REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELALTE JURISDICTION

CIVIL APPEAL NO. 4048/2001

Commissioner of Central Excise, Nagpur .. Appellant

Vs.

Shree Baidyanath Ayurved Bhawan Ltd. .. Respondent

WITH

Civil Appeal Nos.2396-2397/2003

M/s.Shree Baidyanath Ayurved Bhawan Ltd. .. Appellant

Vs.

Commissioner of Central Excise, Patna ..Respondent

WITH

Civil Appeal Nos.9739-9746/2003

M/s. Shree Baidyanath Ayurved Bhawan,Ltd. .. Appellant

Vs.

Commissioner of Central Excise, Patna ..Respondent

WITH

CIVIL APPEAL NO.6691/2004

M/s. Shree Baidyanath Ayurved Bhawan Ltd.
Sathariya, District - Jaunpur ..
Appellant
Vs.
Commissioner of Central Excise, Allahabad ..Respondent

AND

Civil Appeal No .1521/2009(D.No.20489/06)

Commissioner of Central Excise, Nagpur ..Appellant

Vs.

M/s. Baidyanath Ayurvedic Bhawan Ltd. ..Respondent

JUDGEMENT

R.M. LODHA, J.

The only issue in this batch of thirteen civil appeals is in respect of classification of "Dant Manjan Lal"(DML) manufactured by M/s. Baidyanath Ayurved Bhawan Limited (`Baidyanath', for short). While Baidyanath contendsthat the product DML is medicament under Chapter Sub-heading 3003.31 of the Central Excise Tariff Act, 1985, the stand of the Department is that the said product is a cosmetic/toiletry preparation/tooth powder classifiable under Chapter Heading 33.06.

2. The true classification of the product DML has been subject of fluctuating opinion among the benches of the Customs, Excise and Gold (Control) Appellate Tribunal (for short, `Tribunal'). West Regional Bench of the Tribunal decided the classification in favour of Baidyanath and held that DML is classifiable under Chapter Sub-heading 3003.31. The similar view has been taken by East Regional Bench of the Tribunal. However, the larger bench of the Tribunal to which the issue of classification of DML was referred, has held that DML is classifiable under Chapter Sub-heading 3306.10. It is for this reason that the Department as well as Baidyanath has preferred separate appeals.

3. The litigative journey with regard to classification of this product has reached this Court earlier in Shree Baidyanath Ayurved Bhawan Ltd. Vs. Collector of Central Excise, Nagpur1. We shall refer to that decision a little later.

1 (1996) 9 SCC 402

First we shall advert to the sequence of facts leading to the present controversy.

4. Baidyanath is engaged in the activity of manufacturing medicines adopting Indian systems. They have their works situate at Calcutta (now Kolkata), Naini, Patna, Nagpur and Jhansi. One of the products being manufactured by Baidyanath is DML. The product is a powder compounded with Geru, Peepall, Sonth, Kali Mirch, Tambakuh, Clove Oil, Camphor, Pepperment, Babul Chhal, Tumber Beej. Baidyanath claims that DML is manufactured in accordance with the formulae given in Ayurved Sar Sangraha (an authoritative text on the Ayurved system of medicine) by using the ingredients mentioned therein. Ayurved Sar Sangraha is notified under the First Schedule of the Drugs and Cosmetics Act, 1940 (for short `Act, 1940'). It is also the case of the Baidyanath that DML is sold in the name which is specified in Ayurved Sar Sangraha.

5. Prior to 1975, the product DML was considered to be classifiable under Tariff Item 14E of the First Schedule of the Central Excise and Salt Act,1944 (for short `Act, 1944') which item covered medicines. Accordingly, DML was not subject to levy of excise duty and exempted therefrom. On March 1, 1975, Residuary Item 68 was incorporated in the Act, 1944 wherein all items not elsewhere specified in the tariff were liable to be classified. Baidyanath filed a fresh classification list and commenced paying excise duty as was leviable under Residuary Item 68 of the Act, 1944.

6. On March 1, 1978, the Central Government issued an Exemption Notification bearing No. 62/78-CE whereby exemption was extended to ".....all drugs, medicines, pharmaceuticals and drug intermediates not elsewhere specified." Baidyanath claimed the benefit extended by the Central Government under the said Notification and stopped paying duty on the product DML while filing fresh classification list.

7. In the month of March 1980, the Department expressed doubts about the classification of DML and issued notices to Baidyanath requiring them to show cause as to why DML be not subjected to tariff rate without treating it as an Ayurvedic Medicine and without extending the benefit available under the Notification No.62/78-CE.

