish beyond reasonable doubt that the person, company or individual had guilty mind, knowledge of the offence, or had fraudulent intention or in any manner possessed mens-rea (guilty mind) for committing the offence.

## **5. Authority to sanction prosecution**

5.1 The criminal complaint for prosecuting a person should be filed only after obtaining the sanction of the Principal Chief/Chief Commissioner of Central Excise or Service Tax as the case may be.

5.2 In respect of cases investigated by the Directorate General of Central Excise Intelligence (DGCEI), the criminal complaint for prosecuting a person should be filed only after obtaining the sanction of Principal Director General/ Director General, CEI.

5.3 An order conveying sanction for prosecution shall be issued by the sanctioning authority and forwarded to the Commissionerate concerned for taking appropriate action for expeditious filing of the complaint.

## **6. Procedure for sanction of prosecution**

6.1 Prosecution proposal should be forwarded to the Chief Commissioner / Principal Chief Commissioner or Director General / Principal Director General of DGCEI ( in respect of cases booked by DGCEI) after the case has been carefully examined by the Commissioner/ Principal Commissioner or Additional Director General /Principal Additional Director General of DGCEI who has adjudicated the case. In all cases of arrest, examination of the case to ascertain fitness for prosecution shall be necessarily carried out.

6.2 Prosecution should not be launched in cases of technical nature, or where the additional claim of duty /tax is based totally on a difference of opinion regarding interpretation of law. Before launching any prosecution, it is necessary that the department should have evidence to prove that the person, company or individual had guilty knowledge of the offence, or had fraudulent intention to commit the offence, or in any manner possessed mens rea ( guilty mind ) 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 it should be restricted to only against persons who were in charge of day-to-day operations of the factory and have taken active part in committing the duty /tax evasion or had connived at it.

6.3 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 adjudication proceedings are 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 beyond reasonable doubt for recommending prosecution. Decision should be taken on case-to-case basis considering various factors, such as, nature and gravity of offence, quantum of duty/tax evaded or Cenvat credit wrongly availed and the nature as well as quality of evidence collected.

6.4 Decision on prosecution should be normally taken immediately on completion of the adjudication proceedings. However, Honble Supreme Court of India in the case of Radheshyam Kejriwal [2011(266)ELT 294 (SC)] has *interalia* , observed the following :- (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 in nature to each other and (iv) the findings against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution. Therefore, prosecution may even be launched before the adjudication of the case, especially where offence involved is grave, qualitative evidences are available and it is also apprehended that party may delay completion of adjudication proceedings.

6.5 Principal Commissioner/Commissioner or ADG (Adjudication) acting as adjudicating authority should indicate at the time of passing the adjudication order itself whether he considers the case to be fit for prosecution so that it can be further processed and sent to Principal Chief Commissioner/ Chief Commissioner or Principal Director General/ Director General of DGCEI, as the case may be, for sanction of prosecution. Where at the time of adjudication proceedings no view has been taken on prosecution by the Adjudicating Authority then the adjudication wing shall re-submit the file within 15 days from the date of issue of adjudication order to the Adjudicating Authority to take view of prosecution. Where, prosecution is proposed before the adjudication of the case, Commissioner/Principal Commissioner or Principal Additional Director General/Additional Director General, DGCEI who supervised the investigation shall record the reason for the same and forward the proposal to the sanctioning authority. The adjudicating authority shall also be informed of the decision to forward the proposal so that there is no need for him to examine the case at the time of passing of adjudication order from the perspective of prosecution. Principal Chief Commissioner/ Chief Commissioner or Principal Director General/ Director General of DGCEI may on his own motion also, taking into consideration the seriousness of an offence, examine whether the case is fit for sanction of prosecution irrespective of whether the adjudicating authority has recommended prosecution.

6.6 In respect of cases investigated by DGCEI, the adjudicating authority would intimate the decision taken regarding fitness of the case for prosecution to the Principal Additional Director General/ Additional Director General of the Zonal Unit or Headquarters concerned, where the case was investigated and show cause notice issued. The officers of unit of Directorate General of Central Excise Intelligence concerned would prepare an investigation report for the purpose of launching prosecution, within one month of the date of receipt of the decision of the adjudicating authority and would send the same to the Director General, CEI for taking decision on sanction of prosecution. The format of investigation report is annexed as **Annexure-I** to this Circular.

