REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 3644 OF 2008
(Arising out of SLP (C) No. 11726 of 2006)

M/s. Ponds India Ltd. (Merged with H.L. Ltd.) … Appellant

Versus

Commissioner of Trade Tax, Lucknow … Respondent

WITH

CIVIL APPEAL NO. 3647,3645,3646 2008
(Arising out of SLP(C) No. 13202, 13204 of 2006 and 3637 of 2007)

**J U D G M E N T**

**S.B. Sinha, J.**

1. Leave granted.

2. Whether petroleum jelly is a 'drug' or a 'cosmetic' within the meaning of the provisions of U.P. Trade Tax Act, 1948 is the question involved herein.

The factual matrix of the matter is undisputed.

The Legislature of the State of U.P. enacted U.P. Sales Tax Act, 1948. Entry 26(a) as inserted in the Schedule appended thereto by notification No.ST-II-1233/X – 10(1)-1974 dated 14.04.1974 includes petroleum jelly for the purpose of levy of sales tax. It was however, substituted by notification dated 7.9.1981. We would deal with effect thereof on the issue involved herein a little later.

3. We may at the outset notice the provisions of the Drugs and Cosmetics Act, 1940 (for short, "the Act"). Section 39(aaa) defines "cosmetic" as:-

> "Section 3(aaa) "cosmetic" means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic."

'Drug' has been defined in Section 3(b) in the following terms;

> "Section 3(b) "drug" includes –
>
> [(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;

(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;

(iii) all substances intended for use as components of a drug including empty gelatin capsules; and

(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board;"

4. Chapter 4 of the Act provides for manufacture, sale and distribution of drugs and cosmetics. Section 16 provides for the standards of quality in the following terms:

"16. Standards of quality – (1) For the purpose of this Chapter, the expression "standard quality" means -

(a) in relation to a drug, that the drug complies with the standard set out in the Second Schedule, and

(b) in relation to a cosmetic, that the cosmetic complies with such standard as may be prescribed.

(2) The Central Government, after consultation with the Board and after giving by notification in the Official Gazette not less than three months' notice of its intention so to do, may by a like notification add to or otherwise amend the Second Schedule for the purposes of this Chapter, and thereupon the Second Schedule shall be deemed to be amended accordingly.

5. Entry 5 of the second schedule appended thereto lays down the standard in respect of other drugs in the following terms;

| | | |
|---|---|---|
| "5. | Other drugs : - | |
| (a) | Drugs included in the Indian Pharmacopoeia | Standards of identity, purity and strength specified in the edition of the Indian Pharmacopoeia for the time being in force and such other standards as may be prescribed.<br>In case the standards of identity, purity and strength for drugs are not specified in the edition of the Indian Pharmacopoeia for the time being in force but are specified in the edition of the Indian Pharmacopoeia immediately preceding the standards of identity, purity and strength shall be those occurring in such immediately preceding edition of the Indian Pharmacopoeia and such other standards as may be prescribed. |

| | | |
|---|---|---|
| (b) | Drugs not included in the Indian Pharmacopoeia but which are included in the official Pharmacopoeia of any other country. | Standards of identity, purity and strength specified for drugs in the edition of such official Pharmacopoeia of any other country for the time being in force and such other standards as may be prescribed.<br><br>In case the standards of identity, purity and strength for drugs are not specified in the edition of such official Pharmacopoeia for the time being in force, but are specified in the edition immediately preceding the standards of identity, purity and strength shall be those occurring in such immediately preceding edition of such official Pharmacopoeia and such other standards as may be prescribed." |

6. The Central Government, in exercise of the power conferred upon it under Sections 6(2), 12, 33 and 33(N) of the Act, made Rules, known as the Drugs and Cosmetics Rules, 1945 (for short, "the Rules").

Rule 123 of the Rules provides for exemption from Chapter IV of the Act stating;

> "123. The drugs specified in Schedule K shall be exempted from the provisions of Chapter IV of the Act and the rules made thereunder to the extent and subject to the conditions specified in that Schedule.

7. Schedule "K" as specified in Rule 123 specifies the drugs and lays down the conditions under which such exemptions are to be granted. White or Yellow Petroleum Jelly I.P. (Non-perfumed) has been specified in item No. 28 in the following terms:

| | |
|---|---|
| "28. White or Yellow Petroleum Jelly I.P. (Non-perfumed) | The Provisions of Chapter IV of the Act and the rules made thereunder which require them to be covered by a sale licence subject to the conditions that such a product has been manufactured under a valid drug manufacturing licence." |

8. The exemption granted is subject to the condition that such a product has been manufactured under a valid drug manufacturing license.

It is not denied or disputed that the appellants herein are licensees under the said Act. It is also not in dispute that cosmetics within the meaning of the provisions thereof are not included in the Schedule.

9. These cases relate to the assessment years 1981-1982 to 1988-1989.

Indisputably again, the Sales Tax Tribunal by an Order dated 30.3.1990 in respect of assessment year 1981-1982 accepted the notification of the said product as falling under Entry No. 5 being pharmaceutical preparation and, it was therefore, not classified as a cosmetic and toilet preparation. The said order has not been questioned. A similar order was passed by the Sales Tax Tribunal, Ghaziabad on 21.3.1991 relying on its earlier judgment dated 30.3.1990.