8. Baidyanath resisted various show cause notices on diverse grounds, namely; that DML is an Ayurvedic Medicine, that it manufactures the same under a drug licence; that all the ingredients of DML are mentioned in the authoritative book of Ayurved System of Medicine; and that the product is an Ayurvedic Medicine in the trade and common parlance. The Baidyanath, thus, claimed that it was eligible for the benefit extended under the Notification No.62/78-CE.

9. The view of adjudicating authorities who issued show cause notices was not uniform. Their opinion has been varied. While some of the adjudicating authorities held that DML was an Ayurvedic Medicine; the others took the view that it was not so. All these matters ultimately found their way to the Tribunal. On July 14, 1985, the Tribunal delivered its judgment in the matter and held that in common trade parlance, DML is neither treated nor understood as an Ayurvedic Medicine and hence could not be classified as such. The Tribunal, thus, held that the product DML was not eligible for the benefit extended under Notification No.62/78-CE as it was not covered by the category of goods mentioned at Sr.No.19 of the schedule to the said notification. Pertinently, the goods mentioned in the said category included `drugs, medicines, pharmaceuticals and drug intermediates' not elsewhere defined.

10. The aforesaid order of the Tribunal came to be challenged at the instance of Baidyanath before this Court in various appeals. The appeals were admitted and finally disposed of on March 30, 1995 (referred to hereinafter as Baidyanath I1) . This Court held that the product DML would have to be classified on the basis of the common trade parlance test and applying that test, the Tribunal was correct in its finding that DML was not known as an Ayurvedic Medicine. The finding of the Tribunal that DML was toilet requisite was upheld. Be it noticed here that during the pendency of the appeals before this Court, Central Excise Tariff Act, 1985 (for short, `New Tariff Act') was enacted which replaced the Schedule to the Act, 1944. Chapter 30 of the New tariff Act deals with pharmaceutical products. Chapter Sub-heading 3003.30 provided for no excise duty leviable on medicaments, including those used in Ayurvedic, Unani, Siddha, Homeopathic or Bio-chemic System. On August 28, 1987, the First Schedule to the Drugs and Cosmetic Act, 1940 was amended and the book `Ayurved Sar Sangraha' was included therein.

11. On September 25, 1991, the Central Board of Excise and Customs (for short, `the Board') issued a circular in respect of DML and advised its classification as an Ayurvedic Medicine. It is Baidyanath's case that in pursuance

of the circular dated September 25,1991, the concerned Commissioner of Central Excise issued trade notices directing the field formations to classify DML as an Ayurvedic Medicine. The assessee filed classification list in its various units declaring DML as an Ayurvedic Medicine and claimed the exemption benefit extending thereto. Baidyanath, thus, stopped paying excise duty on DML.

12. During 1996-97, Chapter 30 of the New Tariff came to be amended. Under Chapter Heading 30.03, Sub-heading 3003.31 was inserted which provided levy of nil duty in respect of the medicaments manufactured exclusively in accordance with the formulae described in the authoritative books in the First Schedule to the Drugs and Cosmetics Act, 1940.

13. On October 31, 1996, the Board withdrew the circular dated September 25, 1991 and advised its field formations to classify the product DML in accordance with the order passed by this Court in Baidyanath I1. The assessee approached the Board by way of representation putting forth the plea that after the introduction of New Tariff Act and the amendments made in 1996, there is a specific definition of Ayurvedic Medicine and hence classification of its product DML

should be done on the basis of that definition alone and not the common trade parlance test. The Board thereafter on May 27, 1997, sent communication to the Commissioner of Central Excise, Nagpur, concerning the classification of DML to decide the classification of the product in the light of opinion of Drug Controller of India as well as instructions contained in the circulars dated March 29, 1994 and April 3, 1996.

14. On September 10, 1997, the Board withdrew its circular dated May 27, 1997 and directed classification of DML in terms of judgment of this Court in Baidyanath I1 with regard to this very product.

15. In pursuance of the circular issued by the Board on October 31, 1996, several notices came to be issued to Baidyanath by various Excise Authorities at Patna; Allahabad (Naini); Jhansi and Nagpur asking them to show cause as to why DML should not be classified as a toiletry under Chapter 33 of the New Tariff Act and duty be demanded accordingly. The show cause notices were resisted and contested by Baidyanath and the matter reached the Tribunal. As stated above, West Regional Bench and East Regional Bench of the Tribunal decided the classification in favour of Baidyanath. Thereafter, the classifiability issue of DML came up for consideration before the Principal Bench of the Tribunal at New

Delhi and the Bench doubted the correctness of the decisions of West Regional Bench and East Regional Bench and referred the issue to the Larger Bench. The Larger Bench of the Tribunal decided the reference and held that the product DML was classifiable under Chapter Heading 33.06 of the New Tariff Act.

