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DRI Investigation

Thought Paper

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Shareen has been advising clients for more than 15 years on wide-ranging issues in respect of Value-Added Tax Laws, Service Tax, Central Excise, Customs Law, Goods and Services Tax, and Foreign Trade Policy. Her expertise has benefited both Indian and multi-national companies in varied sectors such as banking and financial services, pharmaceuticals, e-commerce, manufacturing, travel and leisure, QSR, construction and engineering, and oil and gas.

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Introduction

The Directorate of Revenue Intelligence (“**DRI**”), which functions under the Central Board of Indirect Tax and Customs (Ministry of Finance, Department of Revenue), is an anti-smuggling intelligence, investigation, and operations agency of India.

DRI enforces the provisions of the Customs Act, 1962 (“**Customs Act**”) and over fifty other allied legislations, including the Arms Act, 1959, Narcotic Drugs and Psychotropic Substances Act, 1985, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, Wildlife Protection Act, 1972, and Antiquities and Art Treasures Act, 1972.

DRI operates to secure India’s national and economic security by preventing smuggling of contraband such as gold, narcotics, fake Indian currency notes, firearms, wildlife and environmental products, and antiques. It also functions to prevent the proliferation of black money, trade-based money laundering, and commercial frauds.

History

The initiation of DRI dates back to 1953, the year when a nucleus cell, called the Central Revenue Intelligence Bureau (“**CRIB**”), was set up for dealing with all matters connected with anti-smuggling and anti-corruption in the Customs and Central Excise organizations pan India. CRIB, a small unit composed of an Assistant Collector and two Superintendents within the Directorate of Inspection (Customs and Central Excise), New Delhi, worked directly under the Central Board of Revenue.

On the recommendations of the Chairman, Central Board of Revenue and Finance Secretary, CRIB was reorganized in 1957, in its new avatar as DRI, from, December 4, 1957. Its work focused exclusively on the collection and scrutiny of information on smuggling activities and the deployment of all anti-smuggling resources at pan India level, besides arranging

training for the intelligence and investigation officers of the Customs Houses and Central Excise Collectrates engaged in similar work.

Charter

- Collection of intelligence on the smuggling of contraband goods, narcotics, under-invoicing etc.
- Analysis and dissemination of such intelligence to the field formations for action and working on such intelligence, where necessary.
- Keeping watch over important seizures and investigation cases. Associating or taking over the investigations which warrant specialized handling by the Directorate.
- Guiding important investigation/ prosecution cases. Keeping liaison with foreign countries, Indian Missions and Enforcement agencies abroad on anti-smuggling matters, liaising with INTERPOL.
- To refer cases registered under the Customs Act to the Income Tax authorities for action under the Income Tax Act, 1961.





Organisational Structure

DRI is headed by the Director General (equivalent to Chief Commissioner) at its headquarters in New Delhi.

DRI is divided into the following zonal units, each under the charge of an Additional Director General (equivalent to a Commissioner).

- Ahmedabad
- Bangalore
- Chennai
- Cochin
- Delhi
- Guwahati
- Hyderabad
- Indore
- Kolkata
- Lucknow
- Ludhiana
- Mumbai

The zonal units are further divided into Regional Units, Sub-Regional Units, and Intelligence Cells with a complement of Additional Directors, Joint Directors, Deputy Directors, Assistant Directors, Senior Intelligence Officers, and Intelligence Officers.

Official Hierarchy

- Director General (Chief Commissioner)
- Additional Director General (Commissioner)
- Additional Director (Additional Commissioner)
- Joint Director (Joint Commissioner)
- Deputy Director (Deputy Commissioner)
- Assistant Director (Assistant Commissioner)
- Senior Intelligence Officer (Superintendent of Customs/Appraising Officers of Customs)
- Intelligence Officer (Inspector/Examiner/ Preventive Officers of Customs)
- Class III & Class IV Staff (Ministerial & Constables)
- DRI officers are on deputation from the Customs & Central Excise Department and the Corporate Law Service of India

