SUPREME COURT OF INDIA

Messrs Puma Ayurvedic Herbal Private Limited

Vs

Commissioner, Central Excise, Nagpur

Appeal (Civil) 6319-6321 of 2003; Civil Appeal Nos.1414-1416/2004

(Ashok Bhan and Arun Kumar, JJ)

08.03.2006

JUDGMENT

ARUN KUMAR, J.

The appellant claims to be a manufacturer of Ayurvedic products which are intended to cure certain ailments of the human body. A question has arisen as to whether the products manufactured by the appellant fall within the category of medicaments or cosmetics. Answer to this question determines as to whether the goods are classifiable under the Central Excise Tariff Act, 1985 as cosmetics under Chapter 33 or as medicaments under Chapter 30. As cosmetics the rate of excise duty is quite high while as medicament the products attract nil duty. The following products manufactured by the appellant are under consideration:

1.(xvii)Puma Neem Facial Pack (Neemal)

2. (xviii)Puma Anti-Pimple Herbal Powder (Pimplex)

3.(xix) Puma Herbal Facial Pack (Herbaucare)

4.(xx) Puma Herbal remedy for Facial Blemishes

5.(xxi) Puma Herbal Massage Oil

6.(xxii) Puma Herbal Massage Oil for Women

7.(xxiii) Puma Hair Tonic Powder (Sukeshi)

8.(xxiv) Puma Scalp Tonic Powder (Scalpton)

9.(xxv) Puma Anti-Dandruff Oil (Dandika)

10.(xxvi) Puma Shishu Rakshan Tel

11.(xxvii)Puma Neem Tulsi

The appellant has a licence to manufacture these and other products from the Drug Controller under the Drugs and Cosmetics Act. According to the learned counsel for the appellant all the above items are produced from ingredients found in Ayurveda text books. They are manufactured as per the Ayurveda pharmacopaeia and have curative, therapeutic or prophylactic value. They are basically meant to give relief in body ailments. They are not items of cosmetics. In order to determine whether a product is a cosmetic or a medicament a twin test has found favour with the Courts. The test has approval of this Court also vide Collector Vs. Richardson Hindustan Ltd. 2004 (9) SCC 156 (SC)/ 1987 Indlaw CEGAT 163. There is no dispute about this as even the Revenue accepts that the test is determinative for the issue involved. The tests are:

I. Whether the item is commonly understood as a 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 text books on Ayurveda?

The two tests are recognized even by the Central Board of Excise and Customs and the Board had vide its letters dated 3rd October 1991 and 5th December, 1991 directed the Assistant Collector to decide the classification of the products in question by applying the aforesaid two tests.

The learned counsel for the appellant has argued that the products of the appellant satisfy both the above tests and, therefore, the CEGAT was wrong in classifying them under Chapter 33 as cosmetics. According to the learned counsel the products in question have a special use. They are not items of common use. Only those who want to treat a particular ailment will go for the particular product of the appellant. The use of a product by the customers i.e. how the consumers take to a product is a very useful method of determining the classification of products. What is to be seen is whether the products are likely to be in common use by normal consumers. Common parlance meaning and understanding is a strong factor in the determination of classification of products. One need not resort to scientific or technical meaning of the terms used. So far as the other test is concerned, the learned counsel for the appellant has placed on record material from the Ayurvedic texts or Pharmacopoeia in support of each product which is subject matter of the present appeal to show that the ingredients of each product are independently mentioned in the Ayurvedic texts. The ingredients are natural Ayurvedic product like shrubs, herbs, leaves, fruits, nuts, flowers, wood and bark of particular trees. In support of his contention the learned counsel for the appellant placed before the departmental authorities lot of material in the shape of certificates and letters from doctors, Ayurvedic practitioners, experts and above all from the users of the products in question.