A report of the Government Analyst is also in favour of the appellant.

10. The said decision of the Tribunal has also not been questioned by the Revenue. Similar orders of assessment had been passed for the assessment years 1984-1985 to 1986-1987.

The Allahabad High Court refused to interfere with the said orders of Tribunal on a revision application filed by the respondents herein.

11. The Revenue prayed for re-opening of the assessment for the years 1986-1987 to 1988-1989 which was denied, despite its attention having been drawn to a decision of the learned Single Judge of the Allahabad High Court in M/s. Balaji Agency, Gorakhpur Vs. CST [1994 UPTC-184], stating;

> "Therefore, in the above circumstances since against all the above three years judgments have been passed in the Appeals. Therefore, after the aforesaid judgment, the tax assessing officer has no jurisdiction to make amendment in the tax assessment order and in such cases only the appellate authority, who has passed the last judgment has jurisdiction to make amendments. In the light of aforesaid facts in all the above three years the action taken by the Tax Assessing Officer under Section-22 is not just and proper in the eye of law cannot be supported. Therefore, orders passed under Section 22 in all the above three years are set aside."

The said judgment of the Tribunal has been affirmed by the Allahabad High Court.

However, relying on Balaji (supra), the authorities changed the basis of the assessment from the assessment year 1989-90 onwards without producing any new material or proof to establish that the product was not a medicinal preparation and should be classified as a cosmetic. In respect of the assessment years 1990-91, 1991-92, 1992-93 when the matter reached the appellate tribunal, it however opined that the product of the petitioner being 'Vaseline White Petroleum Jelly' should be taxed at the rate of 12 per cent as "cosmetics and toilet preparation". The revision petition filed by the petitioner thereagainst before the Allahabad

High Court has been dismissed by reason of the impugned judgment dated 28.10.2005.

12. We may place on record that in Civil Appeals arising out of SLP (C) No. 11726 of 2006 and SLP(C) No. 3637 of 2007, the appellant did not move the Allahabad High Court in revision and have filed the special leave petition directly before this Court.

13. Mr. Ashok Desai, learned senior counsel appearing on behalf of the appellant would contend:

(i) The product, having consistently being held to be pharmaceutical/medicine from 1990 onwards, and there having been no change in the subsequent period, the purported order of classification of goods is illegal.

(ii) The burden as regards classification of goods being on the Revenue and no material has been placed on record by it to discharge the burden.

(iii) The product is a pharmaceutical preparation falling under Entry 29 as it is used for cure and treatment of various skin disorders.

(iv) Entry 5 relating to cosmetics and toilet preparations cannot have any application in the instant case as the said goods are not used for beautification or care of the skin in the normal circumstances.

(v) Furthermore, the State of U.P. having issued the notification dated 7.9.1981 whereby vaseline was deleted from Entry 5, hence, the same could not have been assessed as a cosmetic and toilet preparation.

(vi) As commercial meaning or meaning in common parlance must prevail over the dictionary meaning or technical meanings,

(vii) The Appellant having filed a large number of affidavits in support of its case and the deponents thereof having not been cross-examined, the averments contained therein must have been held to have been accepted.

(viii) In any event, if an entry is capable of two meanings, the meaning which has been accepted continuously should be held to be valid, unless it is held to be an implausible view.

(ix) Balaji Agency **(**supra**)** being not ex-facie applicable, the Tribunal and the High Court committed an error in relying thereupon despite the amendment made by reason of the notification dated 7.9.1981.

14. Mr. Dinesh Dwivedi, learned senior counsel appearing on behalf of the respondent, on the other hand, would contend:

(i) As Entry 5 contains an elusive definition, it cannot be said to have a fixed meaning but an extended meaning.

(ii) The product being applied for care of skin, it comes within the purview of the definition of "cosmetics" and not within the definition of "medicine".

(iii) Entry 5, as inserted in 1981 would clearly show that all drugs and cosmetics would come within the purview thereof except those which are specifically excluded, and in that view of the matter, Vaseline manufactured by the appellant in a cosmetic.

(iv) Vaseline having no curative value and merely being used for taking care of one's skin, it cannot be a drug within the meaning of the provisions of the U.P. Trade Tax Act.

15. Indisputably, a license has been granted to the appellant under the provisions of the Act.

A drug as defined in Section 3(b) thereof would not only include a medicine which is used for external use of human beings, but if used for prevention of any disease or disorder in human being, shall also come within the purview thereof. The said definition is an extensive one. It even applies to preparations applied on human body for the purpose of killing insects like mosquitoes, which per se does not have any medicinal or any value for curing any disease or disorder in human beings.

We may furthermore notice that Parliament consciously used a restrictive meaning while defining the term "cosmetic" but an extensive meaning has been given to the word "drug".

The effect of such inclusive definition vis-à-vis restrictive definition is well known. In Hamdard (Wakf) Laboratories Vs. Dy. Labour Commissioner and Others [(2007) 5 SCC 281], this Court held;

> "33. When an interpretation clause uses the word "includes", it is prima facie extensive. When it uses the word "means and includes", it will afford an exhaustive explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression."