16. The factual position that the product DML is manufactured by Baidyanath in accordance with the formulae mentioned in the book `Ayurved Sar Sangraha' which is notified in the First Schedule appended to Drugs and Cosmetics Act, 1940 and that the product is sold in the name which is specified in that book has not been seriously put in issue by the Department before us.

17. We heard Mr. C.A.Sundram, learned senior counsel for Baidyanath and Mr. K. Radhakrishnan, learned senior counsel for the Department at quite some length.

18. Mr. C.A.Sundram would contend: (i) that the product DML falls under Chapter Sub-heading 3003.31 as it is a medicament because it comprises of two or more constituents which have been mixed together for therapeutic and prophylactic uses. It is manufactured exclusively in accordance with the formulae described in `Ayurved Sar Sangraha' which is an authoritative text on the Ayurvedic

System of treatment and is notified in the First Schedule to the Drugs and Cosmetics Act, 1940. Moreover, in accordance with the provisions of the Drugs and Cosmetics Act, 1940, the said product is manufactured by Baidyanath under a drug licence issued by the concerned competent authority. Further, the product is sold under the name of `Dant Manjan Lal' which is the name specified for the said product in `Ayurved Sar Sangraha', (ii) that the Government accepts that the product DML is a classical or pharma-copoeial Ayurvedic Medicine. During the parliamentary debates, the Finance Minister clearly stated that if the two conditions are met namely, the product is manufactured exclusively in accordance with the formulae described in the authoritative text on the Ayurvedic System of treatment and is notified in the First Schedule to the Drugs and Cosmetics Act, 1940 and the product is sold in the name which is the name specified for the said product in the authoritative text, there is no duty on the product; (iii) that the New Tariff Act contains definition of Ayurvedic Medicines post-1996 and now there is clear distinction drawn between classical or pharmacopoeial Ayurvedic Medicines and patent and proprietary medicines. Once there is a definition provided in the Tariff Act, that definition alone shall prevail and common trade parlance test is not applicable. The common trade parlance test is to be applied only in the

absence of definition; (iv) that therapeutic and prophylactic uses of DML as pharmacopoeial Ayurvedic Medicine clearly stand established as the formulae has been in existence for the past several 100 years which is contained in the book `Ayurved Sar Sangraha' and the said book is notified in the First Schedule of the Drugs and Cosmetics Act, 1940 and the product is accepted as a medicine under the Drugs Act; (v) that entry in Chapter Sub-heading 3003.31 being more specific entry, it must be preferred over general residuary entry of 3306.10. By applying general rules of interpretation to the Schedule and the New Tariff Act, a specific entry must prevail over a general entry; (vi) that Note 1(d) of Chapter 30 does not cover -"preparations of Chapter 33 even if they have therapeutic or prophylactic properties" and for a product to be excluded by this Note 1(d), it must be a product covered in Chapter 33 while DML is an Ayurvedic Medicine specifically covered under Chapter 30; and (vii) that the product DML does not qualify Note 2 of Chapter 33 as this Court in the case of BPL Pharmaceutical Limited vs. Collector of Central Excise, Vadodra2, has held that for a product to fall under this Entry, it must: (i) be suitable for use as goods of Chapter Heading 33.06, (ii) the packaging, with labels, literature and other indications must indicate that it is for cosmetic or toilet use, and (iii) irrespective of whether they are held out to have

subsidiary curative or prophylactic properties.

2 1995 (77) ELT 500 (SC)

19. The learned senior counsel for Baidyanath relied *upon the judgment of this Court in the case of Collector of Central Excise vs. Andhra Sugar Limited3 wherein the rule of `contemporaneous exposito' has been explained namely that for construction of a statute the Legislative intent and Executive instructions may be taken into account to determine the scope and intent of the entry or statue under consideration. He also relied upon decisions of this Court in (1) Oswal Agro Mills Ltd. vs. Collector of Central Excise & Ors.4 (2) Amrutanjan Ltd. vs. Collector of Central Excise5; (3) Commissioner of Central Excise, Calcutta vs. Sharma Chemcial Works6; (4) Commissioner of Central Excise, Nagpur vs. Vicco Laboratories7 and (5) Meghdoot Gramodyog Sewa Sansthan vs. Commissioner of Central Excise, Lucknow8.*

