CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85264 OF 2025

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-APP1146/2024-25 dated 17th December 2024 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Mumbai Travel Retail Private Limited
A Wing, Unit No. G-A 0809 & B Wing Unit No. G-B 14-15
Art Guild House, Off LBS Marg, Kamani Junction, Kurla,
Mumbai -400 070 … ***Appellant***

versus

Commissioner of Customs
Air Cargo Complex
Andheri (E), Mumbai - 400099 ***…Respondent***

APPEARANCE:

Shri Mihir Mehta and Shri Yash Prakash, Advocates for the appellant

Shri Ram Kumar, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 86980/2025

DATE OF HEARING: 06/05/2025
DATE OF DECISION: 04/11/2025

PER: C J MATHEW

'Have you not the reason then to bee ashamed, and to forbeare

this filthie noveltie, so basely grounded, so foolishly received

> *and so grossely mistaken in the right use thereof?… A custome loathsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoke of the pitch that is bottomelesse.'*

wrote King James I in his treatise, *'A Covnterblaste to Tobacco'*, a few short years after Sir Walter Raleigh persuaded his predecessor, Queen Elizabeth I, to indulge in inhalation of burning tobacco, a product that he had recently introduced in England from Virginia in the pre-independent colonies of America. That horrific description notwithstanding, the appellant herein, M/s Mumbai Travel Retail Private Limited, preferred to obtain approval for the impugned goods as one such rather than the much touted 'less harmful substitute and replacement', generally known as 'e-cigarette' or 'vapes', which the customs authorities opined to be more apt. That the benignness attributed to the latter was not the cause for choice or discard is evident in the order[1] of Commissioner of Customs (Appeals), Mumbai-III which upheld the order of the original authority to the detriment of the importer. And, therein lies the twist of this tale.

2. For reasons best known to policymakers, there is no ban on cigarettes or tobacco products but there is on the substitute which supposedly sates the urge of craving for nicotine without having to smoke paper that wraps tobacco into a convenient cylindrical stick. It

---

[1] [order-in-appeal no. MUM-CUSTM-AMP-APP1146/2024-25 dated 17th December 2024]

is not for us to engage in the causes and consequences of policy made under valid authority; however, it is for us, while presuming such policy to be enforceable, to sustain the bulwark erected by statutory enactment against possible administrative excess. On the facts and submissions, it appears that it is such purported excess which requires resolution in this dispute.

3. The genesis of the dispute is the import of three cases of 'Tereach IQOS plugs' (10,000 sticks packed as cartons of 50 nos. each - amber, menthol and yellow) valued at ₹ 1,57,125, *vide* bill of entry no. 9448700/20.12. 2023 claiming rate of duty corresponding to tariff item 2404 1100 of First Schedule to Customs Tariff Act, 1975, self-assessed to liability of duties of customs of ₹ 4,39,955, from M/s Overseas Distributor Company NV, Belgium which, upon examination, was subject to proceedings under Customs Act, 1962 for confiscation under section 111 (d) and section 111 (m) of Customs Act, 1962, along with attendant penalty under section 112 of Customs Act, 1962, while ordering destruction of the imported goods at the cost of the importer.

4. The lower authorities have proceeded to confiscate the goods, with consequent detriments, founded on Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, along with notification of Ministry of Health & Family Welfare, besides The

Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Act, 2019 by which, on and from the appointed date, the article, described as

> *'... an electronic device that heats the substance, with or without nicotine and flavours, to create an aerosol for inhalation and includes all forms of Electronic Nicotine Delivery Systems, Heat Not Burn Products, e-Hookah and the like devices, by whatever name called and whatever shape, size or form it may have,...*
>
> *Explanation. -For the purposes of this clause, the expression "substance" includes any natural or artificial substance or other matter, whether it is in a solid state or in liquid form or in the form of gas or vapour;'*

in section 3 (d) therein, was illegal to

> *'(i) produce or manufacture or import or export or transport of ourselves or distribute electronic cigarettes, whether as a complete product or any part thereof; and...'*

and to

> *'... knowingly permit it to be used for storage of any stock of electronic cigarettes;...'*

either in section 4 and section 5 therein.