The Collector (Appeals) who decided the issue in favour of the appellant among other things, relied on the opinion obtained by the Assistant Collector as per Board's Circular from the Directorate of Ayurveda Maharashtra, Bombay vide their letter No.AYURVEDIC- 2/Misc/PUMA/1989/10563 dated 1.12.89 which is quoted as under: "With reference to your letter dated 12.9.89 on the subject opted above, the samples of products of M/s. Puma Ayurvedic Herbals (P) Ltd., Nagpur (i.e.11 items) were referred to Dravyaguna Department of one of our institution for carrying out tosts. These items were tested by Organoloptic Method.

2/- Now the Professor and Incharge of Dravyaguna Department has opined that the raw materials used for preparation of the above items are described in Ayurvedic texts. As such, all ingredients are Ayurvedic raw material. Treatment of certain skin diseases is done by Lep, Pralep and Pradheh. This type of treatment is described in Ayurvedic Texts.

3/- In view of the above, the samples of 11 items sent by you vide your letter under reference can be classified as "Proprietary Ayurvedic Medicines". This opinion coming from a competent and authorised source, is of great relevance so far as the case in hand is concerned. Besides this the evidence produced by the appellant before the authorities in the shape of letters from consumers, from doctors and from Ayurvedic physicians satisfies the common parlance test. On the other hand the revenue led no evidence of any sort to rebut the evidence led by the assessee. It is settled law that burden of showing correct classification lies on the revenue. The revenue has done precious little in this case to discharge this burden. The Collector (Appeals) further relied on the following evidence in support of his finding that the products in question fall in the category of medicaments:

(i) licence No.A/40/888 granted by the Drug Controllers, Maharashtra.

(ii) The inscription of the words on the wrapper "Ayurvedic Proprietory medicines or and Ayurvedic licence No.A/888 on the wrapper mentioning of percentage of ingredients as approved by the Drug Controller.

(iii) Circulation of Therapeutic Index of the products for the use of Doctors/Vaidyas.

(iv) Certificate issued by Dr. Narendra Agashe, M.D. Medical Superintendent, Dr. Dalvi Memorial Hospital, Nagpur, the relevant extract of which is reproduced below:

"This is to certify that we in this hospital have extensively tried the following Ayurvedic Medicinal Products from Puma Ayurvedic & Herbal Cosmetics Co., Nagpur. We have found them to be of good therapeautic value and prescribe them regularly whenever the need arises."

We may note here that the Chief Chemist had opined about the classification of these products under the Chapter 233 i.e. "Cosmetic" but the opinion of the Chief Chemist on the question of classification has no relevance. We agree with the Collector (Appeals) that the opinion of the Chief Chemist has no relevance for determining classification of the products. The role of the Chief Chemist is only to supply the analytical data. On the other hand the opinion of the Directorate of Ayurved, Maharashtra referred to above is of great relevance. The said Directorate has clearly and unambiguously stated that the products in question are meant for treatment of certain skin diseases and the type of ingredients used in the products are described in Ayurvedic texts, being useful in such treatments. The learned counsel for the appellant drew our attention to certain decisions of this Court wherein Ayurvedic products have been held to be falling in Chapter 30 of the Central Excise Tariff Act, 1985 and not under Chapter 33. In C.C.E. vs. Sharma Chemical Works it was held that the onus to prove that a particular product falls under a particular head of the Central Excise Tariff is on the Revenue. It was for the Revenue to show and establish that the product in question was not a medicament or that the common man did not understand the product as a medicament. In the present case the Revenue has miserably failed to discharge this burden.