20. Mr. K. Radhakrishnan, learned senior counsel for the Department contending contra, by referring to Notes 1 (d) and 2 of Chapter 30 and Note 2 to Chapter 33 and Chapter Heading 30.03 and 33.06, submitted that Chapter 30 excludes

3 1989 Supp. (1) SCC 144

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1993 (6) ELT 37 SC

5 1995 (77) ELT 500 SC

6 2003 (154) ELT 328

7 2005 (17) ELT 17 SC

8 2004 (174) ELT 14 SC

preparations of Chapter 33 even if they have therapeutic or prophylactic properties. He would submit that the word used in Note 1(d) of Chapter 30 is `properties' while the word used in Note 2 of Chapter 30 is `uses'. These two words, `properties' and `uses' import different concepts. Mr. K. Radhakrishnan would submit that the restrictive definition of the word `medicaments' in Note 2 of Chapter 30 is for the purposes of Heading 30.03. Chapter Heading 30.03 deals with medicaments including veterinary medicaments and medicaments for therapeutic and prophylactic use. Medicaments cover the entire Heading 30.03 including every Sub-heading. Thus, for a product to qualify under `medicament', `use' and `not properties' of the product must be therapeutic or prophylactic. The common parlance test, the learned senior counsel would submit, is inbuilt in the definition of `medicament' in Note 2 of Chapter 30 as the emphasis is on the word `uses'. In the submission of the learned senior counsel for the Department, common parlance test is well recognized as one of the twin tests which should be applied to

classify a product as medicament or cosmetic even post 1996. Without satisfying the common parlance test, the classification cannot be applied. Mr. K. adhakrishnan submitted that as to whether the product described against the Sub-heading 3003.31 is a medicament or not can be ascertained only after resorting to Note 2 of Chapter 30 and the common parlance test inbuilt in it. Rule 1 of the Rules for the interpretation of the Schedule to the New Tariff Act mandates that classification shall be determined according to the terms of the Heading and any relative Section or Chapter Notes, hence Chapter Note 2 dealing with medicaments cannot be by-passed.

21. The learned senior counsel for the Department would urge that the classification cannot be finalized by looking at the description of the goods provided against Sub-heading 3003.31; the description of goods provided against Sub-heading 3003.31, is not a definition of medicament. According to him, Sub-heading 3003.31 provides the process of manufacture of certain medicaments including those used in Ayurvedic and sale of the same. He would submit that procedure for manufacture of a product is not a relevant test legally recognized for classification of the product.

22. Mr. K. Radhakrishnan, learned senior counsel would also submit that the definition under Section 3(a) of Drugs and Cosmetics Act, 1940 does not relate to Ayurvedic Medicines alone and it is materially distinct from Sub-heading 3003.31 of Chapter 30 as collocation of words "sold under the name as specified in such book or pharmacopoeia" is conspicuously absent in Section 3(a).

23. The learned senior counsel for the Department heavily relied upon a three Judge Bench decision of this Court in Baidyanath I1 wherein this Court held that the product DML is not an Ayurvedic Medicine. This Court approved common parlance test applied by the Tribunal. He would submit that the product is the very same product for which Baidyanath is agitating to get a classification under the heading medicament. The product has not undergone any change in their composition, character and use; merely because there is some difference in the tariff entries, the character and use of the product will not change. According to Mr. K. Radhakrishnan, by inclusion of the book `Ayurved Sar Sangraha' in the first schedule of the Drugs and Cosmetics Act, 1940, the product DML could not be classified as `medicament'. The senior counsel also submitted that the

earlier decision of this Court relating to very same product operates as res judicata which is based on three legal maxims: (1) Nemo debet bis vexari pro una et eadem causa (2) Interest republicae ut sit finis litium and (3) Res judicata pro veritate occipitur. He, thus, submitted that the product DML is classifiable under Heading 33.06 being a tooth powder.

24. We deem it appropriate at this stage to set out relevant portions in the Tariff Items, Chapter Notes and the Rules for the interpretation of the Schedule which have bearing for consideration before us.

25. Rules for interpretation of the Schedule as stated in New Tariff Act are as follows:

> "1. The titles of Sections and Chapter are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the provisions hereinafter contained.
>
> 2. (a) .....
>
> (b) ..... The classification of goods consisting of more than one material or substance shall be according to the principles contained in rule 3.
>
> 3. When an application of sub-rule(b) of rule 2 or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific

description shall be preferred to headings providing a more general description. However, when two or more

headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixture, composite goods consisting of different materials or made up of different components, and goods put up in sets, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in the numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related Chapter Notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings at the same level are comparable. For the purposes of this rule, the relative Section Notes also apply, unless the context otherwise requires.

