SUPREME COURT OF INDIA

C.C.E.,Chennai

Vs.

Hindustan Lever Ltd

C.A.No.1941 of 2006

(A.K.Sikri and Rohinton Fali Nariman,JJ.,)

25.08.2015

JUDGMENT

A.K.Sikri,J.,

1. The issue involved in the present appeal is as to whether Vaseline Intensive Care Heel Guard (for short, 'VHG') is to be treated as merely a skin care preparation or it is a medicament having curing properties. Based on the answer to the aforesaid question, classification of this product will be determined. If it is only a skin care preparation then VHG is classifiable under Chapter Heading 3304.00 of the First Schedule to the Central Excise Tariff Act, 1985 (for short, the 'Act'). On the other hand, if it is to be treated as a medicament, VHG would get covered under Chapter Heading 3003.10 of the First Schedule. The rate at which the excise duty is payable depends on the said classification.

2. Chapter 33 under which the Revenue wants to cover VHG pertains to 'essential oils and resinoids; perfumery, cosmetic or toilet preparations' and, therefore, 40% duty is paid. Entry 33.04 thereof, which is specifically sought to be attracted by the Revenue, reads as under: "33.04 Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen and suntan preparations; manicure or pedicure preparations" If a particular product is to be covered under the aforesaid Entry, the basic trait of the said product is that it is beauty or make-up preparations and preparations for the care of the skin. Some products like sunscreen and suntan preparations; manicure or pedicure preparations are specifically included, meaning thereby they are to be treated as beauty or make-up preparations or preparations for care of the skin. At the same time, medicaments are specifically excluded therefrom. We would also like to point out here certain chapter notes of Chapter 30 which are pressed into service by the Revenue in order to claim that VHG is nothing but preparation for the care of the skin. These are chapter notes 2 and 5 and we reproduce the same as under:

> "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." "5. Heading No. 33.04 applies, inter alia, to the following products : beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skinfoods, skin tonics, face powders, baby powders, toilet powders, talcum powders and grease paints, lipsticks, eyeshadow and eyebrow pencils, nail polishes and varnishes, cuticle removers and other preparations for use in manicure or chiropody and barrier creams to give protection against skin irritants." On the other hand, as per the assessee VHG is a medicament and, therefor, it should be covered by Chapter 30. Chapter 30 deals with 'pharmaceutical products'. Entry 30.03, within which the assessee seeks to cover this product, reads as under:

"30.03 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 which are exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic systems	
	Medicaments, including those used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic systems;	
3003.31	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 Homoeopathic Pharmacopoeia of India or the United States of America or the United Kingdom or the German Homoeopathic Pharmacopoeia, as	

		the case may be, and sold under
		the name as specified in such
		book or pharmacopoeia.
3003.32	Medicaments (including
–		veterinary medicaments) used in
		bio-chemic system and not
		bearing a brand name.
3003.39	Other”
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The position which is taken by the assessee is that VHG is patent or proprietary medicament and is, therefore, classifiable under Chapter Heading 3003.10 and only 15% duty is paid. There are certain chapter notes attached to Chapter 30 as well and first two notes are relevant for our purposes which we reproduce below:

> “1. This Chapter does not cover:
>
> (a) Foods or beverages (such as, dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters) (Section 1V);
>
> (b) Plasters specially calcined or finely ground for use in dentistry (Chapter 25);
>
> (c) Aqueous distillates or aqueous solutions of essential oils, suitable for medicinal uses (Chapter 33);
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> (d) Preparations of Chapter 33 even if they have therapeutic or prophylactic properties;
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> (e) Soap or other products of Chapter 34 containing added medicaments;
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> (f) Preparations with a basis of plaster for use in dentistry (Chapter
>
> 34);
>
> (g) Blood albumin not prepared for therapeutic or for prophylactic uses (Chapter 35).
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> 2. For the purposes of 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. 30.03 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 put up in measured doses or in packings for retail sale or for use in hospitals;

(ii) 'Patent or proprietary medicaments' means any drug or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in human beings or animals, which bears either on itself or on its container or both, a name which is not specified in a monograph, in a Pharmacopoeia, Formulary or other publications, namely:—

(a) The Indian Pharmacopoeia:

(b) The International Pharmacopoeia;

(c) The British Pharmacopoeia;

