

CASE NO.:
Appeal (civil) 11651-11652 of 1995

PETITIONER:
ALPINE INDUSTRIES

RESPONDENT:
COLLECTOR OF CENTRAL EXCISE, NEW DELHI.

DATE OF JUDGMENT: 14/01/2003

BENCH:
M.B. SHAH & D.M. DHARMADHIKARI

JUDGMENT:
JUDGMENT

2003 (1) SCR 313

The Judgment of the Court was delivered by

DHARMADHIKARI, J. The present two appeals have been preferred under Section 35L(b) of the Central Excises & Salt Act, 1944 against the three-member Judgement [reported in 1997 (92) E.L.T.53 (Tribunal) of the Customs, Excise & Gold (Control) Appellate Tribunal [for short 'CEGAT'] Principal Bench 'C', New Delhi. The Tribunal by majority opinion of two against one held against the appellant that its manufactured product with trade name 'Lip Salve' is classifiable for payment of excise duty under Heading 33.04 of the Central Excise Tariff Act, 1985 [hereinafter referred as 'Act'] as 'a preparation for care of skin' and not as a 'medicament' under Heading 30.03 of the Act.

The minority view expressed by one Member of the Tribunal in favour of the appellant is that its manufactured product 'Lip Salve' is classifiable as 'medicament' under Chapter 30.03 of the Act although the sub-classification is required to be re-determined by remanding the case to the Assistant Collector of Central Excise.

In the impugned order of the Tribunal, the chemical composition of the product, the manner in which it is marketed and supplied as also its common parlance meaning have all been examined. For deciding these appeals, it is sufficient for us to broadly explain the nature of the product for examining the correctness of the finding reached by the Tribunal. The learned counsel appearing for the appellant very strenuously supported the minority view of the Tribunal. By taking us through the medical literature on the subject, it is stressed that the product is supplied for use of soldiers posted in high altitude areas. It is a medicament for treatment of sore, inflamed, roughened and cracked lips. The product is manufactured in accordance with Defence Services Specifications. Its ingredients are white bees wax, white soft paraffin, liquid paraffin, lanolin-all ingredients conforming to I.P. Grade; Cetyl Alcohol C.P. Grade. The other ingredients are Stabiliser and perfume. It is pointed out from 1923 Edition of British Pharmaceutical Codex that the chemical combination prescribed in British Pharmacopoeia has been changed for making it suitable for use of defence personnel in India and especially those posted in high altitude areas. On this basis, it is contended that the product supplied exclusively to Defence Department for use of military personnel posted in high altitude areas is a 'medicament' and not merely a 'skin care preparation'. It is classifiable as 'medicament' under Chapter 30.03 of the Act.

On behalf of the Revenue, the learned standing counsel submitted that the drug licence obtained by the appellant under the Drugs and Cosmetics Act, 1940, itself mentions that it is a licence for 'ointment and cream for external application as a non-pharmacopoeia item'. In the certificate of the Deputy Director [General] of the Directorate-General of Health Services

issued on 09-2-1987, there is a mention that 'Lip Salve' is a protective/preventive cream used for treatment of chapping of lips. It further says that chapping of lips. It further says that chapping of lips includes sores, inflammation, characteristics, fissures and similar diseases of mucous membrane of lips. It is a matter of common knowledge that chapping of lips occurs because of dryness of air and in cold weather. It is not necessarily limited to high altitude areas although such chapping of lips is more acute in high altitude areas where there is severe cold and sun rays. The use of the product is for protecting the skin and lips against damages caused by natural factors such as cold and weather conditions.

It is well established that in interpreting tariff entries in taxation statute like Excise Act where the primary object is to raise revenue and for that purpose various products are differently classified, the entries are not to be understood in its scientific and technical meaning. The terms and expressions used in tariff have to be understood by their popular meaning that is the meaning that is attached to them by those using the product. See the decision of Supreme Court on the dispute regarding classification for excise duty, the product-Dant Manjan Lal manufactured by Shree Baidyanath Ayurved Bhavan Ltd. reported in the case of Shree Baidyanath Ayurved Bhavan Ltd v. Collector of Central Excise, Nagpur and Ors., [1996] 9 SCC 402. The manufacturer claimed the product to be an ayurvedic medicina preparation product for dental care. The view of the Tribunal was upheld by this court by holding that 'ordinarily a medicine is prescribed by a medical practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with a specific disease like diabetes'.

Learned counsel appearing for the appellant placed reliance on decision of this court of B.P.L. Pharmaceuticals Ltd. Collector of Central Excise, Vadodara, [1996] Supp. 3 SCC in which product with trade name 'Selsun' used for treatment of dandruff was held classifiable as a 'medicament' and not a 'cosmetic product' intended for cleansing, beautifying promoting attractiveness or altering appearance. The learned counsel highlighted nature of preparation of the product the method in which it supplied with the label, literature, and the manner in which it is marketed to bring home his point that it is not merely a skin care lotion or cream but a 'medicament specially prepared to be supplied for use of defence personnel posted in high altitude areas or in severe weather conditions.