5. The impugned order, after analyzing 'front plug', 'tobacco plug', 'hollow acetate tube (HAT)', 'thin hollow acetate tube (thin HAT)', 'mouth piece filter (MPF)', 'outer paper' and 'tipping paper' – the

components making up the imported article, upheld the confiscation and destruction, as well as imposition of penalty, on the finding that

> *'18. From the above it is clear that the goods are nothing but E-Cigarette. Also, it is concluded by the Adjudicating Authority that during the detailed examination of the goods of subject bill of entry, the goods are actually refills of E-Cigarette, that Importer does not have Tobacco Board Certificate and there are no pictorial health warning mentioned as per Ministry of Health & Family Welfare Notification g.s.r. 417(e) dated 27.05.2011; that the important goods are prohibited as per DGFT Notification No. 54/2015-20 dated 09.02.2022 and hence appear to be absolutely confiscated; that the case laws cited vide their letter dated 26.12.2023 by the Importer are not relevant in the instant case as the same are pertaining to Taxation under GST & Service Tax and the facts in the instant case is related to policy restrictions & prohibition of the imported goods; that Importer has violated the DGFT Import policy & Ministry of Health & Family Welfare Notification GSR 417 (e) dated 27.05.2011 and that the impugned goods are liable for absolute confiscation under Section 111 (d), 111 (m) of the Customs Act, 1962 and the Importer also liable for penalty under Section 112 (a) (i) of the Customs Act, 1962.'*

from which it would appear that determination as refills of 'e-cigarette', inviting consequence of prohibition for violation of bar on import in the Foreign Trade Policy, 2015-20, is the crux of the dispute and that, for some reason best known to lower authorities, the imported goods have also been saddled with failure to comply with prescription of certification and pictorial warning pre-requisites that, while obviously not pertinent to banned goods, are attached, as condition mirroring municipal laws on production, sale, storage etc. of tobacco products, to importable goods. That, in addition to the confounding confusion over the impugned goods being ‘equipment’ or ‘refill’, appears to portray a certain want of certainty that should hallmark adjudicatory determination under empowerment in a taxing statute. Be that as it may, we take up the issue of goods being ‘refills of e-cigarettes’ as held *supra*.

6. Learned Counsel for appellant was emphatic that the impugned goods are ‘tobacco products’ which are not cigarettes – conventional or electronic – and also compliant with statutory requirements predicating import consistent with Foreign Trade Policy (FTP). He further contended that the lower authorities were not competent to invoke section 111 of Customs Act, 1962, with consequences appendant, on goods imported for warehousing and, more especially, as declared by them in the bill of entry, intended for retail sale in ‘duty free shop’ at the international airport as none of the prescriptions, including, at the extreme, ‘e-cigarettes’, apply to goods that were yet to be cleared for home consumption on filing, and disposal, of appropriate entry mandated in Customs Act, 1962.

7. The impugned bill of entry sought classification of goods as ‘products containing reconstituted tobacco, intended for inhalation

without combustion' corresponding to tariff item 2404 1100 of First Schedule to Customs Tariff Act, 1975. According to Learned Authorized Representative, 'e-cigarettes' are also classifiable therein and, consequently, prohibited for import. The impugned order has proceeded to find that impugned goods are 'e-cigarettes' even as the said description finds no place in the impugned heading in the First Schedule to Customs Tariff Act, 1975. Nor is there any foundational support drawn from the *Explanatory Notes* appended to Harmonized System of Nomenclature (HSN). The essence of the article banned for production and sale in the domestic market by The Prohibition of Electronic Cigarettes (Production, Manufacture, Import, Export, Transport, Sale, Distribution, Storage and Advertisement) Act, 2019 is an 'electronic device for heating substance for creation of aerosol for inhalation' which, by prohibition in the Foreign Trade Policy, applies to imported goods so as not to discriminate merely from having been manufactured abroad.