Functions and coverage

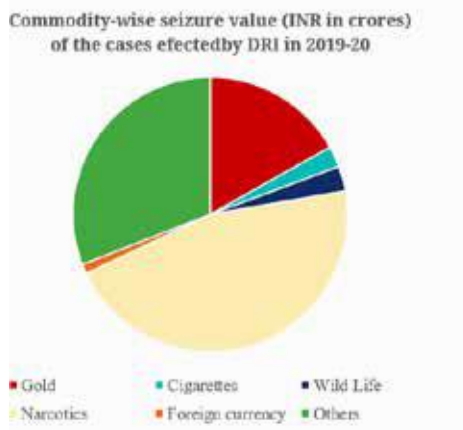
DRI is the enforcement agency responsible for securing India’s economic frontiers and ensuring compliance with the applicable laws for goods entering or leaving the country. The Customs Act empowers the Customs officers to intercept any goods that do not comply with the provisions of relevant legislations in respect of import and export of goods.

DRI’s wide-sweeping role covers various functions enforceable under multiple legislations. These functions can be grouped under three categories:

1. Outright smuggling
2. Commercial frauds
3. Non-fiscal enforcement

Outright Smuggling

Smuggling is the clandestine movement of goods across national borders to evade payment of customs duties or restrictions on import/ export of specified products. Typically, smuggling occurs either when high customs duties tempt a smuggler to make a handsome profit on the smuggled goods or when the demand for prohibited goods is strong. The goods most targeted for smuggling include gold, narcotics, foreign currency, arms and ammunitions, and electronic items.



Source: Smuggling in India Report 2019-20

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Commercial Frauds

Commercial frauds can be categorized as follows:

Trade Based Money Laundering

Trade-based money laundering (“TBML”) entails concealing the proceeds from criminal activities and transferring the value via trade transactions in an attempt to legitimize their illegal origins. In other words, TBML is a process of transferring money via trade transactions.

In practice, TBML is achieved through misrepresentation of the value, quantity, or quality of imports/exports. The frauds are triggered by malpractices such as over- and under-valuation of goods and services, multiple invoicing of goods and services, over- and under-shipment of goods and services, and misleading description of goods and services

Mis-declaration

Importers at times resort to mis-declaration of the description of goods, country of origin, end-use of the imported goods, etc., with the intent to avoid payment of customs duties (including countervailing duty and anti-dumping duty) and to thwart non-tariff barriers.

Under-valuation

Under-valuation typically takes place by producing forged or false documents before the Customs authorities, under-valuation of the goods, avoiding the inclusion of allied cost components in the assessable value at the time of filing bills of entry.

Violation of end use and other conditions

Policy makers provide relief and encourage specific sectors by issuance of exemption notifications. These exemption notifications are issued with conditions that either restrict the eligibility or require fulfilment of certain post-import requirements. For ease-of- doing-business and to fast-track clearances, Customs authorities rely on self-declarations made by the importers. This practice encourages mis-declaration of eligibility criteria, description of goods, or end- use/post importation conditions.

Abuse of Foreign/ Preferential Trade Agreement(s)

India has entered into many bilateral and multilateral trade agreements with other countries to promote trade relations and expand its market. But wherever such agreements allow the exporting country certain tariff and/or non-tariff benefits, they offer the possibility of misuse.

Wrongful use of export promotion schemes

The Government of India provides various benefits to exporters through export promotion schemes under the Foreign Trade Policy such as advance authorization, Merchandise Exports from India Scheme, Services Export from India Scheme, and Export Promotion Capital Goods. These schemes are misused when exporters avail of the export benefits by using wrong description/ declaration of goods and services, over-valuation of exports, diversion of duty free imports, etc.

Misuse of Importer Exporter Code

The Importer Exporter Code (“IEC”), which is linked with the permanent account number, is a unique number allotted by the Directorate General of Foreign Trade (“DGFT”). It is mandatory for every importer/ exporter to obtain an IEC for easy identification. However, to carry on illicit transactions, bogus IECs are used to carry out dubious transactions.