(d) The British Pharmacopoeia;

(e) The British Pharmaceutical Codex;

(f) The British Veterinary Codex;

(g) The United States Pharmacopoeia;

(h) The National Formulary of the U.S.A.;

(i) The Dental Formulary of the U.S.A; and

(j) The State Pharmacopoeia of the U.S.S.R.;"

4. Or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person, having the right either as proprietor or otherwise to use the name or mark with or without any indication of the identity of that person." While contrasting the two Entries, namely, Entry 3304.00 on the one hand and 3003.10 on the other, it can be discerned that if it is a product for care of the skin, then it would fall under Chapter Heading 3304.00 but if it is for the cure of skin disease then the product in-question would be medicament; meaning thereby the inquiry has to be whether it is a care product or a product meant for cure. Another aspect, while comparing the two Entries, which needs to be mentioned is that Entry 3304.00 specifically excludes medicaments. The obvious purpose is

5. That if it is a medicament, it has to fall under Chapter 30. Because of this specific exclusion of medicament from Chapter Heading 3304.00, necessary consequence is that if the Revenue wants to cover it under 3304.00, the onus is on the Revenue to show that the particular product is not a medicament. At the same time, reading of this Entry along with chapter notes 2 and 5, already extracted above, would indicate that if pharmaceutical or antiseptic constituents contained in the product are only subsidiary in nature, or having subsidiary curative or prophylactic value, then that would not make the product as medicament. Again, certain preparation for skin like preparations for use in manicure or chiropody and barrier creams which give protection against skin irritants are still to be treated as preparations for care of the skin and would not be treated as curing the skin diseases. That is the clear intent of chapter note 5 of Chapter 33. This is made further clear with the heading of chapter note no. 1(d) of Chapter 30 which specifically excludes preparation of Chapter 33 even if they have therapeutic or prophylactic properties. However, a conjoint reading of note 5 of Chapter 33 and note 1(d) of Chapter 30 needs us to clarify that in order to see as to whether a particular preparation falls under Chapter 33 or not (or gets excluded from Chapter 30), such therapeutic or prophylactic properties have to be subsidiary in nature. Further, medicaments are specifically defined in note 2 of Chapter 30 and the attributes of this definition are to be kept in mind in order to decide whether a particular product is a medicament or not.

6. To put it in a nutshell, if a particular product is substantially for the care of skin and simply because it contains subsidiary pharmaceutical or antiseptic constituents or is having subsidiary curative or prophylactic value, it would not become medicament and would still qualify as the product for the care of the skin. There would be certain products which would be purely for the care of skin and certain other products would be clearly medicament and such cases may not pose any problem. The issue of determination as to whether a particular product falls in Chapter 33 or Chapter 30 would arise in those cases where certain products have the shades or qualities of both, namely, skin care as well as cure of skin diseases. In such cases, the necessary exercise requires to be undertaken. Whenever product has curative or prophylactic value as well, but the Department still wants the said product to be brought under Chapter Heading 3304.00, onus is on the Department to show that it is not medicament. For this, it will have to demonstrate that curative or prophylactic value is only subsidiary in nature or that the product is covered by the description under chapter notes 5, namely, either it is chiropody or barrier cream to give protection against skin irritants. If the Department fails to discharge this onus, the product has to be treated as medicament and would be covered under Chapter 30.

7. In *BPL Pharmaceuticals Ltd. v. CCE, Vadodra*[1]this Court has laid down the principles which are to be kept in mind while deciding as to whether a particular product would fall under Chapter 30 or under competing Chapter

> "33. That was a case where the assessee was engaged in manufacture of Selenium Sulfide Lotion which contained 2.5% selenium sulfide W/V. The assessee was manufacturing this product under a loan licence from Abbott Laboratories in accordance with Abbott's specifications, raw materials, packing materials and quality

