

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85347 OF 2024

[Arising out of Order-in-Original No: MUM/CUS/HD/09/2023-24/ADJN/APSC dated 28th December 2023 passed by the Commissioner of Customs (Airport Special Cargo), Mumbai.]

Epsilon Eye Care Pvt Ltd
6B-301, Shweta Ashanagar, Western Express Highway
Kandivali, Mumbai- 400 101 *... Appellant*

versus

Commissioner of Customs
Airport Special Cargo
Avas Corporate Point, Makwana Lane, Andheri (E)
Mumbai- 400 059. *...Respondent*

WITH

CUSTOMS APPEAL NO: 85385 OF 2024

[Arising out of Order-in-Original No: MUM/CUS/HD/09/2023-24/ADJN/APSC dated 28th December 2023 passed by the Commissioner of Customs (Airport Special Cargo), Mumbai.]

Shyam Anand
Epsilon Eye Care Pvt Ltd
6B-301, Shweta Ashanagar, Western Express Highway
Kandivali, Mumbai- 400 101 *... Appellant*

versus

Commissioner of Customs
Airport Special Cargo
Avas Corporate Point, Makwana Lane, Andheri (E)
Mumbai- 400 059. *...Respondent*

APPEARANCE:

Shri Sujay Kantawala, Advocate for the appellants
Shri Deepak Sharma, Superintendent Commissioner (AR) for the respondent

WITH

CUSTOMS APPEAL NO: 86197 OF 2024

[Arising out of Order-in-Original No: MUM/CUS/HD/09/2023-24/ADJN/APSC dated 28th December 2023 passed by the Commissioner of Customs (Airport Special Cargo), Mumbai.]

Commissioner of Customs

Airport Special Cargo

Avas Corporate Point, Makwana Lane, Andheri (E)
Mumbai- 400 059.

... Appellant

versus

Epsilon Eye Care Pvt Ltd

6B-301, Shweta Ashanagar, Western Express Highway
Kandivali, Mumbai- 400 101

...Respondent

AND

CUSTOMS APPEAL NO: 87434 OF 2024

[Arising out of Order-in-Original No: MUM/CUS/HD/09/2023-24/ADJN/APSC dated 28th December 2023 passed by the Commissioner of Customs (Airport Special Cargo), Mumbai.]

Commissioner of Customs

Airport Special Cargo

Avas Corporate Point, Makwana Lane, Andheri (E)
Mumbai- 400 059.

... Appellant

versus

Shyam Anand

Epsilon Eye Care Pvt Ltd
6B-301, Shweta Ashanagar, Western Express Highway
Kandivali, Mumbai- 400 101

...Respondent

APPEARANCE:

Shri Deepak Sharma, Deputy Commissioner (AR) for the appellant

Shri Sujay Kantawala, Advocate for the respondents

CORAM:

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

FINAL ORDER NO: 86035-86038/2025

DATE OF HEARING: 09/10/2024
DATE OF DECISION: 08/04/2025

PER: C J MATHEW

All four appeals, viz., that of M/s Epsilon Eye Care Pvt Ltd and Shri Shyam Anand, also Director in the appellant company, as well as respondent-Commissioner of Customs turned appellants in which the two importers are respondents, arise out of common order¹ of Commissioner of Customs (Airport Special Cargo), Mumbai pertaining to the same consignments – live and past – of ‘intra ocular lens’ imported by post that were subjected to the adjudication proceedings and are disposed off in this common proceedings. Besides differential duty of ₹ 1,69,74,756 ordered to be recovered under section 28 of Customs Act, 1962 on 8332 nos. of lens in earlier imports of 49 consignments now re-assessed on value of ₹4,05,28,010 and re-assessment of the consignments under clearance on enhanced value of ₹ 8,03,034 that were, additionally, confiscated without option of redemption in the impugned order, the adjudicating authority held 5977 nos. valued at ₹ 2,90,72,962 from past consignments to be liable to absolute confiscation for contraventions pertaining to medical devices under section 111 (d) of Customs Act, 1962 while the other 2355 nos.

¹ [order-in-original no. MUM/CUS/HD/09/2023-24/ADJN/APSC dated 28th December 2023]

of 'lens' valued at ₹ 1,14,55,048 from past imports were held as confiscable under section 111(m) of Customs Act, 1962 but, not subject to any prohibition, was offered for redemption on payment of ₹ 11,00,000 under section 125 of Customs Act, 1962 besides imposing penalty of ₹ 1,69,74,756 under section 114A of Customs Act, 1962 on M/s Epsilon Eye Care Pvt Ltd, along with penalty of ₹ 2,00,00,000 each under section 114AA of Customs Act, 1962 on the company as well as individual and penalty of ₹ 1,00,00,000 on the individual under section 112 of Customs Act, 1962.