Almost to the same effect is the decision of this Court in N.D.P. Namboodripad (Dead) by Lrs. Vs. Union of India and Others [(2007) 4 SCC 502], wherein the law was stated in the following terms:

> **"18.** The word "includes" has different meanings in different contexts. Standard dictionaries assign more than one meaning to the word "include". *Webster's Dictionary* defines the word "include" as synonymous with "comprise" or "contain". *Illustrated Oxford Dictionary* defines the word "include" as: ( *i* ) comprise or reckon in as a part of a whole; ( *ii* ) treat or regard as so included. *Collins Dictionary of English Language* defines the word "includes" as: ( *i* ) *to have as contents* or part of the contents; be made up of or contain; ( *ii* ) to add as part of something else; put in as part of a set, group or a category; ( *iii* ) to contain as a secondary or minor ingredient or element. It is no doubt true that generally when the word "include" is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. But the word "includes" is also used to connote a specific meaning, that is, as "means and includes" or "comprises" or "consists of."

Yet again in Bharat Coop. Bank (Mumbai) Ltd. Vs. Coop. Bank Employees Union [(2007) 4 SCC 685], it was held;

> **"…..**It is trite to say that when in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. When the word "means" is used in the definition, to borrow the words of Lord Esher, M.R. in Gough v. Gough it is a "hard-and-fast" definition and no meaning other than that which is put in the definition can be assigned to the same. (Also see *P. Kasilingam* v. *P.S.G. College of Technology*.) On the other hand, when the word "includes" is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word "means" followed by the word "includes" in Section 2( *bb* ) of the ID Act is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other."

Yet again in Commercial Taxation Officer, Udaipur Vs. Rajasthan Taxchem Ltd. [(2007) 3 SCC 124], it was held;

> **"22.** We have already extracted the definition of raw material under Section 2(34) which specifically includes fuel required for the purpose of manufacture as raw material. The word *includes* gives a wider meaning to the words or phrases in the statute. The word includes is usually used in the interpretation clause in order to enlarge the meaning of the words in the statute. When the word include is used in the words or phrases, it must be construed as comprehending not only such things as they signify according to their nature and impact but also those things which the interpretation clause declares they shall include. There is no dispute

> in the instant case that the diesel and lubricant is used to generate electricity through DG sets which is admittedly used for the purpose of manufacturing yarn. Thus, it is seen that as diesel is specifically and intentionally included in the definition of raw material by the legislature, the question that whether it is directly or indirectly used in the process of manufacture is irrelevant as argued by Mr Sushil Kumar Jain."

In Associated Indem Mechanical (P) Ltd. Vs. W.B. Small Industries Development Corporation Ltd. and Others [(2007) 3 SCC 607], this Court held;

> **"13.** As the language shows, the definition of the word "premises" as given in Section 2( *c* ) of the Act is a very comprehensive one and it not only means any building or hut or part of a building or hut and a seat in a room, let separately, but also includes godowns, gardens and outhouses appurtenant thereto and also any furniture supplied or any fittings or fixtures affixed for the use of the tenant in such building, hut or seat in a room, as the case may be."

16. In M/s. Mahalakshmi Oil Mills Vs. State of Andhra Pradesh [AIR 1989 SC 335], under the provisions of Section 8 of the A.P. General Sales Tax Act, the "tobacco" is defined in the following term:

> "Tobacco means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth."

It was held that the same consists of two separate parts which specify what the expression means and also what it includes is obviously meant to be exhaustive.

17. Mr. Dwivedi placed strong reliance on the following observations occurring in the well known treatise of Justice G.P.Singh titled "Principles of Statutory Interpretation":

> "…But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which for the purposes of the Act must invariably be attached to those words or expressions". Thus, the word include may in certain contexts be a word of limitation."

There cannot be any dispute with regard to the bare principles of law stated therein. Each question posed in each case has to be determined having regard to the purport and object for which the same had been enacted.

18. Reference to Carter v. Bradbeer [(1975) 3 All ER 158], has been made in the aforementioned treatise. The House of Lords was dealing therein with a case where one word "bar" had more than one meaning and in that context, it was opined:

> "It may well be that the contention advanced on behalf of the appellant sought to derive from the interpretation section a measure of support which that section does not yield. By s. 201(1) of the 1964 Act it is provided that in the Act, unless the context otherwise requires, '"bar" includes any place exclusively or mainly used for the sale and consumption of intoxicating liquor'. It is important to note the word 'includes'. As used in s. 201, I regard the word 'includes' as denoting that the word 'bar' may refer to and may comprehend not only what would ordinarily and in common parlance be spoken of as a bar but also some place (such as a bar-room) which is exclusively or mainly used for the sale and consumption of intoxicating liquor."

It was noticed;

> "I feel not the slightest doubt that anyone asked if the sales took place at a bar would unhesitatingly answer Yes. Parliament must be assumed to use the English language in its ordinary natural sense unless the context shows a contrary intention. If no contrary intention is shown, then one is driven to the conclusion that Parliament intended in s 76(5) the word 'bar' to include counters such as were present in this case, and to prohibit the use of such counters during the substituted permitted hours.
>
> Sometimes a room is called a bar, for instance, a saloon bar or a lounge bar. Such a room, it is not disputed, is

> a bar within s. 76(5). Ordinarily a saloon bar will have a counter in it over which drinks are supplied, but the definition in s 201 extends the meaning of 'bar' to include any place exclusively or mainly used for the sale and consumption of intoxicating liquor. So, for the purpose of s 76(5), a place can be a bar even though it has not within it any bar counter.
>
> It is to be noted that the definition in s 201 does not say that 'bar' means something but that 'bar' included something. That is appropriate where it is sought to apply a word in a sense which it does not normally bear, or to make it clear that the word has a meaning about which otherwise some doubt might be felt."