6.7 In respect of cases not investigated by DGCEI, where the Principal Commissioner/Commissioner who has adjudicated the case is satisfied that prosecution should be launched, an investigation report for the purpose of launching prosecution should be carefully prepared within one month of the date of issuance of the adjudication order. Investigation report should be signed by an Assistant/Deputy Commissioner, endorsed by the jurisdictional Principle Commissioner/Commissioner and sent to the Principal Chief/ Chief Commissioner for taking a decision on sanction for launching prosecution. The format of investigation report is annexed as **Annexure-I** to this circular. A criminal complaint in a court of law should be, filed by the jurisdictional Commissionerate only after the sanction of the Principal Chief / Chief Commissioner or Principal Director General/Director General of DGCEI has been obtained.

6.8 Principal Commissioner/Commissioner or Additional Director General (Adjudication) shall submit a report by 10<sup>th</sup> of every month to the Principal Chief /Chief Commissioner or the Principal Director General/ Director General of CEI, who is the sanctioning authority for prosecution, conveying whether a view on launching prosecution has been taken in respect of adjudication orders issued during the preceding month.

6.9 Once the sanction for prosecution has been obtained, criminal complaint in the court of law should be filed as early as possible by an officer of the jurisdictional Commissionerate authorized by the Commissioner.

6.10 It has been reported that delays in the Court proceedings are often due to non-availability of the records required to be produced before the Magistrate or due to delay in drafting of the complaint, listing of the exhibits etc. It shall be the responsibility of the officer who has been authorized to file complaint, to 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 finalized in consultation with the Public Prosecutor at the time of drafting of the complaint. No time should be lost in ensuring that all exhibits are kept in 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 the Principal Chief/ Chief Commissioner or the Principal Director General or Director General of DGCEI by the Principal Commissioner/ Commissioner in charge of the Commissionerate responsible for filing of the complaint.

## **7. Monitoring of Prosecution**

7.1 Prosecution, once launched, should be vigorously followed. The Principal Commissioner/Commissioner of Central Excise/Service Tax should monitor cases of prosecution at monthly intervals and take the corrective action wherever necessary to ensure that the progress of prosecution is satisfactory. In DGCEI, an Additional/ Joint Director in each zonal unit and DGCEI (Hqrs) shall supervise the prosecution related work. For keeping a track of prosecution cases, 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 shall be updated regularly and inspected by the Principal Commissioner/Commissioner at least once in every quarter of a financial year.

7.2 For keeping a track of prosecution cases, a prosecution register in the format enclosed as **Annexure-III** to this Circular should be maintained in the Zonal Units of DGCEI and DGCEI (Hqrs.) pertaining to cases investigated by them.

## **8. Appeal against Court order in case of inadequate punishment/acquittal :**

8.1 Principal Commissioner/Commissioner responsible for the conduct of prosecution or Principal Additional Director General or Additional Director General of DGCEI (in respect of cases booked by DGCEI), should study the judgement of the Court and, where it appears that the accused person have been let off with lighter punishment than what is envisaged in the Act or has been acquitted despite the evidence being strong, appeal should be considered against the order. Sanction for appeal in such cases shall be accorded by Principal Chief/ Chief Commissioner or Principal Director General/ Director General of DGCEI.

## **9. Publication of names of persons convicted:**

9.1 Section 9B of the Central Excise Act, 1944 also made applicable to Service Tax vide section 83 of the Finance Act, 1994 grants power to publish name, place of business etc. of the person convicted under the Act by a Court of Law. The power is being exercised very sparingly by the Courts. It is directed that in deserving cases, the department should make a prayer to the Court to invoke this section in respect of all persons who are convicted under the Act.

## **10. Procedure for withdrawal of Prosecution :**

### **10.1 Procedure for withdrawal of sanction-order of prosecution**

10.1.1 In cases where prosecution has been sanctioned but complaint has not been filed and new facts or evidences have come to light necessitating review of the sanction for prosecution, the Commissionerate or the DGCEI unit concerned should immediately bring the same to the notice of the sanctioning authority. After considering the new facts and evidences, the

sanctioning authority namely Principal Chief/ Chief Commissioner or Principal Director General or Director General of DGCEI, if satisfied, may recommend to the Board (Member of the policy wing concerned) that the sanction for prosecution be withdrawn.

## **10.2 Procedure for withdrawal of Complaint already filed for prosecution**

10.2.1 In cases where the complaint has already been filed complaint may be withdrawn as per Circular No. 998/5/2015-CX dated 28.02.2015 which provides that where on identical allegation a noticee has been exonerated in the quasi-judicial proceedings and such order has attained finality, Principal Chief Commissioner/ Chief Commissioner or the Principal Director General/ Director General of DGCEI shall give direction to the concerned Commissionerate to file an application through Public Prosecutor requesting the Court to allow withdrawal of the Prosecution in accordance with law.