GENERAL EXPLANATORY NOTES

1. Where in column (3) of this Schedule, the description of an article or group of articles under a heading preceded by "-" the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by "- -", the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of article or group of articles which has "--".

26. Chapter 30 to the extent, it is relevant for the present matter, is as follows:

"CHAPTER 30
PHARMACEUTICAL PRODUCTS

NOTES

1. This Chapter does not cover:
(a) .....
(b) .....
(c) .....
(d) Preparations of Chapter 33 even if they have therapeutic or prophylactic properties;
(e) .....
(f) .....
(g) .....
2. For the purposes of the heading No.30.03,
(i) `Medicaments' means goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within heading No.30.02 or 30.04 which are either :
(a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or
(b) unmixed products suitable for such uses.
3. .....
4. .....
5. .....
6. .....

27. Relevant portions in Chapter 33 is thus:

CHAPER 33

ESSENTIAL OILS RESINOIDS; PERFUMERY, COSMETIC OR TOILET PREPARATIONS

NOTES
1. .....

2. Heading Nos. 33.03 to 33.08 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 of other indications that they are for use as cosmetics or toilet preparations or put up in a form clearly specialized 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.

3. .....

4. .....

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
33.06	3306.00	Preparations for oral or dental Hygiene, including dentifrices (for example toothpaste and Tooth powder) and denture Fixative pastes and powders"	15%

28. In 1996-97, Chapter 30 to New Tariff Act came to be amended. Chapter Sub-heading No.3003 now stands as under:

"MEDICAMENTS (INCLUDING VETERINARY MEDICAMENTS)

3003.10-Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic

3003.20- Medicaments (other than patent or proprietary) other than those medicaments which are exclusively Aurvedic, Unani, Siddha, Homoeopathic or Bio-chemic

-Medicaments, including those used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic systems

3003.31 - - Medicaments (including veterinary Medicaments) used in Ayurvedic, Unani, Siddha or Homoeopathic Systems, manufactured exclusively in accordance with the formulae described in the authoritative books specified in the First Schedule to the Drugs and Cosmetics Act, 1940 (23 of 1940) or ..... and sold under the name as specified in such book or pharma-copoeia;"

29. Baidyanath's product DML has not been treated as Ayurvedic Medicine to qualify for exemption from payment of excise duty under Notification No.62/78-CE dated March, 1, 1978 by this Court. This Court approved common parlance test applied by the Tribunal that DML could not be described as a medicinal preparation and that it could rightly be described as a toilet preparation. In Baidyanath I1, it was held thus:

"The ingredients for the product in question are stated to be Geru (red earth) to the extent of 70% which is sated to have cooling quality but the Tribunal noticed that it is largely used as a filler or colouring agent and is not described as a medicine in common parlance. After going through the various texts, the definition of `drug' under the Drugs and Cosmetics Act, 1940 and ayurvedic books as well as opinion of experts in this behalf, the Tribunal ultimately came to the conclusion that the product in question could not be described as a medicinal preparation and accordingly rejected the claim of the appellant.

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 Department 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 in case of the appellants if the same runs counter to how the product is understood in popular parlance. That is why the Tribunal observed in para 86 of the judgment as under:

> "So certificates and affidavits given by the Vaidyas do not advance the case of Shri Baidyanath Ayurved Bhawan Limited in the absence of any evidence on record to show and prove that the common man who uses this Dam Manjan daily to clean his teeth considers this Dant Manjan as a medicine and not a toilet requisite."

It is this line of reasoning with which we are in agreement. The Tribunal rejected the claim of the appellant 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. We are, therefore, of the opinion that the Tribunal applied the correct principles in concluding that the product in question was not a medicinal preparation (`Ayurvedic') and, therefore, the appellant was not entitled to the benefit of the exemption notification. Having heard the learned counsel at length and having perused the line of reasoning adopted by the Tribunal with which we are in general agreement, we see no reason to interfere with the conclusion reached by the Tribunal and, therefore, we dismiss these appeals, but make no order as to costs."

30. Merely because there is some difference in the tariff entries, the product will not change its character. Something more is required for changing the classification especially when the product remains the same. (BPL Pharmaceuticals Ltd.)9

31. There cannot be justification enough for changing the classification without a change in the nature or a change in the use of the product. The exception being where Tariff Act itself provides for a statutory definition, obviously, the product has to be classified as per the definition.

32. The question, therefore, is: does Chapter Sub-heading 3003.31 contain a definition of Ayurvedic Medicine and, if so, common parlance test for classifiability of the product, whether medicament or cosmetic, is inapplicable?