Such a question does not arise herein for our consideration.

19. Indisputably, having regard to the provisions contained in Rule 123 of the Rules, white Jelly IP (non-perfumed) is a drug. The Act and the Rules framed thereunder do not provide that non-perfumed white jelly IP would also be a cosmetic.

20. This Court is called upon to interpret Entry 5 of the notification dated 7.9.1981. While doing so, it is necessary to consider that with a view to attract the applicability thereof, it must not only be a kind of cosmetic but also be the one which is used for the care of the face, skin, nails, eyes or brows.

What would be the effect of such a provision came up for consideration before this Court in Ramavatar Budhaiprasad Etc. Vs.

Assistant Sales Tax Officer, Akola [1962 1 SCR 279], wherein it was held;

> "Thus under the Act all articles mentioned in the Schedule were exempt from Sales Tax and articles not so specified were taxable. In the Schedule applicable there were originally two items which are relevant for the purposes of the case. They were items Nos. 6 and 36.
>
> Item 6 Vegetables – Except when sold in sealed containers.
>
> Item 36 Betel leaves.
>
> The Schedule was amended by the C.P. & Berar Sales Tax Amendment Act (Act XVI of 1948) by which item No. 36 was omitted. It is contended that in spite of this omission they were exempt from Sales Tax as they are vegetables. The intention of the legislature in regard to what is "vegetables" is shown by its specifying vegetables and betel leaves as separate items in the Schedule exempting articles from Sales Tax. Subsequently betel leaves were removed from the Schedule which is indicative of the legislature's intention of not exempting betel leaves from the imposition of the tax. But it was submitted that betel leaves are vegetables and therefore they would be exempt from Sales Tax under item 6."

21. It is therefore, difficult to agree with Mr. Dwivedi that a medicinal preparation must be one which has the effect of curing a disease. While interpreting an entry in a taxing statute, the Court's role would be to consider the effect thereof, upon considering the same from different

angles. Different tests are laid down for interpretation of an entry in a taxing statute namely dictionary meaning, technical meaning, users point of view, popular meaning etc.

It is true that the Court must bear in mind the precise purpose for which the statute has been enacted, namely, herein for the purpose of collection of tax, but the same by itself would not mean that an assessee would be made to pay tax although he is not liable therefor, or to pay higher rate of tax when is liable to pay at a lower rate.

An exemption notification may require strict construction, but where a statute merely provides for different rates of tax, application of the principles of strict construction may not be appropriate.

Whether a product would be a drug or a cosmetic sometimes poses a difficult question and, thus, answer thereto may not be easy. For the said purpose, the Court may not only be required to consider the contents thereof, but also the history of the entry, the purpose for which the product is used, the manner in which it has been dealt with under the relevant statute as also the interpretation thereof by the implementing authorities.

22. Pharmacopeia of India, Third Edition, Volume -1, page 362 deals with Yellow Soft Paraffin and White Soft Paraffin. White petroleum jelly is included in the term white soft paraffin. Standards therefor had been laid down. We have noticed hereinbefore that the product has specifically been mentioned in Schedule "K" of the Rules. It comes within the purview of the exemption envisaged under Rule 123 of the Rules.

23. Mr. Dwivedi referred to Wikipedia in respect of white petroleum which describes the product in the following terms :

> "**Petroleum jelly**, vaseline, **petrolatum** or **soft paraffin** is a semi-solid mixture of hydrocarbons (with carbon numbers mainly higher than 25), originally promoted as a topical ointment for its healing properties. Its folkloric medicinal value as a "cure-all" has since been limited by better scientific understanding of appropriate and inappropriate uses (see *Uses* below). However, it is recognized by the U.S. Food and Drug Administration (FDA) as an approved over-the-counter (OTC) skin protectant and remains widely used in cosmetic skin care. It is commonly referred to as Vaseline as a genericized trademark."

24. Contention of Mr. Dwivedi is that it is merely a skin protectant and remains widely used in cosmetic skin care and thus it does not have any curative value.

Wikipedia, like all other external aids to construction, like dictionaries etc, is not an authentic source, although the same may be looked at for the purpose of gathering information. Where an express statutory definition of a word exists, a Wiki definition cannot be preferred. It cannot normally be used for the purpose of interpreting a taxing statute or classification of a product vis-à-vis an entry in statute.

However, as a source of authority, Wikipedia is frequently cited by judges around the world. This is not restricted to India alone. The New York Times reports that beginning in 2004, more than 100 opinion in the States have cited Wikipedia, including 13 from federal appeals courts.

Is this a good thing? There's a split of authority. Let us notice some.

- Said the Seventh Circuit's Judge Posner, who recently cited the online encyclopedia in this opinion: Wikipedia is a terrific resource . . . Partly because it so convenient, it often has been

updated recently and is very accurate. He added: It wouldn't be right to use it in a critical issue. If the safety of a product is at issue, you wouldn't look it up in Wikipedia.