8. It is moot if mere tabulation of component parts of the impugned goods, described by the importer as 'products containing tobacco intended for inhalation without combustion', conforms to description of the article banned from production, storage and sale in the domestic market by the special enactment referred to. There are two modes of pursuing policy designed to discourage consumption by denizens of a State, *viz.*, by criminalization of usage or by elimination of licit

availability and it is not the case of anyone that the State has, like in narcotic drugs and psychotropic substances, criminalized usage of 'e-cigarettes' thus circumscribing disbarment by municipal law strictly to commercial establishments indulging in transactional engagements. The disbarment from import, under Foreign Trade Policy (FTP), is intended for articles that conform to

> *'heats the substance, with or without nicotine and flavours, to create an aerosol for inhalation'*

and 'tobacco', surely, satisfies a broad description as 'substance' for the purpose. In the light of claim of Learned Authorized Representative that the impugned order does find the impugned goods to fit that template, we must look to the tabular exposition therein for such conformity as well as the conclusion drawn by the lower authorities therefrom.

9. Not one of the detailing of the components of the imported article leads to the conclusion that it is either a heating device or that it is capable of generating heat; in the absence of potential to perform that function, the imported article, by no stretch, can be 'e-cigarette' as intended in the prohibiting statute or in the Foreign Trade Policy (FTP). There is no provision in the referenced municipal law encompassing 'refills', even if the goods be so, as the subject of the ban is, first and foremost, heating device. From the description, adumbrated in the show cause notice, there can be no doubt about lack of amenability of the

goods to conform either to ‘cigarettes’ or to ‘e-cigarettes’ for warranting compliance with appendant pre-requisites or interdiction, as the case may be, in the Foreign Trade Policy (FTP). No effort has been put in to appreciate the manner and mode of terminal transaction which, in turn, may require adherence to the printing of statutory warnings or pictorially disturbing representations mandated by law. The goods are imported as cases, comprising 50 cartons of 200 sticks each, have not been evidenced as intended for sale in cases or cartons and the sticks themselves are not of such dimension as to enable printing of ‘cautionary words or representation’ in the manner prescribed for ‘cigarette packs’ by the regulating statute; whether printing on cartons, either during or after clearance for home consumption, suffices as adherence to regulatory prescriptions will be contingent on the intent of the regulating statute and on peculiar construct of facts of each import. That certainly was not an option and, despite the finding of non-adherence to prescriptions in Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 as well as referred notification of Ministry of Health & Family Welfare, no visible effort appears to have been taken to render investigation on the channel of distribution or the retail presentation of the article.

10. Learned Counsel relied upon the decision of the Hon’ble Supreme Court in *Hotel Ashoka (Indian Tourism Development*

Corporation Ltd) v. ACCT & anr [2012 (12) TMI 62 – SUPREME COURT] holding that

> *'29. The learned counsel appearing for the respondent submitted that the sale would not be subject to tax under the Act only if it occasions in the course of import but the transactions of sale, which are subject matter of this litigation had not taken place in the course of import and, therefore, they would not be exempted under the provisions of Section 5 of the Central Act. In our opinion, the aforesaid submission cannot be sustained.*
>
> *30. They again submitted that in the course of import 'means the transaction ought to have taken place beyond the territories of India and not within the geographical territory of India'. We do not agree with the said submission. When any transaction takes place outside the customs frontiers of India, the transaction would be said to have taken place outside India. Though the transaction might take place within India but technically, looking to the provisions of Section 2 (11) of the Customs Act and Article 286 of the Constitution, the said transaction would be said to have taken place outside India. In other words, it cannot be said that the goods are imported into the territory of India till the goods or the documents of title to the goods are brought into India. Admittedly, in the instant case, the goods had not been brought into the customs frontiers of India before the transaction of sales had taken place and, therefore, in our opinion, the transactions had taken place beyond or outside the customs frontiers of India.'*

to press the point that sales preceding entry through customs barrier do not constitute transaction for domestic tax and control. There is no doubt this judgement settles the law that statutes intended for domestic transactions do not, *ipso facto*, extend to transactions prior to import of goods into the country. Doubtlessly, and unlike import transactions that set much store by documents of title, goods accompanying an owner does not get imported until the owner has made a declaration overtly or impliedly.