33. Chapter 30 of the New Tariff Act deals with pharmaceutical products. Note 2 thereof provides that for the purpose of the Heading No.30.03, `medicaments' means goods .....not falling within Heading 30.02 or 30.04 which are products comprising two or more constituents having been mixed or compounded together for therapeutic or prophylactic uses or unmixed products suitable for such uses. Chapter Heading 30.03 is in respect of medicaments. Sub-heading 3003.10 refers to patent or proprietary medicaments other

9 . 1995 Supp.(3) SCC 1

than those which are exclusively Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic. Sub-heading 3003.20 refers to medicaments including those used in Ayurvedic, Unani, Sidha, Homoeopathic or Bio-chemic system. Inter alia Sub-heading

3303.31 refers to medicaments used in Ayurvedic system of medicine exclusively in accordance with the formulae described in the authoritative books specified in the First Schedule to the Drugs and Cosmetics Act, 1940 and sold under the name as specified.

34. Does Chapter Sub-heading 3003.31 contain specific definition of Ayurvedic Medicine? We do not think so. What is provided in column 3 of Schedule is description of goods against sub-heading 3003.31. We are afraid description of goods cannot be treated as definition. There is merit in the contention of the learned senior counsel for the Department that Chapter Sub-heading 3003.31 provides process for manufacture of certain medicaments including those used in Ayurvedic system and sale of the same; it is not a definition clause. Classification of a product, interpretative Rule 1 of rules for interpretation of the Schedule says, is to be determined according to the terms of the heading and any relative Section or Chapter Notes and provided such headings or Notes do not otherwise require. Chapter Sub-heading 3003.31 is an entry double dash (--) occurring under the single dash (-) heading for medicament including those in Ayurvedic Systems. As per general explanatory Note 1 appended to rules for interpretation, single dash (-) indicates the said article or

group of articles to be a sub-classification of the article or group of articles covered by the said heading and double dash (--) indicates, the said article or group of articles to be a sub-classification of the immediately preceding description of article or group of articles which has single dash (-). It is, thus, clear that Chapter Heading 30.03 would cover every Sub-heading as well. Therefore, to find out whether the product described against Sub-heading 3003.31 is a medicament or not, aid to Note 2 of Chapter 30 for the purposes of Heading 30.03 is necessarily called in. Note 2 to Chapter 30 defines medicaments for the purposes of Heading 30.03 as products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses or unmixed products suitable for such uses. The use of expression "uses" in Note 2 is not without significance and is

surely distinct from the expression "properties" used in Note 1 (d) of Chapter 30. The term "uses" brings within its comprehension, the act of user and, thus, there is merit in the submission of the learned senior counsel for the Department that common parlance test is inbuilt in Chapter Heading 30.03.

35. As a matter of fact, this Court has consistently applied common parlance test as one of the well recognized

tests to find out whether the product falls under Chapter 30 or Chapter 33. In a recent decision in Puma Ayurvedic Herbal (P) Ltd. vs. Commissioner, Central Excise, Nagpur [10] this Court observed that in order to determine whether a product is a cosmetic or medicament, a twin test (common parlance test being one of them) has found favour with the courts. This is what this Court observed:

> *".... In order to determine whether a product is a cosmetic or a medicament a twin test has find favour with the courts. The test has approval of this Court also vide CCE v. Richardson Hindustan {(2004) 9 SCC 156}. There is no dispute about this as even the Department accepts that the test is determinative for the issue involved. The tests are:*
>
> *I. Whether the item is commonly understood as medicament which is called the common parlance test. For this test it will have to be seen whether in common parlance the item is accepted as a medicament. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the product is very material . One may buy any of the ordinary soaps available in the market. But if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.*
>
> *II. Are the ingredients used in the product mentioned in the authoritative textbooks on Ayurveda ?"*

[10] *(2006) 3 SCC 266*

36. In Puma Ayurvedic Herbal (P) Ltd., the question that arose for consideration before this Court was whether the products manufactured by the appellant therein were covered under the category of medicaments or cosmetics. The following products were under consideration: 1. Puma neem facial pack (Neemal), 2. Puma anti-pimple herbal powder (Pimplex), 3. Puma herbal facial pack (Herbaucare), 4. Puma herbal remedy for facial blemishes, 5. Puma herbal massage oil, 6. Puma herbal massage oil for women, 7. Puma hair tonic powder (Sukeshi), 8. Puma scalp tonic powder (Scalpton), 9. Puma anti-dandruff oil (Dandika), 10. Puma shishu rakshan tel,

11. Puma neem tulsi. This Court referred to various decisions of this Court and held:

> "From the above judgments it follows that the law is settled on the twin test for determination of classification of a product. We have already found that the twin test is satisfied in the present case regarding most of the items under consideration."