Details of import frauds booked by DRI in FY 2019-20

Category	No. of cases	Duty (in INR mn)	Duty (in USD mn) ¹
Under valuation	45	1,068.52	14.73
Mis-declaration	173	3,329.20	45.89
Evasion of ADD	6	127.59	1.76
Evasion of CVD	3	105.98	1.46
Misuse of end use and other notification	18	1,179.05	16.25
Mis use of FTA, overvaluation and others	250	9,728.64	134.10
Evasion of IGST	5	372.63	5.14
Total	500	15,911.60	219.32

Source: Smuggling in India Report 2019-20

Non-Fiscal Enforcement

The Government of India is a signatory to various treaties and conventions under which trans-border movements of specified commodities are regulated. Multilateral agreements, such as the Basel Convention on the Control of Trans-boundary movements of Hazardous Wastes and their Disposal, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Cartagena Protocol on Bio-safety, and the Montreal Protocol on substances that delete the ozone layer, regulate the cross-border movements of several products. DRI has made several efforts to limit the violations of these multilateral agreements.

¹ USD 1 = INR 72.55



Triggers for **investigation**



Disputes typically arise on account of contradictory and divergent views on one or more of the following issues:

- Interpretation of statutory provisions;
- Conflicting instructions by the authorities (circulars, trade notices, notifications, etc.);
- Judicial precedents with contradictory rulings;
- Bias of the administration towards the revenue;
- Instances involving evasion of duties, fraud, misrepresentation

Being an investigating agency, DRI is known to approach issues with a strong bias towards revenue recovery, thereby leading to harassment of the assesseees.

Investigations by the intelligence/anti-evasion units such as DRI are typically triggered on account of the following reasons:

Industry specific knowledge

Instances of tax evasion

Identification of duty evasion by certain assesseees in a particular industry sector could trigger investigations of other assesseees in the same sector on the presumption of indulgence in similar fraudulent activities.

Current state of affairs in the country

Depending on the focus industry, the intelligence team researches operational knowledge and common practices to initiate investigations in such focus sectors².

Free Trade Agreements

The Government of India has recently introduced stringent measures for goods imported under Free Trade Agreements. New provisions have been introduced in the Customs Act vide Finance Act, 2020 effective from September 21, 2020³. The conditions for availing the benefits of preferential duty rates have become more onerous, compelling the importer to rely on more than the certificates made available by the supplier.

Given the new stringent measures and increased responsibility for importers, the DRI officers are likely to be more rigorous in their investigations on imports under such agreements.

Tip-off

In several instances, investigations are triggered by a tip-off (internal or external). Some such tip-offs can be initiated by business partners and associates, disgruntled employees, another government or statutory agency/authority of the country, competitors, etc.

In the wake of the pandemic and unrest amongst employees (depending on policies of the respective employers or business partners and associates), an increase in investigations by the Customs (as well as Goods and Services Tax) authorities has been observed.

Suo moto intimation

While a voluntary action of self-declaration should not (as one would expect) result in an investigation, given the inherent pro revenue approach of the authorities, such voluntary disclosures can (in practice) escalate into the need for an investigation/enquiry.

This is to ensure that the assessee in the wake of self-declaration does not cover up other important aspects of a transaction, which could entail larger duty collections by the authorities.

²One such instance was recently seen wherein investigations were undertaken for the hand sanitizer industry (that gained momentum on account of COVID-19 outbreak).

³Customs (Administration of Rules of Origin under Trade Agreements) Rules, 2020

Investigation and Adjudication

The primary focus of DRI used to be anti-smuggling activities, narcotics, smuggling of foreign currencies, wildlife, foreign trade violations, etc. In recent times, DRI has become aggressive in investigating matters pertaining to the classification of goods and consequent duty differentials, duty benefits claimed under the Free Trade Agreements, concessions pertaining to temporary imports, benefits under various export promotion schemes, valuation of goods, etc.