2. There are, thus, two categories of imports that were impugned in the adjudication proceedings: one in which value had been misdeclared but, otherwise and save for short-payment of duty thereby, entitled to clearance of goods under section 47 of Customs Act, 1962 and other, including the goods yet under customs control, which too were found to have had their values misdeclared, but not entitled to clearance for home consumption for having contravened licence requirements. The two were held to be confiscable under different provisions and duty liability fastened on such of the latter as had already been cleared for home consumption. Surprisingly, the impugned order has also indulged in

'(xi) absolute confiscation of the 'foreign brand Intraocular Lenses' seized at manufacturing unit of M/s Epsilon Eye Care Pvt Ltd ...under section 111(m) of the Customs Act, 1962. The

foreign origin IOLs seized at the Noticee's premises fall under the category of time expired drugs, the release of which could cause harmful effect on public health and safety. Therefore, I order the seizing unit to dispose these in accordance with the provisions of the Disposal Manual, 2019.'

which is, clearly, misappropriation of authority. Customs Act, 1962 has been enacted to deal with dutiability of goods that were in existence at the time of import and the consequence of most stringent provisioning therein is confiscation without offer of redemption or, owing to lack of exercise of option to redeem, standing confiscated. Confiscation is no authority for disposal in any manner; the Disposal Manual, 2019 has not stemmed from any provision of Customs Act, 1962. More particularly, in view of

'126. On confiscation, property to vest in Central Government.

(1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.

(2) The officer adjudging confiscation shall take and hold possession of the confiscated goods.

of Customs Act, 1962, an adjudicating authority is mere custodian of confiscated goods and what the Central Government may do, in all responsibility and sense of accountability, with goods so confiscated is not within the scope of an adjudication order. Furthermore, authority vested in 'proper officer' by

'47. Clearance of goods for home consumption.

[(1)] Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

(2) The importer shall pay the import duty –

- (a) on the date of presentation of the bill of entry in the case of self-assessment; or*
- (b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or*
- (c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf,*

and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent. but not exceeding thirty-six per cent. per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

on such duty till the date of payment of the said duty:

Provided that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:

Provided further that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.'

of Customs Act, 1962, not to permit clearance of 'prohibited goods' which are

'(33) "prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;'

in Customs Act, 1962, may only be invoked at the time of clearance or, post-clearance, on such goods as were prohibited at that time of extinguishment of control over imported goods. No evidence of state of these goods at the time of import is available and for an 'officer of customs', acknowledged in section 3 of Customs Act, 1962 and endowed with jurisdiction by section 5 of Customs Act, 1962, to be arbiter of 'public health and safety' is extra-legal exercise of power. That portion of the order must be struck down as not being legal or proper.

3. This does not appear to be an isolated departure from the framework of law in the impugned proceedings. It all began with interception of one 'post parcel' containing 253 nos. 'mixed lens'

valued at UD\$ 2024 addressed to one Anand Shyam, Epsilon Eye Care Centre, Kandivli, Mumbai on 20th September 2022 that was under process in APSO, Mumbai which, on examination, was found to be 273 nos. of 'Medennium Matrix foldable intraocular lens' and seized under section 110 of Customs Act, 1962. Another 'post parcel' containing nos. 141 nos. 'mixed lens' valued at UD\$ 1128 addressed to Epsilon Eye Care Centre, Kandivli, Mumbai on 24th September 2022 under process in APSO, Mumbai that, on examination, turned out to be 141 nos. of 'Medennium Matrix foldable intraocular lens' suspected to have been undervalued. Search of the said premises did not yield anything of consequence except that of occasional storage of goods manufactured at their factory in Valsad and 2598 nos. of unusable 'intraocular lens' sourced from Eyekon Medical Inc and 24 nos. of 'Medennium Matrix foldable intraocular lens' well within indicated 'shelf life' also sourced from Eyekon Medical Inc. It was ascertained during investigation that 'intraocular lens' were being imported by 'post parcels' through APSO, Mumbai as well as through Air Cargo Complex (ACC) and that their licence from Central Drugs Standard Control Organisation (CDSCO), initially valid from January 2017 to January 2020, was revalidated only in October 2022 though reapplied for in May 2022 with easing off of pandemic. In October 2022, the importer remitted ₹ 1,00,00,000 towards potential liability. From investigation, it was also ascertained that 8332 nos. of 'intra ocular lens' in 49 consignments had been

cleared through APSO between 2017 and 2022 upon payment of duties of customs of ₹ 79,431 on declared value of ₹ 52,46,343. Thus the proceedings leading to the impugned order was about some breach vis-à-vis each of these seizures or past imports.