- Cass Sunstein, a visiting professor at Harvard Law who once fixed an error on Posner's Wikipedia entry: I love Wikipedia, but I don't think it is yet time to cite it in judicial decisions . . . it doesn't have quality control." He told the Times that "if judges use Wikipedia you might introduce opportunistic editing" to influence the outcome of cases.

- Kenneth Ryesky, a New York tax attorney, says "citation of an inherently unstable source such as Wikipedia can undermine the foundation not only of the judicial opinion in which Wikipedia is cited, but of the future briefs and judicial opinions which in turn use that judicial opinion as authority.

- Stephen Gillers, NYU law professor and legal ethics guru: The most critical fact is public acceptance, including the litigants, he said. A judge should not use Wikipedia when the public is not prepared to accept it as authority. He said it's best used for "soft facts."

- Lawrence Lessig, a Stanford law professor urges using a system such *www.webcitation.org* that captures in time online sources like Wikipedia, so that a reader sees "a stable reference" — i.e., the same material that the writer saw.

These points must be kept in mind by us when we intend to rely on Wikipedia as a source of authority.

The said material itself shows that it helps keep the outside world out and it protects the skin from the effects of weather and exposure. Secondly, it acts like a sealant to help keep the inside world in.

25. It is, therefore, accepted that if used as a preventive measure, of course, it would have a curative value. In any event having regard to the definition of drugs, any product which prevents a disorder of human function would also come within the purview of drug.

If the submission of Mr. Dwivedi is taken to its logical conclusion, even a Plaster of Paris or other ingredients used for setting a fractured right bone may not be treated to be coming within the purview of the definition of "drug".

26. This Court in Chamanlal Jagjivandas Sheth Vs. State of Maharashtra [(1963) Supp. 1 SCR 344], opined that even absorbent,

cotton wool, roller bandages and gauze would be drugs within the meaning of the provisions of the Act, stating :

> "…..The expression "substances", therefore, must be something other than medicines but which are used for treatment. The part of the definition which is material for the present case is "substances intended to be used for or in the treatment". The appropriate meaning of the expression "substances" in the section is "things". It cannot be disputed, and indeed it is not disputed, that absorbent cotton wool, roller bandages and gauze are "substances" within the meaning of the said expression. If so, the next question is whether they are used for or in "treatment". The said articles are sterilized or otherwise treated to make them disinfectant and then used for surgical dressing; they are essential materials for treatment in surgical cases. Besides being aseptic these articles have to possess those qualities which are utilized in the treatment of diseases. Thus, for instance, in the case of gauze – one of the articles concerned in this appeal – it has to conform to a standard of absorbency in order that it might serve its purpose: otherwise the fluid which oozes is left to accumulate at the site of the wound or sore. The Legislature designedly extended the definition of "drug" so as to take in substances which are necessary aids for treating surgical or other cases. The main object of the Act is to prevent sub-standards in drugs, presumably for maintaining high standards of medical treatment. That would certainly be defeated if the necessary concomitants of medical or surgical treatment were allowed to be diluted: the very same evil which the Act intends to eradicate would continue to subsist."

27. We may, however, place on record that in State of Goa and Others Vs. Leukoplast (India) Ltd. [(1997) 4 SCC 82] while considering Entry 77 of the Sales Tax Act which spoke of drugs and medicines, including all I.V. Drips to hold that Zinc Oxide Adhesive Plaster BPC (Leukoplast), Surgical Wound Dressing (Handyplast); Belladona Plaster BPC; Capsicum Plaster BPC and Cotton Crape Bandages BPC (Leukocrapes) were held to be not 'medicine' or 'drug'. Apart from the fact that this Court did not take into consideration the decision in Chimanlal (supra), it was opined;

> "The assessee's contention that it has got a licence to manufacture these products under the Drugs and Cosmetics Act and its production is controlled at every stage by the Drug Control Authorities does not conclude the matter. The question is how these terms are understood by people generally? For example, can a bandage be treated as a drug or a medicine? Will the position be different if the bandage is medicated? These questions cannot be decided by reference to any definition of the Drugs and Cosmetics Act or product control licence issued by the Drugs Controller. There is no definition given in the Local Sales Tax Act or in the Central Sales Tax Act of these terms. It has to be found out how these products are understood and treated in the market. In the ordinary commercial sense, are these articles considered as drugs or medicines? These are basically questions of fact."

28. The said decision, therefore, in our opinion, cannot be held to be of any assistance for determining the issue involved herein. For the purpose of finding out the definition of 'drug', within the meaning of the Sales Tax Act, this reference to the statutory meaning contained in the Act would be permissible. However, if the definition contained therein does not fit in with the object and purport for which an entry had been introduced under the local Sales Tax Act, the matter would be different. It has not been suggested nor could it be that even the ordinary meaning of 'medicine' cannot be read into the taxing statute while interpreting an Entry made therein.

It is interesting to note that in Leukoplast (supra), this Court itself observed;

> **"12.** Lord Reid pointed out that in the Purchase Tax Act, "medicine" had not been defined. So it had to be understood as an ordinary word of English language. Lord Reid observed:
>
> > "As with so many English nouns there is no clear limit to the denotation of the word medicine. All the circumstances must be considered and there may be cases where it is extremely difficult to decide whether or not the term medicine is properly applicable. But here I think that however one approaches the matter it would be a misuse of language to call

> Ribena a medicine and I would therefore allow the appeal."