11. Building on that proposition, Learned Counsel asserted that the imports are intended for stocking in ‘duty free outlets’ to service passengers passing through the international terminals and that the entire proceedings have emanated from ‘bill of entry for warehousing’ that defers, by convention as well as by operation of law, occurrence of ‘import’ till an importer comes into existence by filing of entry prescribed in Customs Act, 1962. Concomitantly, it is his contention that the test of prohibition, arising from empowerment of ‘proper officer’ under section 47 of Customs Act, 1962, which, though effective from passing into territory or territorial waters of India, has been erroneously fastened on the appellant.

12. In the light of facts set out in the show cause being insufficient to conclude that the impugned goods are ‘e-cigarettes’ and the evident inability to narrow down coverage of the impugned goods to ‘tobacco product’ or ‘refill for e-cigarette’, there is no justification for confiscation under section 111 of Customs Act, 1962, by way of being either, to survive let alone absolute confiscation. To set aside the

impugned order is also tantamount to condonation of proceedings which, though under appropriate empowerment, may well be questioned for impropriety; the existence of power to initiate proceedings under section 124 of Customs Act, 1962 does not, in the absence of threshold cause, warrant deployment and, therefore, rendering resort thereto as inconsistent with responsible exercise of adjudicatory process.

13. The appellant filed bill of entry for warehousing and not to enable clearance for home consumption. Warehoused goods may, at some future date, be entered to be cleared for home consumption, under section 68 of Customs Act, 1962, entered for such clearance after alteration of form following manufacture facilitated by section 65 of Customs Act, 1962 or to be exported, either in the same form or after manufacture, by filing shipping bill under section 50 of Customs Act, 1962. Or the goods may be transferred to another person with all these several options continuing to attach to the goods. 'Duty free' retail operations are centred around this aspect of warehousing and the peculiar construct of this channel of commerce is governed by conditions attached to the licence accorded to operators. Though, by and large, warehousing is about economies of scale in procurement tempered by deferred discharge of duty liability commensurate with consumption constraints, with *entrepot* and manufacturing as outliers, that 'duty free' – comprising deferment of duty liability and transfer to

another, privileged with omnibus classification in chapter 98 of First Schedule to Customs Tariff Act, 1975 along with attendant exemption regime of tariff and policy – is often lost sight of. Generally, these are visible only in international airports of the country and, from the business standpoint, intended to convenience last minute shopping for travelling passengers without constraints of excess baggage charges. From the consumer point of view, the framework of warehousing is understandably irrelevant but customs authorities do not have that luxury of ignorance as this 'niche' business model is accorded legal sanctity only thus and every activity of import and export governed by regulatory oversight intended in the statute.

14. Only very rarely does the 'duty free' operator clear the goods for home consumption and as, patently, unwelcome failure of stocking projections. And the buyer of the goods does not derive the benefit of duty deferment that attaches only to the 'duty free' operator. Essentially, it is 'duty free' only in the hands of the operator but dutiable in the hands of the passenger, except to the extent that legislation has exempted through rules framed for accompanied baggage, though at 'rate of duty' different from that declared, for purposes of limited liability, in the warehousing bill of entry. In consequence, assessment of such bills of entry for determining duty liability as well as the verification, prescribed in section 47 of Customs Act, 1962, for discharge of duty liability and for prohibitory

interdiction, does not come into play. Such goods enter the process of assessment and clearance with entry preferred under the authority of section 77 of Customs Act, 1962 and in the hands of the owner after purchase in a 'duty free shop' thus alienating the 'duty free' operator from the goods for classification as well as trade policy restrictions enforceable on an importer. To put it in most simple terms, a warehousing bill of entry filed by 'duty free' operator is nothing but an accounting control instrument for fastening default liability on goods not traded and found not to be in stock. To initiate adjudicatory proceedings for contraventions, yet to occur and, if at all, to be fastened on a travelling passenger only on some distant date, by issue of notice under section 124 of Customs Act, 1962 is attributable either to ignorance of law or to disregard for comprehended law. And neither reflects credit on the customs administration.