control. It was sold under the private name 'Selsun'. The assessee in that case claimed that this product was used in the therapeutic quantity i.e. 2.5% W/V which was the only active ingredient and other ingredient merely served the purpose of a bare medium. It was also claimed that the product is manufactured under a drug licence issued by the Food and Drug Administration. The assessee, thus, wanted the product to be classified under heading 3003.19 as Pharmaceutical Product under Chapter 30. However, the Revenue took the plea that it would fall under sub-heading 3305.90 i.e. under Chapter 33. Thus, the respective contentions of the Department as well as the assessee were almost on the same lines as in the present case, namely, whether the said product was Pharmaceutical product or it was a cosmetic/toiletry preparation. The only difference was of sub-headings under those Chapters. This Court went into the essential characteristics of the product and found it that dominant use of the product was medicinal, as it was sold only on medical prescription as a medicine for treatment of disease known as Seborrhoeic Dermatitis, commonly known as Dandruff. It was manufactured under a Drug Licence; the Food and Drug Administration had certified it as a Drug; and the Drug Controller had categorically opined that Selenium Sulfide present in Selsun was in a therapeutic concentration etc. The relevant passages from the said judgment throwing light on these aspects are reproduced below: "19. So far as medicinal properties of the product are concerned it can be gathered from the technical and/or pharmaceutical references that Selenium Sulfide has anti-fungal and anti-seborrhoeic properties and is used in a detergent medium for the treatment of dandruff on the scalp which is milder form of Seborrhoeic Dermatitis and Tinea Versicolour 2.5% of this compound is the therapeutic quantity.

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24. Elaborating the above submissions, the learned counsel for the respondents invited our attention to chapter notes of Chapter 30 and Chapter 33 and also the rules of interpretation. According to the learned counsel a careful reading of chapter notes of Chapter 30 would show that preparations of Chapter 33 even if they have therapeutic or prophylactic properties would not fall under Chapter 30. However, he fairly admitted that 'medicaments' are those that have therapeutic or prophylactic uses. Nevertheless those medicaments, if they are classifiable under Chapter 33 or Chapter 34 will not fall under Chapter 30, according to him, if they are more specifically preparations falling under Chapter 33 or Chapter 34. In other words, he wants to equate the product in question to 'shampoo' enumerated under Heading No. 33.05. He also invited our attention to the fact that the appellants before the coming into force of the new Tariff Act described the product as shampoo and they have omitted the word 'shampoo' deliberately only to claim that the product would fall under Chapter 30.

25. We do not think that we can accept all the contentions of the learned counsel for the respondents except certain obvious admitted positions. The submission that the

product in question must be equated to shampoo falling under Chapter 33 is not at all correct.

26. It is true that the learned counsel for the appellants have placed reliance on the definition of the words "cosmetic and drug" as defined in the Drugs and Cosmetics Act, 1940. On a perusal of the definitions, we can broadly distinguish cosmetic and drug as follows:

"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." and "A 'drug' includes 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."

27. We cannot ignore the above broad classification while considering the character of the product in question. Certainly, the product in question is not intended for cleansing, beautifying, promoting attractiveness or altering appearance. On the other hand it is intended to cure certain diseases as mentioned supra.

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35. The learned counsel also placed reliance on a number of judgments to support his argument that in common and commercial parlance the product is known as medicine rather than cosmetic. As pointed out already and in support of that submission, affidavits and letters from chemists, doctors and customers are filed to show that the product is sold under prescription only in chemists' shops unlike shampoos sold in any shop including provision shops. This conclusion, namely, that the product is understood in the common and commercial parlance as a patent and proprietary medicine was also found by the Central Board of Excise and Customs as early as in 1981 and accepted by the Excise authorities and in the absence of any new material on the side of the respondents there is no difficulty in accepting this contention without referring to decision cited by the counsel for the appellants." The aforesaid case draws and delineates a clear distinction between a 'cosmetic' and a 'drug'. It further lays down that essential character of the product in question is to be kept in mind for ascertaining whether it would be a cosmetic or a drug. Another relevant consideration, which is highlighted, is to see whether in common and commercial parlance the product is known as medicine or cosmetic/skin care product. If the product is registered as medicament by the Drug Controller, that would be a strong factor to consider it as having curative or prophylactic value and it is not for the care of the skin per se."

