

CASE NO.:
Appeal (civil) 779-783 of 1997

PETITIONER:
M/S Muller & Phipps (India) Limited

RESPONDENT:
The Collector of Central Excise, Bombay-I

DATE OF JUDGMENT: 05/05/2004

BENCH:
CJI & G.P. MATHUR.

JUDGMENT:
JUDGMENT

RAJENDRA BABU, CJI. :

In these appeals arising out of an order passed by the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the 'Tribunal') question raised for our consideration is whether Johnson's Prickly Heat Powder and Phipps Processed Talc are patent or proprietary medicines classifiable for the purposes of excise duty under the erstwhile tariff item 14E (as prior to 1.3.1986) and Heading 30.03 (subsequent to 1.3.1986) as claimed by the appellants or whether they are cosmetics or toilet preparations falling under the erstwhile tariff item 14F (prior to 1.3.1986) and Heading 33.04 (after 1.3.1986) as claimed by the Department.

The Tribunal held that the products in question are 'cosmetics' and not 'medicament' on the basis that boric acid, salicylic acid and zinc oxide present in the product are subsidiary pharmaceutical or antiseptic constituents and their curative and prophylactic value is subsidiary and, therefore, the product is a preparation for the care of the skin and is classifiable under tariff item 14F upto 28.2.1986 and under heading No. 33.04 from 1.3.1986 and there is no legal infirmity in the order issued under Section 37B of the Central Excise Act, 1944.

The relevant entries of tariff item 14F and Heading No. 33.03 are as follows :-

14F. Cosmetics and toilet preparations not containing alcohol or opium, Indian hemp or other narcotic drugs or narcotics, namely:-

(i) Preparations for the care of the skin, beauty or make-up preparations and manicure or pedicure preparations, such as beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skin foods and skin talcs, face powders, baby powders, toilet powders, talcum powders and grease paints, lipsticks, eye-shadow and eye-brow pencils, nail polishes and varnishes, cuticle

removers and other preparations for use in manicure or chiropody, sun-burn preventive preparations and sun-tan preparations, barrier creams to give protection against skin irritants, personal (body) deodorants, depilatorics.

(ii) Preparations for the care of the hair, such as : brilliantines, perfumed hair oils, hair, lotions, pomades and creams, hair dyes, shampoos whether or not containing soap or organic surface active agents.

(iii) Shaving creams, whether or not containing soap or organic surface active agents.

Explanation. I. "Alcohol", "Opium", "Indian Hemp", "Narcotic Drugs" and "Narcotics" have the meanings respectively assigned to them in section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

Explanation II.- This Item includes cosmetics and toilet preparations whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value.

Explanation III.- this Item includes, unmixed products, only when they are in packing of a kind sold to the consumer and put up with labels, literature or other indications that they are for use as cosmetics or toilet preparations or put up in a form clearly specialised to such value."

"33.04 :Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen and suntan preparations; manicure or pedicure preparations."

The case put forth before us on behalf of the appellants is that prickly heat powder contains a range of medicines and are used only for the treatment and prevention of a skin ailment known as Malaria Rubra commonly known as prickly heat; that prickly heat powders are manufactured under a Drug Licence issued under the Drug and Cosmetics Act, 1940 and have been treated as a drug and not a cosmetic by the authorities under the Drugs Act; that on a reference made by the Finance Ministry, the Drug Controller of India has opined that due to the high content of 5% boric acid in a prickly heat powder, it would be classifiable as a drug or medicament and not as cosmetics; that from 1970 till 1985 prickly heat powders have been classified and assessed under tariff item 14E of the old tariff as "Patent or Proprietary Medicines"; that the Collector (Appeals), disagreeing with the authorities, has taken the view that in view of the medicinal ingredients, namely, salicylic acid and boric acid which are meant to cure the disease called