4. According to the impugned order, the goods were not covered within heading 9804 of First Schedule to Customs Tariff Act, 1975 and, hence, in terms of circular² issued by Central Board of Indirect Taxes & Customs (CBIC), to be charged to duties of customs and integrated tax – under section 12 of Customs Act, 1962 and section 3(7) of Customs Tariff Act, 1975 – at rates corresponding to tariff lines conforming to description of the goods by assessment of bills of entry under section 17 of Customs Act, 1962 before clearance in the manner set out in section 47 of Customs Act, 1962. It was alleged that failure to do so entailed short payment of duty warranting recovery under section 28 of Customs Act, 1962 besides attracting confiscation under section 111 of Customs Act, 1962 for failure to comply with registration and licence requirements prescribed in notification³ of Government of India in Ministry of Health & Family Welfare. The differential duty was sought to be charged by resorting to ‘surrogate value’ of US\$ 22 per unit for ‘Matrix Model 401’, US\$ 65 per unit for ‘Matrix Model 404’, US\$ 38 per unit for ‘Matrix Model 403’ and US\$

² [no. 14/2018 – Customs dated 4th June 2018]

³ [no. 1468 (E) dated 6th October 2005]

65 per unit for 'Matrix Model 400', accepted as 'transaction value' of imports through Air Cargo Complex (ACC), Mumbai *vide* bill of entry no. 6567899/21.01.2020, in accordance with rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Thus, the 'assessable value' of the two intercepted consignment, comprising 273 nos. of Model 401, 86 nos. of Model 401 and 55 nos. of Model 403, was revised from the declared price of ₹ 2,53,421 to ₹ 8,03,036 and, as far as the past imports of 8332 nos. was concerned, the declared price of ₹ 52,46,343 was revised to ₹ 4,05,28,010 for assessment by adopting the highest unit price of the imports effected at Air Cargo Complex (ACC) *supra*, owing to

21.1 The importer has failed to provide the details/records of model of Intraocular Lenses imported in the last five years. During search of the office premise and the manufacturing unit of M/s Epsilon Eye Care Pvt. Ltd., no records/documents were found, which provides the segregation of imported Intraocular Lenses model wise.

21.2 In absence of the proper records/documents of imported Intraocular Lenses (model wise), the value of Intraocular Lenses imported vide past postal articles in last five years, has been ascertained on the basis of following aspects: -

- i) The importer has mis-declared the goods in terms of description and value in respect of past import too. On perusal of commercial invoices of past postal articles, it was observed that the model number of intraocular lenses has not been mentioned. Hence, it appears that the importer has imported high valued (USD 65) Intraocular*

Lenses of model 404/400 through APSO, Vile Parle, Mumbai, as similar lenses have been imported by M/s Epsilon Eye Care Pvt. Ltd. through Air Cargo Complex, Mumbai vide B.E. No. 6567899 dated 21.01.2020 (as detailed in TABLE-E). The importer declared the goods, imported at APSO, as Mixed Lens, to evade legitimate Customs Duty.

- ii) *During the investigation, analysis of sale invoices of the company M/s Epsilon Eye Care Pvt. Ltd. was done and it was observed that the Intraocular Lenses of mixed models have been supplied to the local customers of the company. Hence, it is difficult to identify the correct model of Intraocular Lenses imported in last five years and therefore, the Intraocular Lenses of model 404/400 having value (USD 65) was taken for reference.*
- iii) *The Intraocular Lenses (expired) seized at the manufacturing unit of the company were of various models of foreign brand. It also indicated that the importer has imported Intraocular Lenses of different models. It was difficult to identify the correct model imported in last five years. Therefore, the Intraocular Lenses of high valued was taken for reference.*
- iv) *Hence, the value of 8332 Intraocular Lenses imported vide 49 past postal articles can be taken as USD 65.00 per Intraocular Lens as the similar high valued Intraocular Lenses have been imported by the same importer as detailed in TABLE-E. Therefore, the declared assessable value of the goods imported vide 49 past postal Articles i.e. Rs. 546,343/- imported by M/s Epsilon Eye Care Pvt. Ltd. at APSO, Vile Parle are proposed to be re-determined under Rule 5 of the CVR 2007, i.e. as per the "Transaction value of similar goods"'*