37. Applying twin test for determination of classification of products (including common parlance test), this Court in Puma Ayurvedic Herbal (P) Ltd. held that items 1,2,3,4,7,9,10 & 11 were medicaments while items 5,6 & 8 were liable to be classified as cosmetics under Chapter sub-

heading 33.04.

38. We endorse the view that in order to determine whether a product is covered by `cosmetics' or `medicaments' or in other words whether a product falls under Chapter 30 or Chapter 33 : twin test noticed in Puma Ayurvedic Herbal (P) Ltd., continue to be relevant. *The primary object of the Excise Act is to raise revenue for which various products are differently classified in New Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products. We find it difficult to accept the contention of the learned senior counsel for Baidyanath that because DML is manufactured exclusively in accordance with the formulae described in Ayurveda Sar Sangrah which is authoritative text on Ayurvedic system of treatment and is notified in the First Schedule to the Drugs and Cosmetics Act, 1940 and the said product is sold under the name `Dant Manjan Lal' which is the name specified for the said product in*

Ayurveda Sar Sangrah, the common parlance test is not applicable. As a matter of fact, this contention is based on misplaced assumption that Chapter Sub-heading 3003.31 by itself provides the definition of Ayurvedic Medicine and there is no requirement to look beyond.

39. West Regional Bench of the Tribunal in its order dated 13.12.2000 which is subject matter of Civil Appeal 4048/2001 observed thus :

> "The Drugs and Cosmetic Act, 1940 provides for a licence to be obtained for manufacture of Ayurvedic, Sidha, Homoeopathic and Unani medicines. Technical Advisory Board to advise Central and State Government on technical matters. Among the members of this Board are persons well versed in ayurvedic medicines, including teacher in Dravya Guna and Kalplana and a practitioner in ayurvedic medicine. It also provides for a Ayurvedic, Sidha, and Unani Drugs Consultant Committee. The manufacture of ayurvedic medicament is subject to supervision and checks by officers appointed to carry out the provisions under the Drugs and Cosmetic Act, 1940.
>
> Section 3 (a) of the Drugs and Cosmetics Act, 1940 defines "Ayurvedic, Sidha or Unani Drug" as follows:
>
> Ayurvedic, Sidha or Unani drug" includes all medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease or disorder inhuman beings or animals and manufactured exclusively in accordance with the formulae described in the authoritative books of "Ayurvedic, Sidha or Unani Tibb system of medicine, specified in the First Schedule."
>
> A comparison of this definition and the entry now contained in heading 3003.30 of the Tariff shows that the two are virtually identical for the purpose of both the Drugs and Cosmetics Act and the Tariff, after its amendment, the medicament which is made exclusively in accordance with

the formulae described in the First Schedule to the Act is to be considered as ayurvedic medicament.

The effect of insertion of the new entry in the tariff is that to bring it on a par with the Drugs and Cosmetics Act, 1940. The term "ayurvedic medicament" in the tariff will have the same meaning as the meaning in the Drugs and Cosmetics Act. Therefore, if the product under consideration conforms to the requirements specified in that Act and the tariff, it will be entitled to be so classified. There would be no requirement that the Central Excise authorities

must independently test it for its efficacy as medicament by apply the provisions of Note (2) to the Chapter.

It must be emphasized that these considerations were not present before the Supreme Court which passed its orders on the classification of Dant Manjan Lal. The Tribunal, and on appeal the Supreme Court, was concerned with the classification of the goods under Item 14E of the earlier Central Excise Tariff. The Tribunal has therefore rightly applied the test as to whether the product was a medicament, as is normally understood by persons in the trade, was shown to possess the therapeutic or prophylactic properties, was demonstrated as to be medicament by being prescribed for a limited period, for a specific disease or disorder. By virtue of the amendment made to the tariff, these considerations cannot be gone into. The judgment of the Supreme Court therefore cannot be a deciding factor in determining its classification under the heading as it now stands. This in fact is the view that has been expressed by the Commissioner (Appeal), Patna, whose order was cited by the advocate for the appellant. We therefore hold t hat the product was rightly classifiable under heading 30.03 as claimed by the appellant."

