

**VOLUME 1 | ISSUE 1**

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**INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH**

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**BAN ON E-CIGARETTES AND THE ROAD AHEAD FOR E-CIGARETTES PATENT APPLICATIONS**- Saloni Maheshwari<sup>1</sup>**INTRODUCTION**

E-cigarettes as the name suggests are electronic cigarettes which are run by battery. It produces an aerosol by heating a substance, with or without nicotine and various flavors.<sup>2</sup>This gadget bought about a revolution in the tobacco industry when it first found way to the Indian markets in the year 2005. E-cigarettes were basically developed to help people quit smoking and the thought of using these aerosol producing cigarettes instead of the traditional cigarettes seemed like a way to the smokers all across the country. In no time, it gained wide vogue among the youth and the smokers, due to the influence from the western countries and also the availability of a large number of flavors.

With the rampant growing traction of the e-cigarettes, it also posed a threat to the society. It started becoming addictive among the adolescents without them even realizing it. This led to a social menace which needed to be checked.

According to a study by the World Health Organization, 48.8% population of India comes under the category of smokers and 31.7% population uses smokeless tobacco products. After a thorough consideration, the Government of India decided to ban the use of e-cigarettes nationwide.

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<sup>2</sup>The Prohibition of The Electronic Cigarettes Act,2019

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## **THE PROHIBITION OF ELECTRONIC CIGARETTES ACT, 2019**

Indian Government has banned the production, manufacture, import, export, transport, sale, distribution, storage, and advertisement of e-cigarettes. The Act was passed on 5 December 2019 and has been regarded to come into force from 18 September 2019.<sup>3</sup>

For the first time offenders, the offender can be imprisoned for up to one year or charged a fine of up to 1,00,000 INR or both. In the case of repeated crime, the person can be detained for up to three years and 5,00,000 INR fine. A person stocking e-cigarettes will face imprisonment for up to six months or a fine of 50,000 INR or both.<sup>4</sup>

This ban has brought the flourishing e-cigarettes manufacturing units to a standstill. Furthermore, it has also left the companies filing for patents of e-cigarettes at a misfortune.

## **PATENT FILING TRENDS IN E-CIGARETTES IN INDIA**

Taking into consideration the smoking population of India which is around 106 million, it makes India the second largest tobacco consuming country in the world. With such a high number of smoking population, India makes a very thriving market for e-cigarettes producing firms such as Juul, Philip Morris etc.

The tobacco manufacturing companies saw a huge potential in the Indian markets. There was a sharp spike in the patent filing for e-cigarettes in the year 2011. Post that, the patent documenting trend was more or less consistent till the year 2014. From 2014 to 2016, there was again a dramatic rise in the patent filing numbers for e-cigarettes. In the year 2020, there was a major fall.<sup>5</sup>

## **STAND BY INDIAN PATENT OFFICE (IPO)**

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<sup>3</sup>Id.

<sup>4</sup>Id.

<sup>5</sup>Derwent Innovation, Patent filing trends for e-cigarettes in India, (2020) , <https://www.effectualservices.com/wp-content/uploads/2020/03/Capture-1-555x357.png> (last visited April 30,2020)

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The stand of the IPO regarding e-cigarettes has changed after the Government of India has issued a ban on e-cigarettes. The Controllers at the IPO have become averse to providing any patents or examining the patents under process in regard to e-cigarettes.

Objections are being raised under such claims by resorting to Section 3(b) of The Indian Patent Act, 1970. Section 3(b) states that an invention, the primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes serious prejudice to human, animal or plant life or health or to the environment is not patentable.<sup>6</sup> As per the latest manual of patent practice and procedures issued by the IPO, the examples of inventions which may fall within the purview of Section 3(b) may include, but are not limited to, device, apparatus, machine or method for committing theft/burglary, for adulteration of food, for counterfeiting of currency notes, for gambling, or invention the use of which can cause injury.<sup>7</sup>

With the change in the view point of the IPO in regard to the patentability of e-cigarettes, the plight of the companies having the patents and patent applications for related items has definitely increased. Apart from clearing various objections such as novelty objection, the inventive step involved and various other prerequisites, the applicants currently need to beat another obstacle that has been created by this ban.