Typically, adjudication of matters pertaining to evasion of tax, valuation, classification of goods, etc. is handled by the Adjudicating Authority of the Customs. However, given the complex and multi-faceted nature of matters, the officers of DRI were empowered to undertake detailed investigation.

DRI investigations are intrusive and adverse as compared with the regular audits undertaken by the

Customs authorities. The DRI officers have pan India jurisdiction to undertake investigations which cover imports and exports made over a period of five years, which means the quantum of demand of duty, interest, and penalty is significant. Also, the duration of these investigations can extend up to several months, leading to a strain on the time, money, and resources of the concerned Company.

Such investigations not only have a financial impact but also incur reputational threats, business discontinuity, and legal and prosecution risks.



¹ Notification no. 17/2002-Customs (NT) dated March 7, 2002 and Notification no. 83/2004-Customs (NT) dated June 30, 2004

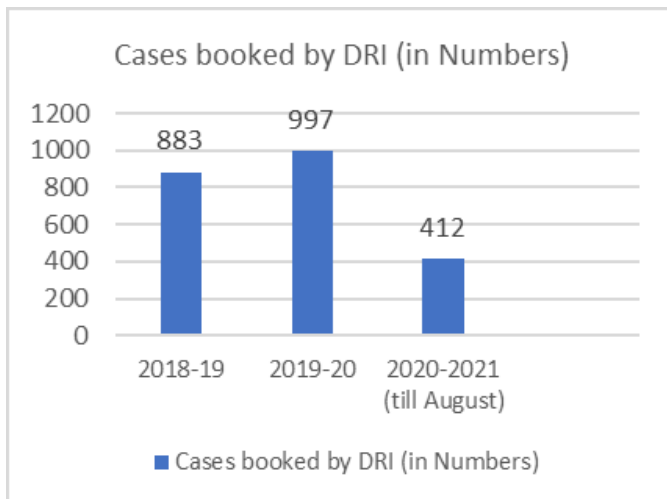
² Notification no. 40/2012-Customs (NT) dated May 2, 2012

Investigation framework

A typical customs investigation involves:

- Issuance of summons;
- Recording statements of senior management team – a lengthy and exhausting process;
- Threat of arrest against key members;
- Search and seizure operations at business premises;
- Restrain order for goods imported and used for business purposes;
- Coercive and prejudicial approach for demand of duty;
- Possible reporting of the investigation by the media.

DRI officers, following the procedure laid down in the Customs Act, proceed with issuance of show-cause notices based on the findings of the investigation.



Source: Smuggling in India Report 2019-20

Adjudication

Adjudication of alleged contraventions under the Customs Act is an important function of the Customs officers, basis which the prevalence of the contravention is determined, and subsequent demand, imposition of penalty, redemption fine, etc. are confirmed.

The adjudicating authorities are empowered to decide matters based on evidence collected during investigation by DRI officers, binding precedents, written and oral submissions of the parties. All the cases booked by the DRI are taken up by the adjudicating authority for adjudication.

Any proceedings initiated under the Customs Act should follow the principles of natural justice, i.e., to provide an opportunity of being heard. The assessee is required to prove, beyond reasonable doubt, that no trace of a culpable state of mind in respect of intention, knowledge, belief, etc., was evident.

Confiscation of goods or imposition of penalty cannot be invoked unless the importer is given:

1. A notice/order, in writing, informing him of the grounds of confiscation of goods or imposition of penalty;
2. An opportunity of making a written representation within the prescribed time, against the grounds of confiscation of goods/ imposition of penalty mentioned in the notice; and
3. A reasonable opportunity of being heard.

Procedure for adjudication

Proceedings are initiated based on an investigation by DRI, evidence collected by Customs officers, assessments, etc. The procedure for adjudication typically involves the following steps:

Show cause notice

Show- cause notice is issued based on investigations, enquiries, third party records, etc. The assessee is accorded the opportunity to file a reply to the show- cause notice and to appear for personal hearing before the Customs officer to show cause as to why the duty, interest, and penalty demanded in the show- cause notice should not be raised against the assessee. The officer, pursuant to the representation by the assessee convinced of the allegation against the assessee, may issue an order demanding duty, interest, and penalty.