8. This Court in *Muller & Phipps (India) Ltd. v. Collector of Central Excise, Bombay*[2] was called upon to decide as to whether prickly heat power, which was manufactured and marketed by the appellant/assessee therein under the brand name Johnson's Prickly Heat Powder and Phipps Processed Talc, was a medicament or was simply a product for care of the skin. The case put- forth by the assessee therein was that prickly heat power contains a range of medicines and is used only for the treatment and prevention of a skin ailment known as Milaria Rubra, commonly known as prickly heat. Prickly heat powders are manufactured under a Drug Licence issued under the Drug and Cosmetics Act, 1940 and have been treated as a drug and not a cosmetic by the authorities under the Drugs Act. On a reference made by the Finance Ministry, the Drug Controller of India has opined that due to the high content of 5% boric acid in a prickly heat powder, it would be classifiable as a drug or medicament and not as a cosmetic. From 1970 till 1985, prickly heat powders have been classified and assessed under Tariff Item 14E of the old tariff as 'Patent or Proprietary Medicines'. It was also contended that prickly heat power not only relieves prickly heat faster but actually helps prevent it. When a person perspires profusely the sweat stays on the skin too long and the person becomes a potential victim of prickly heat. This specially formulated prickly heat powder absorbs the sweat better and faster and prevents the build up of bacteria on the skin. Therefore, the person avoids getting a red rash, itching and burning. No person who requires ordinary talk for the purposes of beautifying her or himself would use the said products which contain the aforesaid active therapeutic ingredients. These products are known as, as already mentioned above, prickly heat/ Milaria Rubra. The sale of these products is much higher in hot summer months when this disease frequently erupts.

9. Accepting the aforesaid case set up by the assessee therein, the Court held that the said prickly heat power was a medicament for treatment of red rashes, itching and burning and not merely a powder for care of skin or for the purpose of beauty. The Court was greatly influenced by the fact that a department like Drug Controller and Central Sales Tax authorities had accepted the product in question as medicinal preparation. The discussion which is relevant for our purposes is contained in paras 11 and 12 of the said judgment and we reproduce the same hereinbelow: “11. But in the present case when throughout the meaning given to products in question not only by the department itself but also by other departments like Drug Controller and Central Sales Tax authorities is that the product in question is a medicinal preparation should be accepted.

10. Applying the principles enunciated in BPL Pharmaceuticals Ltd. case and taking into consideration various circumstances as to the manner in which the goods had been treated on the earlier occasions by the department and the product having been utilised with reference to the commercial parlance and understanding, that it had been treated as a drug it would not cease to be one notwithstanding the fact that new tariff act has come into force. What is to be seen in such cases is when in the common parlance, for purposes of the Drug Act, for purposes of Sales Tax Act and in various findings recorded on earlier occasions by the department itself having been noticed, the conclusion is inevitable that the products in question must be treated as medicinal preparations.” Interplay of Chapter 30 vis-a-vis Chapter 34 (which deals with detergent products) came up for consideration in *Commissioner of Central Excise v. Wockhardt Life Sciences Limited*[2]. In that case, the Court

again emphasized 'common parlance test' or the 'commercial usage test' as the mot common test for determining the classification in such cases. After taking note of number of earlier decisions, this aspect was highlighted as under: "33. There is no fixed test for classification of a taxable commodity. This is probably the reason why the "common parlance test" or the "commercial usage test" are the most common (*see A. Nagaraju Bros. v. State of A.P*[3]., Whether a particular article will fall within a particular tariff heading or not has to be decided on the basis of the tangible material or evidence to determine how such an article is understood in "common parlance" or in "commercial world" or in "trade circle" or in its popular sense meaning. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted (see *Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan*[4],

11 One of the essential factors for determining whether a product falls within Chapter 30 or not is whether the product is understood as a pharmaceutical product in common parlance (see *CCE v. Shree Baidyanath Ayurved Bhavan Ltd.*[5], *and CCE v. Ishaan Research Lab (P) Ltd.*[6], Further the quantity of medicament used in a particular product will also not be a relevant factor for, normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. *[Puma Ayurvedic Herbal (P) Ltd. v. CCE,* [7]*, State of Goa v. Colfax Laboratories Ltd.*[8]*, and B.P.L. Pharmaceuticals Ltd. v. CCE,*[9]

12. However, there cannot be a static parameter for the correct classification of a commodity. This Court in *Indian Aluminium Cables Ltd. v. Union of India*[10], has culled out this principle in the following words: (SCC p. 291, para 13):

> "13. To sum up the true position, the process of manufacture of a product and the end use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal schedule like the Central Excise Tariff. What is more important is whether the broad description of the article fits in with the expression used in the Tariff."