15. This peculiarity has been legislatively acknowledged[2] by incorporation of

> *'58A Licencing of special warehouses*
>
> *(1) The Principal Commissioner of Customs or Commissioner of Customs may, subject to such conditions as may be prescribed, licence a special warehouse wherein dutiable goods may be deposited and such warehouse shall be caused to be locked by the proper officer and no person shall*

[2] [Finance Act, 2016 (28 of 20160]

> *enter the warehouse or remove any goods therefrom without the permission of the proper officer….'*

in Customs Act, 1962 with effect from 14th May 2016 and Special Warehouse Licencing Regulations, 2016 notified[3] thereupon by Central Board of Excise & Customs (CBEC). The *minutiae* are governed by Special Warehouse (Custody and Handling of Goods) Regulations[4], 2016 and circulars[5] of Central Board of Excise & Customs (CBEC). Thus, it is no longer convention and implied authority under the erstwhile section 58 of Customs Act, 1962 that allows 'duty free' but special provisioning for the two unique characteristics of 'duty free', *viz*. multi-location licencing - with secured storage space as hub and open 'point of sale' as spokes - and shifting clearance thereof into the hands of passengers with alteration of 'rate of duty' and loss of identity of the articles within the omnibus 'baggage' attended by legislated privilege. This regulatory framework has not found deserving consideration in the entirety of the impugned proceedings.

16. Several customs jurisdictions have issued 'trade facilities' or 'public notices' that appear to have been blissfully ignored by the lower authorities. Among these, the appellant has drawn our attention to public notice[6] issued by Commissioner of Customs (Preventive), Kochi, and of concern to them as licenced 'duty free' operator at

---

[3] [notification no. 72/2016-Customs (NT) dated 14th May 2016]
[4] [notification no. 69/2016-Customs (NT) dated 14th May 2016]
[5] [circular no. 17/2016 dated 14th May 2016, no. 19/2016 and no. 20/2016 dated 20th May 2016]
[6] [public notice no. 01/2022 dated 22nd April 2022]

Thiruvananthapuram International Airport, and, in particular, to

> *'4. There shall be no restriction on the type of goods that can be stored in Special warehouse, as long as they are covered under Para 2 (a) of Notification No. 66/2016-Cus (N.T.) dated 14.05.2016, i.e. for supply to duty free shops in the customs area…*
>
> *5. There is no restriction on the items that can be stored in the Special Warehouse (as mentioned in the ground plan) licenced under section 58A of the Customs Act, 1962 and are removed to the duty free shop under physical export of the Bond officer.'*

Similarly, does the 'Frequently Asked Questions (FAQ)'[7] attest to lack of restriction thus

> *'5. Are there any restrictions on the items that can be stored in a warehouse licenced under section 58A ?*
>
> *There is no restriction on the items that can be stored in a special warehouse under Section 58A as long as the goods are removed to a DFS under physical escort by the Bond officer.'*

17. The appellant has not entered the goods for home consumption. The appellant, as 'duty free' operator is required to comply with the conditions, pertaining to goods, attached to warehousing licence. Neither does the show cause notice allege nor do the orders of the lower authorities conclude that any such condition or restriction has been breached for the full measure of section 111 of Customs Act, 1962 to

[7] [https://cgsthyderabadzone.gov.in/faq/faqs-on-customs-bonded-warehouses]

be brought to bear on the impugned goods. Nor is there any examination of the manner in which policy prescriptions apply to warehoused goods that, for ‘duty free’ operations, change hands and assume different classification relegating identity of goods to an omnibus description.

18. Clearly, the obligations, as perceived by the lower authorities, have been fastened on an importer intending storage of the impugned goods to ‘special warehouse’ and not intended by law to respond to charges preferred in the show cause notice. Clearly, too, the lower authorities have failed to establish that the impugned goods conform to description in the prohibiting legislation – whether domestic or in the course of international trade – or that any other stipulated mandate intended to be administered on clearance for home consumption was not adhered to. Clearly, the entire proceedings are a study in misplaced enthusiasm and jurisdictional overreach. For these reasons, the impugned order lacks authority of law and is set aside to allow the appeal.

(Order pronounced in the open court on 04/11/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*