Appeals to Commissioner (Appeals)

The assessee, aggrieved by such an order, can file an appeal against such order before the Commissioner (Appeals).

Appeals to Appellate Tribunal

If the Commissioner (Appeals) supports the allegation(s) and disagrees with the arguments put forth by the assessee, he may issue an order in appeal, which can be challenged by the assessee by filing an appeal before the Appellate Tribunal.

High Court/ Supreme Court

If the Appellate Tribunal is of the view that the allegations should be upheld, the assessee can approach the High Court and/or the Supreme Court to further contest the matter. Any orders issued by the Appellate Tribunal pertaining to determination of any question in respect of the rate of duty of Customs or the value of goods for the purpose of assessment lie directly before the Supreme Court.

Can DRI officers issue a show cause notice?

DRI officers, by way of notifications, have been entrusted with the powers of a “proper officer” for the purpose of the Customs Act. But the Supreme Court, in a recent ruling⁴, has held that the notifications entrusting DRI officers with the powers of a “proper officer” are ill-founded. Based on this ruling, DRI officers are not considered “proper officer” (i.e., officers empowered under the Customs Act for issuing notices for recovery).

This judgment impacts the validity of proceedings initiated by DRI for recovery so far. The Central Board of Indirect Tax and Customs has taken cognizance of this ruling and has issued an instruction⁵ directing the jurisdictional Commissionerate(s) to keep show-cause notices issued by Additional Director General, DRI pending till further directions. Also, the instruction states that all future show-cause notices issued should be issued by the jurisdictional Commissionerate(s) where imports take place.

This is a landmark ruling and its impact needs to be evaluated for ongoing/ prospective litigation emanating from show cause notices issued by DRI.

⁴Canon India Private Limited vs. Commissioner of Customs, TS-75-SC-2021-CUST

⁵Instruction no. 04/2021-Customs dated March 17, 2021



Penalties and Prosecution

Penalties envisioned under the Customs Act triggers the following types of liabilities:

Civil Liability: Penalty for violation of statutory provisions involving a monetary penalty and confiscation of goods.

Criminal Liability: Criminal punishment is of imprisonment and/or fine, levied only in a criminal court after prosecution.

Improper Import/ Export Of Goods

Confiscation of goods

Penalties in respect of goods are imposed on any person who does or omits to do an act that renders such goods liable for confiscation. Goods are liable for confiscation in cases of:

- Improper importation of goods⁶; or
- Attempting to improperly export goods⁷.

The Customs Act defines smuggling in relation to any goods to mean any act, or omission of act that will render such goods liable for confiscation. Therefore, improper importation or exportation of goods is considered smuggling.

Possible penalties

In addition to confiscation of goods, the Customs Act provides for imposition of penalties⁸ in cases of improper importation and improper exportation of goods, ranging from 10% to 100% of the value of goods (minimum INR 5,000/~ USD 70), depending on whether the goods are prohibited goods or not. In case of mis-declaration of value, penalty may be imposed on the difference between actual value and declared value.

Additionally, penalty equivalent to the duty or interest can be levied where duty/interest has not been levied or short-levied or erroneously refunded by collusion, wilful mis-statement, or suppression of facts⁹.

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document that is false or incorrect, a penalty up to five times the value of the goods can be levied¹⁰.

In addition to the above, the Customs Act also provides for penalties for the following violations.

1. Obtaining instrument by fraud, collusion, wilful misstatement, or suppression of facts and utilizing the same for discharging duty
 - Penalty not exceeding the face value of such instrument¹¹.
2. Fraudulent utilization of input tax credit for claiming refund - Penalty up to five times the value of refund claimed¹².
3. Non-accounting of failure or deficiency of goods unloaded into India, as compared with the documentation, to the satisfaction of the Customs authorities - Penalty up to two times the duty chargeable¹³.
4. Contravention or abetment of contravention of any provisions prescribed under the Customs Act
 - Penalty up to INR 400,000/~USD 5,500 (where penalty not expressly provided for)¹⁴.