## **11. Transitional Provisions**

11.1 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.

## **12. Compounding of offences**

12.1 Section 9A(2) of the Central Excise Act, 1944 also made applicable to Service Tax vide section 83 of the Finance Act, 1994 provides for compounding of offences by the Principal Chief/ Chief Commissioner on payment of compounding amount. Circular no. 54/2005-Cus dt 30-12-2005 and Circular no 862/20/2007-CX-8 dated 27-12-2007 on the subject of compounding of offences may be referred in this regard which inter alia provides that all persons against whom prosecution is initiated or contemplated should be informed in writing, the offer of compounding.

## **13. Inspection of prosecution work by the Directorate of Performance Management:**

13.1 Director General, Directorate of Performance Management and Chief Commissioners, who are required to inspect the Commissionerates, should specifically check whether instruction contained in this Circular are being followed scrupulously and to ensure that reasons for pendency and non-compliance of pending prosecution cases are looked into during field inspections apart from recording of statistical data.

14. The field formations may suitably be informed. Receipt of this Circular may please be acknowledged. Hindi version will follow.

Yours faithfully,

(ROHAN)

Under Secretary to the Govt. of India

**Annexure-I**

F. No.

## **INVESTIGATION REPORT FOR THE PURPOSE OF LAUNCHING PROSECUTION AGAINST ..**

### **COMMISSIONERATE DIVISION ..**

1. Name & address of the person(s) (including legal person(s):
2. Central Excise/Service Tax Registration No.(If any):
3. Nature of offence including commodity:
4. Charges:
5. Period of offence:
6. Amount of evasion involved
7. Particular of persons proposed to be prosecuted :
  - a. Name:
  - b. Fathers 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.
8. Brief note why prosecution is recommended :

(Deputy/Assistant Commissioner or Deputy/ Assistant Director, DGCEI)

Place

Date

9. I have carefully examined the Investigation Report and find it in order for filling criminal complaint under Section 9 and 9AA of the Central Excise Act, 1944.

(Commissioner, Central Excise \_\_\_\_\_)/

(Additional Director General, DGCEI-----)

Place

Date

- The proposal should be made in the above form in conformity with the guidelines issued by the Ministry. With regard to column 4 above, all the charging sections in the Central Excise Act/Service Tax and other allied Acts should be mentioned. With regard to column 7, information should be filled separately for each person sought to be prosecuted.
- A copy of the Show Cause Notice as well as the Order of Adjudication (Wherever adjudication has been issued) should be enclosed with this report.
- If any appeal has been filed, then this fact should be specifically stated.

## Annexure-II

### FORMAT OF PROSECUTION REGISTER

| Sl. No.                                   | Case investigated by | Division/Range    | File no. | Criminal complaint no.                    | Date of detection | Name of assessee and address    | Registration no.   | Nature of offence           |
|---|----------------------|-------------------|----------|---|-------------------|---------------------------------|--|-----------------------------|
| 1   | 2                    | 3                 | 4        | 5   | 6                 | 7                               | 8  | 9                           |
| Amount of tax/duty confirmed              |                      | Period of evasion |          | Name of accused person (s)                |                   | Date of sanction of prosecution |  | Date of filing of complaint |
| 10  |                      | 11                |          | 12  |                   | 13                              |  | 15                          |
| Name, address and phone no of the counsel |                      | Date of judgement |          | Appeal status- date/ court in which filed |                   | Date of hearing                 | Remarks/sign with name and date (Officer filing the information) |                             |
| 16  |                      | 17                |          | 18  |                   | 19                              | 20   |                             |

## ANNEXURE-III

### FORMAT OF PROSECUTION REGISTER TO BE MAINTAINED BY DGCEI

| Sl.No.                               | Date of Receipt of O-in-O in DGCEI | Date of submission of Investigation report | Date of Receipt of Sanction Order from DG,CEI | Sanction Order No. & Date   |
|--------------------------------------|------------------------------------|--|---|-----------------------------|
| 1                                    | 2                                  | 3  | 4   | 5                           |
|                                      |                                    |  |   |                             |
|                                      |                                    |  |   |                             |
| Date of filing of Complaint in Court |                                    | Criminal Complaint No.                     | File No. of Commission - erate                | Name of Commiss- - ionerate |
| 6                                    |                                    | 7  | 8   | 9                           |
|                                      |                                    |  |   |                             |
|                                      |                                    |  |   |                             |
|                                      |                                    |  |   |                             |