**13.** Lord Morris who delivered a dissenting judgment tried to define the term "medicine" in the following manner:

> "What then is a medicine? The learned Judge (1969) 1 WLR at p. 1527 pointed to a dictionary definition of medicine (when used in a sense other than a substance) as 'the science and art concerned with the cure, alleviation, and prevention of disease, and with the restoration and preservation of health'. In line with the learned Judge I think that a fair approach is to regard a medicine as a medicament which is used to cure or to alleviate or to prevent disease or to restore health or to preserve health."

**14.** Lord Wilberforce, who agreed with Lord Reid, pointed out that the fact that a drug was present in something did not convert that preparation as a whole into a drug. Merely because Vitamin C was present in Ribena, it did not become a drug."

29. Mr. Dwivedi has placed strong reliance on a decision of this Court in Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur etc. [(1996) 9 SCC 402]. This Court therein applied common sense test in relation to 'Dant Manjan' (Tooth powder) to hold that it is not a medicine, opining :

> **"3.** We have heard the learned counsel at some length. He also invited our attention to the provisions of the Drugs and Cosmetics Act, 1940, the opinion of the experts, the statements of a few consumers as well as the description given in certain Ayurvedic books and contended that the preparation would fall within the relevant entry in the exemption notification. The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance."

30. Tooth powder is never treated to be a medicinal preparation. It is a toiletary preparation. No evidence on record therein was produced to prove that common man who uses 'dant manjan' daily to clean his teeth consider it as a medicine and not as a toilet requisite. It does not have a limited use for a limited time. The said decision, in our opinion having regard to the entry contained in the Schedule "K" appended to the Drugs and Cosmetics Rules cannot be said to have any application in the instant case.

The product, in question, however, is treated to be a "drug". For its production, a license is required. Further, it finds place in Indian

Pharmacopeia; and it does not contain any perfume. A cosmetic ordinarily would contain some perfume.

31. Reliance has also been placed by Mr. Dwivedi on Alpine Industries Vs. Collector of Central Excise, New Delhi [(2003) 3 SCC 111], wherein this Court was considering a product known as "Lip Salve". It was principally to be used by the soldiers stationed at a high altitude. It was, however, found to be used as protection from dry, cold weather or sun rays. It was noticed that it is neither prescribed by any doctor nor obtained from the chemist or pharmaceutical shops in the market. This Court, categorically noticed that under Chapter 30 of the Central Excise Rules, pharmaceutical product was a "medicament" under Heading 30.03, what was covered, having regard to the provisions contained in the Chapter Note, that even if they have "therapeutic or prophylactic properties", are excluded therefrom. "Medicament" was defined in Note 2 as item in "goods which are either products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic use". It is on the aforementioned premise this Court opined;

> "**13.** Reading the above italicized portions of Note 2 and Note 5 with Entry 33.04, we find ourselves in 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 " *preparations for 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 Entries 33.03 to 33.07 as per Note 2 under Chapter 33. The product clearly is covered by Entry 33.04 read with Note 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."

The said decision, therefore, is also not applicable to the facts of the instant case.

32. "Lip Salve" was found to have no Ayurvedic ingredient and it was perfumed, whereas, the production, in question finds place in Indian Pharmacopeia, and is also not perfumed.

33. The learned senior counsel has also placed reliance on the decision of this Court in State of Goa & Anr. Vs. M/s. Colfax Laboratories Ltd. & Anr. [JT 2003 8 SC 203]. This Court therein inter alia followed BPL Pharmaceuticals (supra). In that case, this Court was dealing with "after

shave lotion" which has been considered as a cosmetic and toilet preparation by the Excise Commissioner who was an expert in the field. It is in that view of the matter, the decision of the Excise Commissioner was not interfered with.

Answer to the questions posed therein, therefore, must be found having regard to the facts and circumstances of the cases noticed supra.

34. In the context of Ayurvedic Products, vis-à-vis their medicinal value came up for consideration in Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur [(2006) 3 SCC 266], wherein it was stated:

> **"20.** It will be seen from the above definition of "cosmetic" that the cosmetic products are meant to improve appearance of a person, that is, they enhance beauty, whereas a medicinal product or a medicament is meant to treat some medical condition. It may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. What is to be seen is the primary use of the product. To illustrate, a particular Ayurvedic product may be used for treating baldness. Baldness is a medical problem. By use of the product if a person is able to grow hair on his head, his ailment of baldness is cured and the person's appearance may improve. The product used for the purpose cannot be described as cosmetic simply because it has ultimately led to improvement in the appearance of the person. The primary role of the

> product was to grow hair on his head and cure his baldness."

35. The authorities referred to hereinbefore clearly show that there does not exist difference of opinion on legal principles. What is however required is the application thereof to the fact of each case and the statute involved.

36. In determination of the question involved herein, we cannot be oblivious of the fact that Revenue itself thought 100 per cent pure white petroleum jelly of I.P. grade (non-perfumed) to be a pharmaceutical preparation from 1981 to 1989. No material change has occurred after the said period.