13. Moreover, the functional utility and predominant or primary usage of the commodity which is being classified must be taken into account, apart from the understanding in common parlance. [See *O.K. Play (India) Ltd. v. CCE*[11], *Alpine Industries v. CCE*[12], *Sujanil Chemo Industries v. CCE & Customs*[13], *ICPA Health Products (P) Ltd. v. CCE*[14], *Puma Ayurvedic Herbal*[15]*CCE v. Ishaan Research Lab (P) Ltd*[16]*., and CCE v. Uni Products India Ltd.*[17],

14. A commodity cannot be classified in a residuary entry, in the presence of a specific entry, even if such specific entry requires the product to be understood in the technical sense (see *Akbar Badrudin Giwani v. Collector of Customs*[18], and *Commnr. Of Customs v. G.C. Jain*[19], A residuary entry can be taken refuge of only in the absence of a specific entry; that is to say, the latter will always prevail over the former [see *CCE v. Jayant Oil Mills (P) Ltd.*[20], *HPL Chemicals Ltd. v. CCE*[21], *Western India Plywoods Ltd. v. Collector of Customs*[22], *and CCE v. Carrier Aircon Ltd.*[23],

15. In *CCE v. Carrier Aircon Ltd.*[24], this Court held: (SCC p. 601, para 14):

> "14...There are a number of factors which have to be taken into consideration for determining the classification of a product. For the purposes of classification, the relevant factors inter alia are statutory fiscal entry, the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to (sic produced), the end use to which the product is put to, cannot determine the classification of that product."

16. In our view, as we have already stated, the combined factors that require to be taken note of for the purpose of the classification of the goods are the composition, the product literature, the label, the character of the product and the user to which the product is put. However, the miniscule quantity of the prophylactic ingredient is not a relevant factor. In the instant case, it is not in dispute that this is used by the surgeons for the purpose of cleaning or degerming their hands and scrubbing the surface of the skin of the patient before that portion is operated upon. The purpose is to prevent the infection or disease. Therefore, the product in question can be safely classified as a "medicament" which would fall under Chapter Sub-Heading 3003 which is a specific entry and not under Chapter Sub-Heading 3402.90 which is a residuary entry." It is required to be noted that in para 36 quoted above, the Court also laid importance to the functional utility and predominant or primary usage of the commodity that is to be taken into account while classifying the product. Another important aspect which needs to be noted is that the combined effect of the aforesaid factors is to be taken into consideration, which would include composition, the product literature, the label, the character of the product and the user to which the product is put. It was also clarified that miniscule quantity of the prophylactic ingredient is not a relevant factor.

17. Discussion on this aspect was again revisited in the case of *Commissioner of Central Excise, Mumbai IV v. Ciens Laboratories, Mumbai*[25]. In that case, a moisturising cream sold under the brand name 'Moisturex' was the product and it was to be determined as to whether it was used simply for care of the skin or was intended for treating or curing dry skin complaints like fissure feet, dry scaly skin conditions, ichthyosis etc. and, therefore, was a medicament. The argument of the Revenue that this cream was used merely for softening the skin was rejected in the following manner:

> "15. The contention that "Moisturex" is a moisturising cream used for softening the skin cannot be appreciated. As we have already discussed, the use of the cream is not for the care of the skin. "Moisturex" is also not primarily intended to protect the skin from sun, tan or dryness, etc. On the other hand, it is intended for treating or curing the dry skin conditions of the human skin and for a few other skin complaints like fissure feet, dry scaly skin conditions, ichthyosis, etc. The argument advanced on behalf of the Central Excise that use of urea or lactic acid or propylene glycon, etc. is only as subsidiary pharmaceutical constituents and, hence, they cannot be held out as having curative, therapeutic or prophylactic value, cannot also be appreciated. It is the presence of the ingredients of the pharmaceutical constituents which makes the difference and not the percentage of the ingredients as held by this Court in *Meghdoot*

Gramodyog Sewa Sansthan v. CCE[26], Main feature which needs to be taken note of from the aforesaid discussion is that small percentage of the ingredients of pharmaceutical constituents would not be a reason by itself to conclude that pharmaceutical constituents are subsidiary in nature. On the other hand, what is more relevant is the purpose for which the product is used, namely, functional test. On that basis, the product in that case was treated as medicament. What is important is that the Court, in the process, laid down the guiding principles which are to be kept in mind while determining the classification. These principles are formulated in the following manner: "22. Thus, the following guiding principles emerge from the above discussion:

22.1. Firstly, when a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not invariably decisive. What is of importance is the curative attributes of such ingredients that render the product a medicament and not a cosmetic.

