

CASE NO.:

Appeal (civil) 4589 of 1995

Appeal (civil) 138 of 1989

PETITIONER:

M/s Sunny Industries Private Ltd.

RESPONDENT:

Collector of Central Excise, Calcutta

DATE OF JUDGMENT: 25/03/2003

BENCH:

M.B. SHAH & ARUN KUMAR.

JUDGMENT:

J U D G M E N T

Shah, J.

It is the contention of the appellant Company that it is engaged in manufacture inter alia of Ad-vitamin Massage Oil forte (Patent or Proprietary Medicines) since 1949 on the basis of sanction accorded by the Drug Control Authorities. This preparation was brought and classified for levy of duty of Excise with effect from 1.3.1961 falling under Tariff Item No.14-E of the First Schedule to the Central Excise and Salt Act, 1944 (hereinafter referred to as "the Act"). By order dated 26.12.1985, the Assistant Collector classified the said product under Tariff Item No.14-F (Heading 3304.00) excisable as cosmetics goods. Collector (Appeals) also affirmed the order of the Assistant Collector by order dated 29.4.1986. Against that order, appellant preferred appeal No.E-2226/86-C before the Customs, Excise and Gold (Control) Appellate Tribunal ("Tribunal" for short) which was also dismissed by order dated 26.10.1988. Aggrieved thereby, appellant filed Civil Appeal No.138 of 1989 before this Court.

In the meanwhile, the Central Excise Tariff was reconstituted with effect from 28.2.1986 as follows: -

- (i) 14E is equivalent to T.I. 30.03 of the Central Excise Tariff Act, 1985. (Medicaments)
- (ii) 14-F is equivalent to Tariff Item No. 33.04 of the Central Excise Tariff Act, 1985. (Cosmetic Goods)

On re-construction of the tariff as aforesaid, the appellant submitted its classification list No. 2/86 dated 3.3.1986 claiming classification of its product under heading 3003.19 as patent and proprietary medicine. Upon receipt thereof, the Assistant Collector issued notice to the appellant to show cause as to why the product should not be classified under sub-heading No.3304.00 in view of the change of Tariff description after 1985 budget. Being not satisfied with reply of the appellant, the Assistant Collector modified the classification of the said product from Chapter 30 to Chapter 33 and approved classification heading 3304.00. Appeals filed by the appellants before the Collector (Appeals) and the Tribunal were also dismissed.

The Tribunal observed that the vitamins are added in several cosmetic preparations, skin care lotion etc. but mere addition of vitamins would not render the product as a drug. The product has to be judged entirely in the light of the words in tariff and not with reference to the licence under the Drug Control Act. After detailed

scrutiny of the documents filed by the appellant and the contentions raised by the parties, the Tribunal arrived at the conclusion that the classification done by the authorities below under sub-heading 3304.00 is correct and the product in question is clearly a massage oil, intended for care of the skin but possibly having some marginal medicinal properties.

Aggrieved by the order of the Tribunal, the appellant has preferred Civil Appeal No.4589 of 1995.

It is contended by the learned counsel for the appellant that the product Ad-vitamin massage Oil Forte was considered as medicine and it would be covered under heading 3003.19 as patent and proprietary medicine. It is submitted that the product is primarily a drug. This is because:

- (i) It contains a drug or medicinal preparation in Oil form;
- (ii) It is used for massage;
- (iii) It prevents the ailment or rickets and treats the same;
- (iv) It has a trade mark and symbol including that it is a proprietary.

The question that arises for consideration in these appeals is whether the product in question can be classified as a cosmetics and toilet preparation falling under Tariff Item 33.04 or as patent or proprietary medicine under Tariff Item No.30.03?

For this purpose, we would refer to the relevant part of tariff entries as under:

Old Tariff Entries:

Item No.14E Patent or Proprietary Medicines.

Item No. 14E.	Tariff Description Patent or Proprietary medicines not containing alcohol, opium Indian hemp or other narcotic drugs or other narcotics other than those medicines which are exclusively Ayurvedic, Unani Sidha or Homoeopathic.
------------------	---

Rate of Duty
Twelve and a half
per cent ad
valorem.

Item No.14FCosmetics and Toilet Preparations.

Item No. 14F.	Tariff Description Cosmetics and toilet preparations not containing alcohol or opium, Indian Hemp or other narcotic Drugs or narcotics, namely
------------------	---

Rate of Duty
One hundred per
cent ad valorem.

(i) Preparations for the care of the skin including beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skin foods and tonics, face powders baby powders, toilet powders, talcum powders and lipsticks.

(ii) (iii) "

By introduction of Finance Bill, 1985, explanations II and III were added to the said tariff item No.14-F of the Central Excise Tariff. Relevant Explanation II reads as under:

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."

Equivalent Tariff Items After Reconstitution w.e.f. 28.2.1986
Entry No. Description of Goods

30.03 Medicaments (including veterinary medicaments)

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.

Chapter Notes 1(c) and (d) of Chapter 30 coupled with Chapter Notes 2 and 5 of Chapter 33 would clearly reveal that the product in question cannot be termed as medicaments. The aforesaid Chapter Notes are as under:
Chapter 30 (Pharmaceutical Products)

Note:

1. This Chapter does not cover:

(c) Aqueous distillates or aqueous solutions of essential oils, suitable for medicinal uses (Chapter 33);

(d) Preparations of Chapter 33 even if they have therapeutic or prophylactic properties."

Chapter 33 (Essential Oils and Resinoids; Perfumery, Cosmetic or Toilet Preparations):

"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 packings 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.

5. Heading No.33.04 applies, inter alia, to the following products: beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skinfoods, 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 manicure or chiropody and barrier creams to give protection against skin irritants."

From the aforesaid Chapter notes, it is clear that heading 33.03 would include products whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value and heading 33.04 would inter alia include the products specified therein and other preparations for use in manicure or chiropody and barrier creams to give protection

against skin irritants. Therefore, the product mainly oil containing some A&D vitamins which is used for massage, even if it prevents ailment of rickets and treats the same, it cannot be held to be medicaments.

Hence, in our view, after verification of the entire evidence and the certificates produced on record as well as the report of the Chemical Analyser, the Tribunal rightly arrived at the conclusion that the product in question is oil used for massage and would be covered by heading 33.04. Similar contention was raised in *M/s Alpine Industries v. Collector of Central Excise, New Delhi* [JT 2003 (1) SC 130]. The Court observed that '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(i) 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'. The Court thereafter held thus:

"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 the product under Central Excise Tariff Act, "commercial parlance theory" has to be applied. It is true that the entry 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."

The same would be the position in the present case. The oil is not used for cure of skin but is oil for massage and it takes care of the skin.

In this view of the matter, we find no substance in these appeals and they are accordingly dismissed. There shall be no order as to costs.