as set out in the impugned order with consequent duty liability of ₹ 3,37,917 on goods yet to be cleared and ₹ 170,54,187 at 10% and 28% *ad valorem* for basic customs duty and integrated tax respectively with differential duty of ₹ 1,69,74,756 ordered for recovery under section 28 of Customs Act, 1962.

5. Learned Counsel for appellant resisted the basis of investigation reportedly prompted by unduly high price, adopted without proper recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, for seizure. It was contended that the 'invoice price', with no evidence of any other outflow, was not sought to be discarded for not being 'transaction value' as required by rule 3 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 besides which 'integrated tax' had been charged at the wrong rate of duty. He informed that, even upon disputation stretched to plausible limits, differential duty liability to be recovered may, at best be ₹ 34,624 and ₹ 7,03,120 at 7.5% of assessable value as basic customs duty and 5% as integrated tax. Further, he contested the competence of customs authorities to adjudicate consequence of non-possession of licence when their application for re-licencing had been preferred well before the imports that got intercepted even though approval was accorded for renewal and that, in any case, valid licence was available at the time of adjudication; furthermore, he contended that, in the absence of relevant dates of specific imports, it was not legal

to take recourse to section 28 of Customs Act, 1962 for past imports or to attribute the imports for five years to the short period, and particularly when implant surgery was virtually non-existent, between February 2020 and May 2022.

6. Learned Counsel submitted that the impugned order had travelled beyond show cause notice which would be the consequence in the event of success of appeal of the jurisdictional Commissioner of Customs. In support thereof, he placed reliance on the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Mumbai v. Toyo Engineering India Ltd* [2006 (201) ELT 513 (SC)], in *Commissioner of Central Excise, Nagpur v. Ballarpur Industries Ltd* [2007 (215) ELT 489 (SC)] and in *Commissioner of Central Excise v. Gas Authority of India Ltd* [2008 (232) ELT 7 (SC)]. On the issue of valuation, Learned Counsel submitted that value in bill of entry of theirs, pertaining to several devices/appliances, including 'lens', imported together would not find application in assessment of 'lens' alone and, that too, through the medium of post; he contended that the value does not meet the requirements of rule 5 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 let alone reliance on internet values for recourse to rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007. Reliance was placed on the decision of the Tribunal in *Aggarwal Distributors (P) Ltd v. Commissioner of Customs, New Delhi* [2000 (117) ELT 49 (Tribunal)] which was

affirmed by the Hon'ble Supreme Court in appeal of Revenue as also in *Naresh Lokumal Serai v. Commissioner of Customs (Export), Raigad* [2006 (203) ELT 580 (Tri-Mumbai)] similarly affirmed.

7. Learned Authorized Representative submitted that valuation of live consignments was revised on the basis of their own imports through Air Cargo Complex which was also applied to the 49 consignments similarly imported through post in the past. It was further submitted that the modus of 'post parcels' appeared to have been intended to evade restrictions on import of 'lens' and that the statements of key persons, including the individual-appellant, did spell out the number of consignments so procured and which were matched with records of Foreign Post Office for identification of similar parcels. It was contended that 'drugs' in Drugs & Cosmetics Act, 1940 covered 'lens' and that section 10 therein stipulated imports only against licence and that section 11, read with notification⁴ dated 6th October 2005 of Ministry of Health & Family Welfare in Government of India, did empower customs officers to deal with unlicensed imports. He placed reliance on the decision of the Tribunal in *Nirvanza Trading Pvt Ltd v. Commissioner of Customs, Nhava Sheva-I* [2020 (2) TMI 102 – CESTAT MUMBAI], in *Commissioner of Customs, Panaji v. Max Overseas* [2019 (6) TMI 1278 – BOMBAY HIGH COURT], in *ALM Enterprises v. Commissioner of Customs (Imports)* [2017 (2) TMI 295 – MADRAS HIGH COURT] and in *Ferryman Trading Company v.*

⁴ [F no. 11014/2/2005-DMS & PFA]

Commissioner of Customs (Appeals), New Delhi [2021 (11) TMI 29 – CESTAT NEW DELHI].