22.2. Secondly, though a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over/across the counter are cosmetics. There are several products that are sold over the counter and are yet, medicaments.

22.3. Thirdly, prior to adjudicating upon whether a product is a medicament or not, the courts have to see what the people who actually use the product understand the product to be. If a product's primary function is "care" and not "cure", it is not a medicament. Cosmetic products are used in enhancing or improving a person's appearance or beauty, whereas medicinal products are used to treat or cure some medical condition. A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients even in small quantities, is to be branded as a medicament." After straitening the position in law, we now proceed to apply this principles to the present case."

18. As pointed out above, the product in question, Vaseline Intensive Care Heel Guard, is marketed as a solution for cracked heels and it is claimed that this solution is specially developed by the scientists at Vaseline Research. The composition of this product includes salicylic acid I.P. 1.5% w/w. lactic acid 8.0% w/w. Triclosan 0.1% w/w. Cream base – q.s. Salicylic acid is described as keratolytic substance having bacteriostalic and fungicidal properties used in the treatment of fungus infection of the skin. The Tribunal, while deciding that the aforesaid product is a medicament, pointed out that the product was formulated and essentially used for treatment of 'cracked heels', protection from further cracks in the human heels due to extreme climatic conditions and low humidity, constant exposure of feet to water and due to absence of shoe or other protection while walking. It also found that this product was manufactured under a drug licence as drug authorities had treated the same as a medicament. The Tribunal also found that the usage of this product was related to the effect of therapeutic or mitigating substance of prophylactic substances added. Thus, the effect of mitigation of an external condition is primary effect and the effect of smoothing the skin was

secondary in nature and, therefore, it was to be treated as a medicament and classified under Chapter 30.

19. Interestingly, all the aforesaid features of the product are accepted by the Department. However, only on the ground that salicylic acid contained in the product is marginal, the Department took the view that it was a subsidiary substance. Having regard to the exposition of law narrated above, this was clearly an erroneous approach on the part of the Revenue as percentage of the said substance is immaterial to label it as subsidiary.

20. Another more important factor which needs to be stated at this stage is that though the burden was on the Department, it did not lead any evidence or produce any material to discharge this onus. It simply went by the pamphlet of the product, that too selectively picking up that portion where the product was described as good for care of the skin as well, ignoring the fact that the same very literature gives more emphasis to the therapeutic value of the product. On the other hand, the assessee had filed various affidavits of the dealers as well as consumers in support of its plea that the product was essentially a medicament, which material was blissfully ignored by the Department.

21. From the aforesaid, we conclude that the decision of the Tribunal holding the product in question to be a medicament and, therefore, covered by Chapter Heading 3003.10 is perfectly justified and does not call for any interference.

22. The civil appeal is, accordingly, dismissed with no order as to costs.

Judgment Referred.

[1]*(1995) Supp 3 SCC 0001*
[2]*(2004) (167) ELT 374 (SC)*
[3]*(1994) Supp 3 SCC 0122*
[4]*(1980) 4 SCC 0071*
[5]*(2009) 12 SCC 0419*
[6]*(2008) 13 SCC 0349*
[7]*(2006) 3 SCC 0266*
[8]*(2004) 9 SCC 0083*
[9]*(1995) Supp (3) SCC 0001*
[10]*(1985) 3 SCC 0284*
[11]*(2005) 2 SCC 0460*
[12]*(2003) 3 SCC 0111*
[13]*(2005) 4 SCC 0189*
[14]*(2004) 4 SCC 0481*
[15]*(2006) 3 SCC 0266*
[16]*(2008) 13 SCC 0349*
[17]*(2009) 9 SCC 0295*
[18]*(1990) 2 SCC 0203*
[19]*(2011) 12 SCC 0713*
[20]*(1989) 3 SCC 0343*
[21]*(2006) 5 SCC 0208*
[22]*(2005) 12 SCC 0731*
[23]*(2006) 5 SCC 0596*

[24]*(2006) 5 SCC 0596*
[25]*(2013) 14 SCC 0133*
[26]*(2005) 4 SCC 0015*