The question was referred to by a learned Single Judge of the Allahabad High Court in M/s. Balaji Agency, Gorakhpur Vs. Commissioner of Sales Tax [1994 UPTC 184]., wherein only on the basis that vaseline finds place in Entry 26A of the Schedule as inserted by notification dated 14.4.1974, it was held to be a cosmetic or a toilet requisite.

37. Submission of Mr. Dwivedi that in Balaji (supra), common parlance test was also applied to Vaseline, is stated to be rejected. Vaseline is dealt with in paragraph 5 of the judgment which was on the premise that it was included in the entry in question. With regard to other products, namely Emami Naturally etc., the "user test" was applied. Only in view of the said decision, an application was filed in terms of Section 22 of the Act. The Tribunal and the High Court took a different view only having regard to Balaji (supra), without noticing the distinctive features thereof.

38. There cannot be any doubt whatsoever that artificial definition of a term under a statute is permissible in law, but when goods which were included in one notification is consciously taken out in the latter, the same meaning cannot be attributed thereto simply on the basis of judicial interpretation.

39. When a case of obvious intent on the part of the Legislature is made out, a meaning which subserves the legislative intent must be given effect to. It is however also well known that when a word is defined by the legislature itself, the same meaning may be attributed even in the changed situation.

Entry 5 relates to "cosmetics" and "toilet preparation". If the common parlance test is to be applied, vaseline must come within the purview of cosmetic or toilet preparation. With a view to satisfy the requirements of the said definition, it must be held to be used for beautification or care of the skin in the normal circumstances. If the product, in question does not satisfy the aforementioned twin tests, it is difficult to presume any legislative intention in this behalf despite the fact that Vaseline had been deleted from the entry relating to cosmetic and toilet preparation.

This Court in The Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. M/s. Jaswant Singh Charan Singh [AIR 1967 SC 1454], clearly held;

> "….There were two items in the Schedule, namely, item 6, "vegetables", and item 36, "betel leaves", and subsequently item No. 36 was deleted by an amendment of the Act. This Court held that the use of two distinct and different items, i.e., "vegetables' and "betel leaves" and the subsequent removal of betel leaves from the Schedule were indicative of the Legislature's intention of not exempting betel leaves from taxation."

40. Even if the Tribunal or the High Court did not apply the common parlance test, what should necessarily be applied is the commercial meaning test or the meaning in common parlance test.

It is interesting to note that application of common parlance test was applied in M/s. Jaswant Singh (supra) stating that only because "charcoal" contains the word 'coal', the same would not mean to be a species of coal.

41. Reliance has rightly been placed for the said proposition on His Majesty the Kind v. Planters Nut and Chocolate Co. Ltd. [1951 CLR (Ex) 122] wherein it is stated:

> "It will be noted that none of these definitions of 'fruit' and 'vegetable' (except in the strictly botanical sense) include 'nuts' of any sort.
>
> It is of considerable interest, also, to note that in the tariff rates under The Customs Act (which, as a revenue Act, I consider to be in pari material), separate items are set up for fruits, for vegetables, and also for 'nuts of all kinds, not otherwise provided, including shelled peanuts.' This would seem to indicate that in the minds of the legislators, nuts were not included in the categories of fruits or vegetables, and also that peanuts fell within the category of nuts. I do not think that their view of the matter differs at all from the common understanding of the words.

> My findings must be that as products and as general commodities in the market, neither salted peanuts nor cashews, or nuts of any sort, are generally denominated or known in Canada as either fruits or vegetables. I think it may be assumed, therefore, that if Parliament had intended to include 'nuts' among the exempted foodstuffs, the word 'nuts' would have appeared in the schedule. That being so, it must follow that salted peanuts and cashew nuts, which as I have said above are considered generally in Canada to be within the category of 'nuts,' do not fall within the exemptions provided for fruit and vegetables in Schedule III."

In M/s. Asian Paints India Ltd. Vs. Collector of Central Excise (1988) 2 SCC 470], this Court opined;

> "**8.** It is well-settled that the commercial meaning has to be given to the expressions in tariff items. Where definition of a word has not been given, it must be construed in its popular sense. Popular sense means that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it. See *CIT* v. *Taj Mahal Hotel.* This Court observed in *Indo International Industries* v. *CST* that in interpreting items in statutes like the Excise Act or Sales Tax Acts, whose primary object was to raise revenue and for which purpose to classify diverse products, articles and substances, resort should be had not to the scientific and technical meaning of the terms or expressions used but to their popular meaning, that is to say, the meaning attached to them by those dealing in them.
>
> **9.** Justice Cameron of the Canadian Exchequer Court in *King* v. *Planter's* Co. and the decision of the United States Supreme Court in " *Two Hundred*

> *Chests of Tea* " emphasised that commercial understanding in respect of the tariff items should be preferred. It was observed that the legislature does not suppose our merchants to be naturalists or geologists, or botanists."

{See also Shri Bharuch Coconut Trading Co. and Others *Vs.* Municipal Corporation of the City of Ahmedabad and Others [1992 Supp. (1) SCC 298]. }

42. The assessee had filed a large number of affidavits. The deponents of the said affidavits have not been cross-examined. It is even from that point of view the application of common parlance test stood satisfied in the instant case.