Milaria Rubra, prickly heat powder is a drug and, therefore, classifiable as a drug or a medicinal preparation; that whereas the Tribunal reversing the order of the Collector took the view that prickly heat powders are cosmetics and not 'medicament'. It is contended that prickly heat powder not only relieves prickly heat faster but actually helps prevent it; that when a person perspires profusely the sweat stays on the skin too long and the person becomes a potential victim of prickly heat; that specially formulated prickly heat powder absorbs the sweat better and faster and prevents the build-up of bacteria on the skin; that, therefore, the person avoids getting a red rash, itching and burning; that no person who requires ordinary talc for the purposes of beautifying her or himself would use the said products, which contain the aforesaid active therapeutic ingredients; that the said products are known as prickly heat/Milaria Rubra; that the sale of the said products are much higher in hot summer months when this disease frequently erupts. It is further submitted that the Central Government by its order dated 22.3.1970 held that the product was a drug; that the Sales Tax Tribunal by its order dated 4.2.1970 held that the product was a drug and not a cosmetic; that the Central Board of Excise and Customs had also passed an order dated 17.1.1981 holding that selsum shampoo was not a cosmetic but was a drug and the basis for arriving at that decision was that 'Johnsons' prickly heat powder and NYCIL have been recognised as a drug and selsum stood on a stronger ground. Our notice was drawn to the decision of this Court in BPL Pharmaceuticals Ltd. vs. CCE, 1995 Supp. (3) SCC 1, and the decision of the Andhra Pradesh High Court in State of A.P. vs. Koduri Satyanarayana & Co., 1988 STC 233 (AP) wherein it was held that Sales Tax Tribunal was right in considering Johnson's prickly heat powder as falling under Entry 37 (drugs) and not under Entry 36 (cosmetics). It is further contended that the price of the product was fixed under the Drug Price Control Order, 1970 as it had been manufactured under a Drug Licence issued under the Drugs Act; that under the Drug Act there are two regimes, namely, one for drugs and the other for cosmetics; that before a drug licence is issued various conditions as required by Rule 17 of the Drugs and Cosmetics Rules, 1945 have to be complied with; that the product is known and understood in commercial parlance as a patent or proprietary medicine used for the prevention and treatment of the disease, prickly heat; that the Head of the Pharmacology Department of the Grant Medical College, Mumbai has also opined that Johnson's prickly heat powder contains active ingredients like salicylic acid and boric acid and it is of medicinal value and can be used in the treatment of skin disorders. Various text books have been referred in support of the argument. In analysing and understanding the meaning of the relevant entries of the tariff items our attention is drawn to various tariff items. It was noticed by the Secretariat of the HSN that it had no specific information concerning a classification practice with regard to prickly heat powders in other countries and that a product known as Dakosan, which was described as prickly heat powder had been classified under heading 33.07, that is, deodorant. The Government,

however, pointed out to the Secretariat of the HSN that Dakosan could not be compared with the prickly heat powder whose classification was under scrutiny because of the 5% content of boric acid. It was pointed out that the Government had consulted the Drug Controller who had opined that because of the high concentration of boric acid the product may be treated as a drug.

The view of the Secretariat of HSN is under strong attack before us. It is stated that the question to be considered is whether the product had the essential character of preparations of heading 33.03 or medicaments of heading 30.04. the Secretariat thereafter purported to consider certain examples given in Martindale's Extra Pharmacopoeia and came to the conclusion that in those examples the active ingredients were higher. It is stated that boric acid was described in pharmaceutical literature as having feeble antibacterial and antifungal properties and that the European Committees had issued a directive relating to cosmetic products indicating that boric acid could be used in cosmetics in specified maximum concentration limited to 5%. Salicylic acid was described as a keratolytic substance having bacteriostatic and fungicidal properties used in the treatment of fungus infections of the skin, zinc oxide was stated to be applied externally in dusting powders and a mild astringent, Chlorphensin which is the active ingredient in Nycil was described as having antibacterial antifungal and antitrichomonal properties and was used in dusting powders in concentration of 1%. In that view, the Secretariat questioned the classification of Johnson's prickly heat powder and Shower to Shower as a medicament and stated that in view of its use and composition it would lean towards classification of these two products as preparations for the care of the skin falling under Heading 33.04. however, it is stated that Nycil should be considered as a medicament falling under Heading 30.04.

What is required to be considered in the matters of this nature where commodity taxation is taken up by the State authorities the court should be guided by the manner of classification of the goods which are brought to tax rather than the etymological meaning of the product in question or expert's opinion thereto.