In C.C.E. vs. Sharma Chemicals Works this Court was considering whether "Banphool oil" could be classified as medicament. The product was a hair oil and all its ingredients were said to be Ayurvedic which were found in Ayurveda text books. It had 98% Til oil and 2% Camphor, Amla and Chandan (sandalwood). It was found that all the ingredients of the hair oil were mentioned in Ayurveda text books and, therefore, the product was liable to be classified as medicament. C.C.E. vs. Pandit D.P. Sharma was again a case of hair oil named "Himtaj Hair Oil". The Court emphasized the common parlance test and found that a common man understood the said hair oil as a medicinal hair oil and not hair oil of common use as a hair oil. Accordingly, this Court upheld its classification as a medicament. Naturalle Health Product (P) Ltd. vs. C.C.E. . Two appeals were under consideration in this case. One was with respect to Vicks Vapo Rub and Vicks Cough Drops while the other was with respect to Sloan's Balm and Sloan's Rub. Both the appeals were allowed holding that the items in question were classifiable under the Chapter dealing with medicament in

the Central Excise Tariff Act. In this case this Court followed the twin test earlier upheld by this Court in C.C.E vs. Richardson Hindustan Ltd. 1987 Indlaw CEGAT 163. Further this Court observed: "39 We are also of the opinion that when there is no definition of any kind in the relevant taxing statute, the articles enumerated in the tariff schedules must be construed as far as possible in their ordinary or popular sense, that is, how the common man and persons dealing with it understand it. If the customers and the practitioners in Ayurvedic medicine, the dealers and the licensing officials treat the products in question as Ayurvedic medicines and not as Allopathic medicines, that fact gives an indication that they are exclusively Ayurvedic medicines or that they are used in Ayurvedic system of medicine, though it is a patented medicine.

This is especially so when all the ingredients used are mentioned in the authoritative books on Ayurveda. As rightly contended by the Counsel for the appellants, the essential character of the medicine and the primary function of the medicine is derived from the active ingredients contained therein and it has certainly a bearing on the determination of classification under the Central Excise Act. As held in Amruthanjan case, the mere fact that the ingredients are purified or added with some preservatives does not really alter their character."

In Amritanjan vs. C.C.E.) this Court held that Amritanjan Pain Balm having Menthol IP, Camphor IP, Turpantine IP and Methyl IP, Salicylate IP as main ingredients, was classifiable as Ayurvedic medicine under Chapter 30 of the Tariff. It was noticed that the ingredients were known both to Ayurvedic and western sciences. Still the classification as medicament was upheld.

BPL Pharmaceuticals vs. C.C.E. was a case in which "Selsun Shampoo" was under consideration for purposes of classification under the Tariff Act. According to the manufacturers this shampoo was a medicated shampoo meant to treat dandruff which is a disease of the hair. This Court held that having regard to the preparation, label, literature, character, common and commercial parlance, the product was liable to be classified as a medicament. It was not an ordinary shampoo which could be of common use by common people. The shampoo was meant to cure a particular disease of hair and after the cure it was not meant to be used in ordinary course.

Muller & Phipps (India) Ltd .vs. C.C.E. was a case of Johnson Prickly Heat Powder. This powder was again held to be a medicament because it was not an ordinary talcum powder but a powder to be used to get rid of the problem of prickly heat. Similar was the case reported in 1999 Indlaw DEL 114 Manisha PharmaPlasto Pvt. Ltd. vs. .Union of India. In this case the product under consideration was Nycil Prickly Heat Powder. The ingredients whereof were Chlorphensesin IP 1% w/w Zinc Oxide IP 16% w/w Starch IP 51% w/w Talc Purified IP to 100% w/w The powder was held to be not an ordinary talcum powder but one falling in the category of medicament.

Lastly we were referred to Dabur (India) Ltd. vs. C.C.E. (SC). This is a judgment of three Judge Bench of this Court and the products under consideration were Janam Ghunti and Lal Tail. Regarding Lal Tail, this Court held that it was liable to be classified as medicament under Chapter 30 as all its imgredients were found to be in Ayurvedic texts. However, regarding other product the matter was remanded for further consideration on basis of evidence to be recorded. From the above judgments it follows that the law is settled on the applicability of 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.

The word 'medicament' is not defined anywhere while the word "cosmetic" is defined in the Drugs and Cosmetics Act, 1940 as under:

"A '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."

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 appearance of the person. The primary role of the product was to grow hair on his head and cure his baldness.