In addition to the penalties imposed on the legal entity, penalties can also be imposed on any director, manager, secretary, or other officer of the Company who, at the time the offense was committed, was in charge of the conduct of the accused legal entity.

⁶ Section 111 of Customs Act

⁷ Section 113 of Customs Act

⁸ Section 112 and Section 114 of the Customs Act

⁹ Section 114A of Customs Act

¹⁰Section 114AA of Customs Act

¹¹Section 114AB of Customs Act

¹²Section 114AC of Customs Act

¹³Section 116 of Customs Act

¹⁴Section 117 of Customs Act



Publication of Name

The Court of Law has the powers to direct publication of names, place of business or residence, nature of contravention, etc., of any person accused.

Provisions pertaining to imprisonment

The Customs Act provides for prosecution in the following instances:

- Any person knowingly makes a false or incorrect declaration, statement, or document¹⁵- Imprisonment for a term which may extend to two years, or with fine, or both.
- Any person fraudulently evades duty or fraudulently claims any exemption¹⁶- Imprisonment for a term ranging from 3 years to 7 years plus fine.

Who can be punished?

The proceedings for prosecution can be initiated against any person guilty of the aforementioned offences.

In case the person committing the offence is a Company, every person (such as director, manager, secretary, or any other person) who, at the time the offence was committed, was in charge or responsible for conduct the company's business, as well as the company, will be deemed to be guilty of the offence and be liable to be proceeded against and punished accordingly, except if such person proves that the offence was committed without their knowledge or that due diligence was exercised to prevent the commission of such offence¹⁷.

These can be imposed only by a Court of Law and are independent of monetary penalties and confiscation of goods that can be ordered by the Customs authorities through an adjudication process. It is an agreed principle of law that both can be imposed simultaneously for the same offence.

¹⁵Section 132 of Customs Act

¹⁶Section 135 of Customs Act

¹⁷Section 140 of Customs Act



How to handle DRI investigations?

Any person subject to DRI investigation should keep in mind the following key considerations while dealing with the authorities.

- Cooperate with the investigation/ investigating officer;
- Summons issued for recording statements or submissions of information, whether delivered physically or electronically, should be attended by an authorized person;
- Summons should be attended without default (unless genuine reasons are available for non- attendance). In case alternate date is sought, a written request should be made;
- Furnish information sought by the authorities – Do not furnish any information without verifying the details of the notice for submission of information/summons;
- All submissions should be made in writing and the facts/ figures submitted should be accurate and supported by certificates from independent third parties, to the extent possible;
- Acknowledgment should be obtained from the authorities for all submissions;
- Request for a copy of the statements recorded and documents relied upon;
- Duties and taxes should not be paid without consulting with the legal advisor;
- Payment of any duty, interest, and penalty should be made only to the extent of computation provided by the authorities and duly verified;
- In case a threat for arrest is perceived, an option to obtain anticipatory bail should be explored and discussed with the legal advisors;
- Show-cause notice for duty demands, penalties, etc. should be requested.



How can JSA assist?



JSA’s team specializing in Customs and Indirect Taxes has the expertise to assist/guide organizations in appropriately responding to customs investigations.

JSA support includes the following:

Investigation

- Assistance in duty computation, drafting appropriate written submissions, affidavits;
- Representation before the DRI/Customs authorities;
- Handholding during investigation;
- Support during raid, search, and seizure.

Litigation support

- Review of show-cause notice, order, etc. and advising on way forward;
- Assistance in drafting and filing replies, appeals, and other submissions;
- Representation before the Customs authorities and/or court of law;
- Exploring approaches to defend any coercive actions from the authorities.

Advisory support

- Advising on the interplay of Customs laws and procedures with business processes and other regulations;
- Developing strategies for mitigating risks;
- Assistance in implementation of new processes from a Customs perspective with a view to avoid future investigations.

For assistance in the foregoing respects or any clarifications, please reach out to our indirect tax partners.



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