We have gone through the pharmaceutical and medical literature produced before us in the course of hearing and which has been duly dealt with by the Tribunal in its minority and majority opinion. The certificate issued by the Army Authorities and the chemical ingredients of the product are not decisive on the question of classification of the product for levy of excise duty. It is firmly established that on the question of classification of product under Central Excise Tariff Act, "commercial parlance theory" has to be applied. It is true that the entire supply by the appellant of its product 'Lip Salve' has been to the Defence Department for use of military personnel but that would also not be determinative of the nature of the product for classifying it. It is not disputed that the product 'Lip Salve' is used for the care of the lips. It is a product essentially for "care of skin" and not for "cure of skin". It is, therefore, classifiable as a skin care cream and not a medicament. From the nature of the product and the use to which it is put. We do not find that the claim of the appellant is acceptable that it is primarily for therapeutic use. What we find from the material produced before the Tribunal is that essentially the product is a protective/preventive preparation for chapping of lips. It is not a curative product maybe that incidentally on cracked and chapped lips, it has some curative effect. It is also not denied that the product 'Lip Salve' is not suitable for use only for soldiers operating in high altitude areas but it is of use for every one as protection from dry, cold weather or sun rays. The product, therefore, essentially is protective of skin of lip. It is lip care product

and not a 'medicament'. It is neither prescribed by any doctor nor obtainable from the Chemist for Pharmaceutical shops in the market.

The appellant seeks classification of the product as a pharmaceutical product under Chapter 30 and as a 'medicament' under Heading 30.03. The rules for interpretation of the Schedule under the Central Excise Tariff Act 1985, for the purpose of classification chapter notes can be taken as aid for understanding their various entries under various Headings of the tariff. What is to be noted from Chapter 30 of the Tariff Act is that under note no 1(d) preparations covered by Chapter 33 even if they have 'therapeutic or prophylactic properties' are excluded from Chapter 30. 'Medicament' has been defined in note No.2(i) to mean 'goods which are either products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic use'. On a reading of note No.1(d) with note No.2 (1) of Chapter 30 under Heading 'Pharmaceutical Products, 'it is clear that preparations which fall under Chapter 33 even if they have therapeutic or prophylactic properties are not covered under Heading 30.03 as 'medicaments'.

Note 2 of Chapter 33 has been brought to our notice and commented upon by counsel for both the parties. It reads thus:-

"2. Heading Nos. 33.03 to 33.07 apply, inter alia, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packing 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 use and includes products whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value.

[underlining for emphasis]

Based on note No.2. the main emphasis in the arguments advanced on behalf of the appellant is that the product is manufactured especially for defence personnel and packed in simple packing with labels and literatures indicating that it is not sold as cosmetics or toilet preparation. On the other hand on behalf of Revenue, portion of note no.2 underlined above has been highlighted to contend that the products classifiable under Chapter 33 includes such products under it even though they contain 'subsidiary pharmaceutical or antiseptic constituents or held out as having subsidiary curative or prophylactic value'. This submission on behalf of the appellant based on note no.2 under Chapter 33 overlooks note no.5 the said Chapter which reads thus:-

"5. Heading No.33.04 applies, inter alia, to the following products : beauty creams, vanishing creams, cold creams make-up creams, cleansing creams, skin foods, skin tonics, face powders, baby powders, toilet powders, talcum powders and grease paints, lipsticks, eye shadow and eyebrow pencils, nail polishes and varnishes, cuticle removers and other preparations for use in manucure or chiropody and barrier creams to give protection against skin irritants.

[underlining for emphasis]

The above quoted note no.5 has to be read with entry 33.04 which reads as under:-

"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.

[Underlining for emphasis]

Reading the above underlined portions of Note 2 and No.5 with entry 33.04,

we find ourselves in the agreement with the majority opinion of the Tribunal that the product 'Lip Salve' is a kind of "barrier cream" or a protective cream against skin irritants. It, therefore, clearly falls under entry 33.04 and conforms to the description 'preparation of the care of the skin other than medicaments'. The learned counsel of the appellant has not been able to persuade us to take a different view from the one taken in the majority opinion of the Tribunal. We confirm that the product 'Lip Salve' is essentially a preparation for protection of lips and skin and is not a 'medicament'. Such preparations which have a subsidiary curative or prophylactic value clearly fall under entry 33.03 to 33.07 as per note no.2 under Chapter 33. The product clearly is covered by entry 33.04 read with note no.5 of Chapter 33, it essentially being a preparation for protection of lips or skin. We have also gone through the minority opinion expressed by one of the members of the Tribunal and the reasoning therein supported before us on behalf of the appellant. For the reasons aforesaid, we are unable to agree with the minority view. In the result, we find no merit in these appeals and the same are hereby dismissed.