We do not agree. The approach of the West Regional Bench is fallacious in what we have indicated above as it overlooks and ignores common parlance test which is one of the well recognized tests to determine whether the product is classifiable as medicament or cosmetic and that has been

consistently followed by this Court including with regard to this very product. It also overlooks the well-settled legal position that without a change in the nature or a change in the use of the product and in the absence of a statutory definition, the product will not change its character. The product DML remains the same in its composition, character and uses. We have already held above that Sub-heading 3003.31 does not define Ayurvedic Medicine and, therefore, there cannot be any justification enough for changing the classification of the product DML which has not been held to be Ayurvedic Medicine by this Court.

40. The learned senior counsel for Baidyanath heavily relied upon the statement of the Finance Minister during the parliamentary debate on the question of levy of excise duty on Ayurvedic medicines. In the entire debate there is no reference to the product DML with which we are concerned. The part of statement of Finance Minister reads, `.....there is no excise duty on Ayurvedic Medicines manufactured according to the Ayurvedic formulae, some medicines appears to be Ayurvedic medicines.' The Finance Minister also stated, `.....he must raise the dispute on that. It will be decided by the Collector. It will be decided by the appellate authority. There is a method to decide it.....'. We are afraid the statement made by the Finance Minister in the Parliament does not advance the case

of the assessee at all insofaras classification of DML is concerned as method to decide classification has rightly been observed to be within domain of the authorities.

41. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines `Ayurvedic, Sidha or Unani Drug' but that definition is not necessary to be imported in New Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of Excise Act is to raise revenue for which various products are differently classified in New Tariff Act.

42. There is no doubt that a specific entry must prevail over a general entry. This is reflected from Rule 3(a) of the general Rules of interpretation that states that heading which provides the most specific description shall be preferred to headings providing a more general description. DML is a tooth powder which has not been held to be Ayurvedic Medicine in common parlance in Baidyanath I1. We have already observed that common parlance test continues to be one of the determinative tests for classification of a product whether medicament or cosmetic. There being no change in the nature, character and uses of DML, it has to be held to be a tooth

powder - as held in Baidyanath I1. DML is used routinely for dental hygiene. Since tooth powder is specifically covered by Chapter Sub-heading 3306, it has to be classified thereunder. By virtue of Chapter Note 1(d) of Chapter 30 even if the product DML has some therapeutic or medicinal properties, the product stands excluded from Chapter 30.

43. The learned senior counsel for Baidyanath relied upon the judgment of this Court in Vicco Laboratories to show that in Baidyanath I1, no tests for classification were laid down. First, in Baidyanath I1, common parlance test applied by the Tribunal has been approved. Second, and more importantly, with regard to the very product (DML), this Court held that it could not be classified as Ayurvedic Medicine and rather the product is toilet requisite. Baidyanath I1, no doubt relates to old Tariff period i.e. prior to enactment of new Tariff Act but since the product in its composition, character and uses continues to be the same, even after insertion of new sub-heading 3301.30, we have already held that change in classification is not justified as common parlance test continues to be relevant for classification. Vicco Laboratories is of no help to the assessee.

44. In what we have already discussed above, it is not necessary to refer to other decisions cited by the learned Senior Counsel for Baidyanath. Be it noted here that Mr. C.A. Sundaram, learned Senior Counsel submitted before us that matters should be decided by this Court as raising neat question of law about classification of product DML on the available material and any further inquiry or remand was unnecessary.

45. Before we part with the case, we may address to the plea of res judicata raised by the learned Senior Counsel for the Department. Mr. K. Radhakrishnan pressed into service few legal maxims in this regard. It is true that maxim Nemo debet bis vexari pro una et eadem causa is founded on principle of private justice as it states that no man ought to be twice put to trouble if it appear to the court that it is for one and the same cause. The maxim Interest republicae sit finis litium concerns the State that law suits be not protracted. This maxim is based on public policy. In our opinion, these maxims cannot be applied as a rule of thumb in the taxation matters. In the matters of classification of goods, the principles that have been followed by the courts - which we endorse - are that there may not be justification for changing the classification without a change in the nature or a change in the use of the product; something more is required

for changing the classification especially when the product remains the same. Earlier decision on an issue inter parties is a cogent factor in the determination of the same issue. The applicability of maxim Res judicata pro veritate occipitur in the matters of classification of goods has to be seen in that perspective. The interpretation given by this Court in Baidyanath I1 with regard to this product has been considered and applied by us after amendment because Chapter Sub-heading 3003.31 does not contain definition of Ayurvedic Medicine and the product DML in nature, character and uses remains the same as it was prior to amendment.

46. As a result of the foregoing discussion, appeals of Baidyanath must fail and are dismissed. The Department's appeals are allowed. The parties shall bear their own costs.

.....J.
(D.K. Jain)

.....J.
(R.M. Lodha)

New Delhi
April 13, 2009