The Tribunal in the present cases has heavily relied on Explanation II to tariff Item No. 14F of the Tariff Act which reads as "this item includes cosmetics and toilet preparations whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value". This Court in BPL Pharmaceuticals Ltd. held that selenium sulfide product not intended for cleansing, beautifying, promoting attractiveness or altering appearance and having regard to preparation, label, literature, character, common and commercial parlance understanding and earlier decisions of the Central Board of Excise and Customs held the product was a drug or medicinal product covered by Sub-heading 3003.19 and there was no good reason to change the classification merely on ground of coming into force of

the Tariff Act. Value of earlier understanding and precedents was emphasised.

The Tribunal in the present cases adverted to BPL Pharmaceuticals Ltd. and differentiated the same on the basis that facts that arose for consideration by this Court in that case were different from the one they had to decide. The Tribunal stated that the label affixed to the containers of the prickly heat powder did not indicate that it was a medicine to be used under a doctor's advice or under a doctor's prescription. The Tribunal also noted that the product is not known as a prominent medicine but only as an aid to prevent prickly heat. The Tribunal enumerated various arguments advanced on behalf of the appellants and took the view that :

"Now examining the product before us, we find that the composition of the product 'prickly heat powder' is salicylic acid 0.8% to 1.5%, boric acid 5%, zinc oxide 10% to 16%, talc base of hydrate Magnesium silicate. Now the question is whether salicylic acid 0.8% to 1.5% boric acid 5% and zinc oxide 10% to 16% are subsidiary pharmaceutical or antiseptic constituents. The assesses represented that these ingredients were not subsidiary but were significant ingredients. In support of their contention, they cited and relied upon the Drug Controller's opinion wherein the Drug Controller in the case of shower to shower had opined that because of high conc. Of boric acid, the product cannot be used as talcum powder. Against this, we find that Secretariat of the C.C.C.N. in their note in para 28 opined that "In researching the question of the classification of the prickly heat powders of concern to the Indian administration, the Secretariat has determined that certain 'dusting powders' containing boric acid and zinc oxide or salicylic acid are used for their therapeutic value in the treatment of certain skin diseases. However, in such preparations, according to examples cited in the Martindale Extra Pharmacopoeia, the level of active ingredients is rather high. For example, 'compound zinc dusting powder' specified in the section on dermatological agents on page 460, contains zinc oxide (25%), boric acid (5%), sterilised purified talc (35%) and starch (3%). Another cited preparation \026 zinc and salicylic acid dusting powder \026 containing zinc oxide (20%), salicylic acid (5%) and starch (75%) but no boric acid". Then again in para 30, the Secretariat had opined that the conc. Of boric acid in talc is limited to 5%. Regarding salicylic acid, the Secretariat opined that they would lean towards classification of shower to shower and Johnson's prickly heat powder as preparations for the care of skin in heading No. 33.04."

After noticing the finding of the Harmonized

System Committee the Tribunal noted that the Central Excise Tariff is now based on HSN and the opinion and recommendation of the Committee cannot just be brushed aside simply because similar products are manufactured or sold under drug licence.

Indeed, the effect of Harmonised System of Nomenclature (HSN) classification came up for consideration before this Court in Collector of Central Excise, Shillong vs. Wood Craft Products Ltd., 1995 (3) SCC 454. This Court stated therein that when the Central Excise Tariffs are based on internationally accepted nomenclature found in the HSN, any dispute relating to tariff classification must so far as possible be resolved with reference to nomenclature indicated by HSN unless there be an express different intention indicated by the Central Excise Tariff Act, 1985 itself and it was further emphasised therein that when the Central Excise Tariff Act is enacted on the basis and pattern of the HSN the same expression used in the Act must as far as practicable be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian tariff of a different intention.

But in the present case when throughout the meaning given to products in question not only by the department itself but also by other departments like Drug Controller and the Central Sales Tax authorities is that the product in question is a medicinal preparation should be accepted.

Applying the principles enunciated in BPL Pharmaceuticals Ltd. case and taking into consideration various circumstances as to the manner in which the goods had been treated on the earlier occasions by the department and the product having been utilised with reference to the commercial parlance and understanding, that it had been treated as a drug it would not cease to be one notwithstanding the fact that new tariff act has come into force. What is to be seen in such cases is when in the common parlance, for purpose of the Drug Act, for purpose of Sales Tax Act and in various findings recorded on earlier occasions by the department itself having been noticed, the conclusion is inevitable that the products in question must be treated as medicinal preparations.

Therefore, we have no hesitation in reversing the view of the Tribunal and restore that of the Collector. The appeals are allowed accordingly.