8. In the light of the submissions, we take up the three issues sequentially. It is common ground that the goods were imported through post which operates in its own special framework both for rate of duty and for valuation; such imports have like implications insofar as restrictions on trade imports are concerned.

9. The appellant had applied for renewal of licence and imports were effected between then and receipt of renewed licence. As at the time of adjudication, licence was available, seizure on that ground should have been vacated. Insofar as earlier imports are concerned, the adjudicating authority has tied itself up in knots. On the one hand, it is enunciated that absolute confiscation was warranted while, on the other, additional resource mobilization for the exchequer was accepted as adequate fiscal restitution. Thus, prohibitions, by that logic, are amenable to fiscal deprivation for overcoming even legislated bar. Leaving that aside, the authority has been drawn from Drugs & Cosmetics Act, 1940; while the impugned goods may be covered by 'lens' and, as established by the notification, was indeed so, the enforcement jurisdiction is restricted to the place of import. Any breach detected thereafter is breach of law in municipal jurisdiction and for authorities under the relevant statute to handle. The purpose of such legislation is to prohibit or regulate imports

in the same manner that industry and trade within India is and with imported goods, acquiring the hue of domestic goods after clearance for home consumption, is accorded national treatment thereafter. Goods that have already been cleared are beyond the adjudicatory authority of customs officials when acting upon agency entrustments.

10. Further, by insisting on licence from Central Drugs Standard Control Organisation (CDSCO) as condition for permitting clearance of 'lens' upon import, it is implicitly acknowledged that not only is there an appropriate regulatory body and non-intervention by such regulatory body in further marketing of the impugned product but also that the goods are not lacking in quality that is prescribed for transacting locally. We may, thus, state that goods, once cleared for home consumption, may be proceeded against, insofar as restrictions imposed by statute or policy connected with agencies other than trade licencing authorities is concerned, only at the time of clearance for home consumption under section 47 of Customs Act, 1962.

11. The value adopted for assessment is that of the same appellant and undertaken through Air Cargo Complex (ACC), Mumbai at a time before the impugned goods had been imported. There is a substantial distinction between imports effected of goods and that of post parcels – both by description and process. There is no declaration of value by recipient of post parcels; such declaration under section 46 of Customs Act, 1962 for

goods places the onus on the importer, as buyer and fully cognizant with the transaction entered into by them with seller, to declare the correct price for deployment as assessable value. On the other hand, the label or declaration on the parcel was deemed to be the entry, as set out in section 82 of Customs Act, 1962, and, while that enabling provision was omitted by Finance Act, 2017, the scheme of clearances continued even thereafter through the system established by circular⁵ of Central Board of Indirect Taxes & Customs (CBIC) which continued to be in vogue till notification of the Regulations⁶ envisaged in section 84 of Customs Act, 1962. Thus, during the period of disputed import, the goods, even if intended ultimately for the same entity, stood on different footing. More so, as with effect from coming into force of Finance Act, 2017, the coverage of courier was incorporated in the same system.

12. Thus, the goods used for comparison were entered for assessment by the appellant herein from the terms of the contract negotiated by them with the suppliers. Those may have been subjected to the test of rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and in accordance with the scheme of valuation resting on declaration of price by the importer. In the case of the impugned goods, the price is the price charged from the recipient of the goods and which is declared by the supplier. There is no allegation, let

⁵ [circular no. 14/2018- Customs dated 4th June 2018]

⁶ [Postal Import Regulations, 2025]

alone evidence, of any collusive arrangement between the supplier and the appellant. In such circumstances, and without putting the declarant on notice or the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 deeming the recipient of post parcels to be the 'declarant' for the purposes of rule 12 therein, the adverse inference from non-furnishing of required information or lack of satisfaction from furnished information, with consequence thereto from rule 3(4) therein would be insinuation at the cost of integrity of the valuation scheme. Patently, the provisions of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 were not intended to operate for assessment of post parcels and, unless specifically adapted for circumstances as set in the Rules for adjustments, the adoption of value of goods imported through Air Cargo Complex (ACC) is not acceptable.

13. With both the pillars for confiscation, penalties and differential duty, viz., lack of licence and comparison with imports at Air Cargo Complex (ACC), the consequences of adjudication is without authority of law. The impugned order is set aside to allow the appeal. Appeals of Revenue are dismissed.

(Order pronounced in the open court on 08/04/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)