What seems a little satiric here is that no ban has been imposed on various other products that use tobacco such as regular cigarettes. Regular cigarettes are still permitted in the country while the e-cigarettes which claim to diminish the harmful effects of smoking are restricted. Also, the IPO is hesitant in providing patents relating to these. Further, it can be contended by the applicants of the patents that the innovation of e-cigarettes centers on reducing the harmful impact that is caused by the regular cigarettes. Therefore, such innovations should not be held non- patentable under Section 3 (b) of The Indian Patents Act, 1970.

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<sup>6</sup>The Indian Patent Act, 1970

<sup>7</sup>Manual of Patent Office Practice and Procedure,(2019), Pg. 88

[http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Manual\\_for\\_Patent\\_Office\\_Practice\\_and\\_Procedure\\_.pdf](http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/Manual_for_Patent_Office_Practice_and_Procedure_.pdf)  
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Additionally, a lot of products relating to the similar field have been granted patents. Various other products such as regular cigarettes, smoking compositions and the wrapping paper that is used for packing tobacco has been granted patents time to time by the IPO. This might seem unfair to the applicants of the present patent.

## INTERNATIONAL AGREEMENTS

- **TRIPS Agreement**

According to Article 27 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement: Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order, public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.<sup>8</sup>

It can be clearly understood from reading this Article that only because the government of a particular place has imposed a ban on the use of a thing, the right to obtain patent for the same does not go away with it. The product or the process is still very much patentable.

- **Paris Convention**

According to Article 4quater of Paris Convention : The grant of a patent shall not be refused, and a patent shall not be invalidated on the ground that the sale of the patented product or a product obtained utilizing a patented process is subject to restrictions or limitations resulting from the domestic law.<sup>9</sup>

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<sup>8</sup>Agreement on Trade related aspects of Intellectual Property Rights, (1995), Pg.331  
[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (last visited May 1,2020)

<sup>9</sup>Paris Convention for the Protection of Intellectual Property,(1883), Pg. 5,  
[https://www.wipo.int/edocs/lexdocs/treaties/en/paris/trt\\_paris\\_001en.pdf](https://www.wipo.int/edocs/lexdocs/treaties/en/paris/trt_paris_001en.pdf) (last visited May 1,2020)

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In the present case, only because a ban has been imposed on e-cigarettes in the country, the Controllers of the IPO cannot refuse to grant patent for the same.

It can be evidently seen that IPO is acting in contradiction of the terms of these International Agreements

### **RECOMMENDATION TO THE APPLICANTS**

Considering the situation currently, it is suggested that the applicants of the e-cigarette patents may approach the Intellectual Property Appellate Board (IPAB) against the decision of the Controller.

Even if one appeal gets accepted and the decision is changed, it will prove fruitful to all the other similar matters and in turn reduce the plight of the applicants.

### **EFFECT: PATENT ALLOWED**

It is pertinent to note that if the patent is allowed by the Intellectual Property Appellate Board, it will not create any negative effect on the ban. The use of e-cigarettes will still be regulated as per the rules and regulations by the Government of India only. Also, if patent is granted, there will be better ways to regulate the use of e-cigarettes. Without the patent being granted to a single person, the use of e-cigarettes will be very difficult to regulate. In order to regulate the use of these e-cigarettes as and when required by the Government of India, grant of patent will be a useful step.

The ban will in all ways overpower the patent granted to the Applicants. It will only be the technical aspect of it that will be given permission and not the actual use of it. The grant of patent will not authorize the Applicants to act against the ban imposed. It is also needed to be taken into consideration that every time the Government changes, it brings along with it a different set of rules and regulations. It brings along with it different policies which at times might reverse the policy prevalent during the course of former government. The ban may be

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lifted upon in the future and therefore, not granting the patent will affect the applicants in a negative manner.

## CONCLUSION

The IPO should look into the matter from this perspective too and decide the course of action in such a manner which will not hinder the prevalence of the ban imposed by the Government of India and will also keep the applicants in a good shape.



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