43. Furthermore, an expert in the field has also given his opinion in favour of the appellant. This Court in Quinn India Ltd. Vs. Commissioner of Central Excise, Hyderabad [(2006) 9 SCC 559], classified a product relying, inter alia, on the report of the clerical examiner as under :

> **"7.**..The Tribunal has completely ignored the report of the Chemical Examiner dated 6-10-1981 and the final opinion of the Chief Chemist dated 2-4-1992 coupled with the classification issued by the Department regarding use of wetting agents in the textile industries falling under Sub-Heading 3402.90. Test reports of the Chemical Examiner and Chief Chemist of the Revenue unless demonstrated

> to be erroneous, cannot be lightly brushed aside. The Revenue has not made any attempt to discredit or to rebut the genuineness and correctness of the reports of the Government, Chemical Examiner and Chief Chemist. Thus, the reports are to be accepted along with other documentary evidence in the form of classification issued by the Department regarding use of wetting agents in the textile industries to hold that the product Penetrator 4893 possessed surface active properties and, therefore, is covered by Exemption Notification No. 101/66 dated 17-6-1966 as amended from time to time."

In this case also, the report of the Chemical Examiner is in favour of the assessee. Furthermore, in a case of this nature, where the revenue itself has been holding the assessee to be a producer of a pharmaceutical product, the burden would be on the Revenue to establish that the goods cease to fall under a given entry. For the said purpose, no material was placed by the Revenue which was imperative.

In Hindustan Ferodo Ltd. Vs. Collector of Central Excise, Bombay [(1997) 2 SCC 677], this Court held;

> "**4.** It is not in dispute before us, as it cannot be, that the onus of establishing that the said rings fell within Item 22-F lay upon the Revenue. The Revenue led no evidence. The onus was not discharged. Assuming therefore, that the Tribunal was right in rejecting the evidence that was produced on behalf of the appellants, the appeal should, nonetheless, have been allowed.

> **5.** It is not the function of the Tribunal to enter into the arena and make suppositions that are tantamount to the evidence that the party before it has failed to lead. Other than supposition, there is no material on record that suggests that a small-scale or medium-scale manufacturer of brake linings and clutch facings "would be interested in buying" the said rings or that they are marketable at all. As to the brittleness of the said rings, it was for the Revenue to demonstrate that the appellants' averment in this behalf was incorrect and not for the Tribunal to assess their brittleness for itself. Articles in question in an appeal are shown to the Tribunal to enable the Tribunal to comprehend what it is that it is dealing with. It is not an invitation to the Tribunal to give its opinion thereon, brushing aside the evidence before it. The technical knowledge of members of the Tribunal makes for better appreciation of the record, but not its substitution."

Yet again in Union of India and Others Vs. Garware Nylons Ltd. and Others [(1996) 10 SCC 413], this Court opined :

> "…The burden of proof is on the taxing authorities to show that the particular case or item in question is taxable in the manner claimed by them. Mere assertion in that regard is of no avail..."

44. If an entry had been interpreted consistently in a particular manner for several assessment years, ordinarily it would not be permissible for the Revenue to depart therefrom, unless there is any material change.

{See Bharat Sanchar Nigam Ltd. and Another Vs. Union of India and Others [(2006) 3 SCC 1].}

45. Applying the dominant intention test, vis-à-vis, the Aspect Theory, this Court in M/s. United Offset Process Pvt. Ltd. Vs. Asst. Collector of Customs, Bombay and Others [1989 Supp.(1) SCC 131], opined :

> "If there is no meaning attributed to the expressions used in the particular enacted statute then the items in the customs entries should be judged and analysed on the basis of how these expressions are used in the trade or industry or in the market or, in other words, how these are dealt with by the people who deal in them, provided that there is a market for these types of goods. This principle is well known as classification on the basis of trade parlance. This is an accepted form of construction. It is a well known principle that if the definition of a particular expression is not given, it must be understood in its popular or common sense viz. in the sense how that expression is used everyday by those who use or deal with those goods.

46. In Bharat Sanchar Nigam Ltd. and Another Vs. Union of India and Others [(2006) 3 SCC 1], with respect to the dominant intention test vis-à-vis the aspect theory, this Court held:

> "…The Courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual

> position. The reason why Courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a bench of superior strength or in some cases to a bench of superior jurisdiction."

In Imagic Creative Pvt. Ltd. v. The Commissioner of Commercial Taxes and Ors., [(2008) 2 SCC 614] where applicability of Article 246 of the Constitution of India, read with Seventh Schedule was in question, the Court took recourse to various theories including the Aspect Theory. {See M/s Deepak Agro Solution Ltd. v. Commissioner of Customs, Maharashtra (Civil Appeal No. 5210 of 006) disposed of on 8.5.2008 by this Court}

47. We have noticed hereinbefore that the meaning of "drug" is very wide and same has been held to be so in a large number of cases. Balaji

(supra) was clearly not applicable whereupon reliance has been placed by the High Court and/or the Tribunal. In our opinion, the impugned judgments, for these reasons, cannot be sustained. They are set aside accordingly.

48. The appeals are allowed with costs. Counsel's fee assessed at Rs.50,000/-.

……..……J.
[S.B. Sinha]

……..……J.
[V.S. Sirpurkar]

New Delhi
May 16, 2008