The extent or the quantity of medicament used in a particular product will also not be a relevant factor. Normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. The medical ingredients are mixed with what is in the trade parlance called fillers or vehicles in order to make the medicament useful. To illustrate an example of Vicks Vaporub is given in which 98% is said to be paraffine wax, while the medicinal part i.e. Menthol is only 2%. Vicks Vaporub has been held to be medicament by this Court in CCE vs. Richardson Hindustan Ltd. 1987 Indlaw CEGAT 163. Therefore, the fact that use of medicinal element in a product was minimal does not detract from it being classified as a medicament. In order to be a medicinal preparation or a medicament it is not necessary that the item must be sold under a doctor's prescription. Similarly availability of the products across the counter in shops is not relevant as it makes no difference either way

The learned counsel for the respondent drew our attention to Note 2 of Chapter 33 of the Central Excise Tariff which is as under

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"Note 2. Heading Nos.33.03 to 33.07 apply, inter alia, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings with labels literature or other indications that they are for use as cosmetics or toilet preparations or put up in a form clearly 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."

On the basis of this Note it was argued that even if a product had some curative or prophylactic value, it will still be cosmetic. We cannot accept this argument. The learned counsel has overlooked the use of the word 'subsidiary' in the said note from which it follows that a subsidiary curative or prophylactic use will not convert a cosmetic into medicament. We have tried to illustrate this by giving the example of bald man treating his baldness by use of Ayurvedic product. The curative use of the product is primary in that example and not subsidiary. The subsidiary result is improvement in appearance. Therefore, in our view, Note 2 to Chapter 33 does not help the respondent. Rather Note 5 to the said Chapter, makes it clear that the products which fall under heading 33.04 are primarily beauty or make up preparations. They may incidentally help in protection against skin irritants. They may also help as a skin tonic, yet they are cosmetics because skin protection is subsidiary benefit. In this connection reference may also be made to Note 1(d) to Chapter 30 of the Central Excise Tariff. The said Note reads as under:

Note 1 starts with "This Chapter does not cover".

(a)

(b)

(c)

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

Thus preparations falling in Chapter 33 even if they have therapeutic or prophylactic properties will not fall under Chapter 30 which deals with pharmaceutical products. The reasons for this appears to be that even cosmetics may have something to improve skin or other parts of the body where they are used. In that sense they may have some therapeutic value yet they remain cosmetic. From the above discussion it is clear to us that the Revenue has failed to make out any case in support of its stand that all the products in question fall under Chapter 33 i.e. under Heading Note 33.04. Now we will take up each item of the products of appellant and examine as to under which classification they fall. The products at Serial Nos.1, 2, 3, 4, 7, 9, 10 & 11 viz. Puma Neem Facial Pack (Neemal), Puma Anti- Pimple Herbal Powder (Pimplex), Puma Herbal Facial Pack (Herbaucare), Puma Herbal remedy for Facial Blemishes, Puma Hair Tonic Powder (Sukeshi), Puma Anti-Dandruff Oil (Dandika), Puma Shishu Rakshan Tel and Puma Neem Tulsi are clearly medicinal products and are intended to treat certain medical conditions of the human body and therefore, in view of the above tests, are liable to be classified as medicaments falling under Chapter 30 and Note 3003.20/3003.30 Items at Serial No.5, 6 and 8 viz. Puma Herbal Massage Oil, Puma Herbal Massage Oil for Women and Puma Scalp Tonic Powder (Scalpton) however do not appear to be of any medicinal property and it is difficult to classify them under the head of medicament. In fact the learned counsel for appellant conceded that these three items do not qualify to be treated as medicaments. Therefore, the same will be liable to be classified as "cosmetic" under Chapter head 33.04. Regarding these 3 items the matter will have to go to the Assistant Collector for quantification of the duty for the relevant period. Subject to this, the appeals are allowed. No costs. Civil Appeals No.1414-1416/2004 In view of the above these appeals stand dismissed.