Karnataka High Court United Trading Agency vs Additional Commissioner Of ... on 13 December, 1995 Equivalent citations: ILR 1996 KAR 2580 Author: S R Babu Bench: B Padmaraj, S R Babu JUDGMENT S. Rajendra Babu, J. 1. The appellants in these two cases are common. For the assessment years April 1, 1990 to March 31, 1991 and April 1, 1991 to March 31, 1992, the Additional Commissioner of Commercial Taxes revised certain assessments in exercise of the powers under section 22A of the Karnataka Sales Tax Act. For the said two assessment years, the assessments wee concluded on October 31, 1992, by the concerned Deputy Commissioner of Commercial Taxes levying tax at 10 per cent by holding the goods dealt with by the appellant - Vicco products like tooth-paste, tooth-powder and cream come under entry 5, Part M of the Second Schedule to the Karnataka Sales Tax Act ("the Act", for short). Thereafter, the assessing authority resorted to proceedings under section 12A of the Act on the ground that the products sold by the appellant are liable to tax at 15 per cent under entry 10 of Part T of the Second Schedule. On appeal, the Joint Commissioner of Commercial Taxes set aside the reassessment orders and restored that of the assessing authority made originally. This order made by the appellate authority was found to be erroneous and prejudicial to the interest of the Revenue for the reasons set forth in the notice issued to the appellant under section 22A of the Act. The reasons set forth by the revisional authority are as follows : "1. Serial No. 5 of Part M of the Second Schedule reads as medicinal and pharmaceutical preparations (other than those specified elsewhere). 2. Serial No. 10 of Part T of the Second Schedule reads as 'toilet articles (whether medicated or not) except toilet soaps and such other toilet articles as may be specified by the State Government by notification in the official gazette'." Before the issue is interpreted by considering the abovementioned wording, it is necessary to state that it is not disputed that the Vicco products are nothing but a mixture of various types of herbs, barks, roots, etc. In this connection, the Karnataka High Court in the case of L. M. Rajappachetty & Bros. v. Commissioner of Commercial Taxes [1991] 81 STC 109 has held herbs, roots, barks of trees cannot be regarded as medicinal and pharmaceutical preparations falling under this entry (Serial No. 5 of Part M) and that it is difficult to agree on the view that the vegetable products like dried root, barks even though they are of medicinal value are medicinal preparations. In order to make the legislative intention with regard to this entry, very clear, an Explanation is also appended to the Second Schedule and this Explanation reads as 'toilet articles means any articles which is intended for use in the toilet or the human body or in perfuming apparel of any description or any substance, intended to cleanse, intended for use in the toilet or the human body or in perfuming deodorants and perfumes'. Tooth-paste and tooth-powder sold by the respondent along with the cream clearly fall under this entry read with the Explanation and at no stretch of imagination the said goods can be classified as medicinal preparations. 3. The Commissioner of Commercial Taxes in several clarifications has held as under : a. Vicco turmeric - treated as toilet article and taxed as such (MSR CR 70/85-86 dated December 11, 1985). b. Vicco Vajradanthi - tooth-paste and tooth-powder treated as toilet article and taxed

as such (MSR CR 70/85 dated December 11, 1985, CLR CR 101/85-86 dated February 10, 1986). c. Tooth-paste and tooth-powder taxable as toilet article (CLR CR 1082/86-87 dated November 5, 1986, CLR CR 664/87-88 dated October 3, 1987, CLR CR 725/89-90 dated February 24, 1990). From the above, it is very clear that tooth-paste and tooth-powder and the cream are nothing but toilet articles and the assessing authority had rightly taxed them at 15 per cent under serial No. 10 of Part T of the Second Schedule and hence the appeal order is improper and prejudicial to the interest of Revenue." The appellant filed statement of objections setting out the following facts : 1. The licence for manufacture was obtained under drug licence. 2. The products are treated as medicine and drugs for the purpose of payment of duty under the Central Excises and Salt Act. 3. That the Indian Standards Institution rejected the plea that the goods were cosmetics. 4. That several authorities and the courts have taken the view that the goods in question are drugs or medicinal preparations. The revisional authority rejected various other technical objections raised such as initiation of the suo motu revision proceedings when an appeal had been pending before the Appellate Tribunal. The revisional authority formulated the question before him as follows : "Whether Vicco Vajradanthi and other Vicco products are toilet articles or medicines ?" In answering the said question, the revisional authority referred to a clarification issued by the excise authorities to the effect that according to the existing practice, each medicament used in various system of treatments for, e.g., ayurvedic, unani and siddha has to be examined on merits. Broadly, the preparation would merit classification as an ayurvedic medicine if in common parlance it is known as ayurvedic medicine and all the ingredients are mentioned in authoritative books on ayurveda. Thus, the two tests for determining the classification of the products claimed to be an ayurvedic medicine excluding herbal or ayurvedic cosmetic should be kept in view while dealing with such cases. He relied on certain decisions : 1. For any formulation to be considered as ayurvedic medicine, the same should be either recognised so in a standard ayurvedic work or should be so proved by clinical trials or should be recognised so by any authority like the DCHS. Collector of Central Excise v. Warner Hindustan Ltd. (1989) 42 ELT 33. 2. Dant Lal Manjan is used for cleaning the teeth only. Hence, it is not a drug or ayurvedic medicine. Shree Vaidyanath Ayurved Bhavan v. Collector (1991) 51 ELT 502. 3. Halls ice mint tablets are not ayurvedic medicines merely because of the ingredient pudhina and eucalyptus oil. Collector of Central Excise v. Warner Hindustan Ltd. (1989) 42 ELT 33. 4. Swad digestive tablets were held to be a preservative and is an ayurvedic medicine and not a confectionery. Panama Chemical Works v. Union of India (1992) 62 ELT 241 (MP). The revisional authority also took note of the fact that Dant Lal Manjan has been held to be not an ayurvedic medicine and referred to the tariff items in regard to pharmaceutical products. The Central excise department also had clarified that Dant Lal Manjan tooth-paste and powder could more appropriately be described as a preparation for oral or dental hygiene and these products would not merit classification as ayurvedic medicines. On that basis, the revisional authority interpreted entry 10 in Part T of the Second Schedule to the Act with reference

to Explanation VI in the Schedule. He referred to certain dictionary meanings of the words cosmetics and toilet requisites to understand the meaning of the entry in question and held that a tooth-powder can certainly be referred as an item of cosmetic or toilet for it is used for cleaning the teeth which is part of the body and cosmetics and toilet requisites in common parlance is an essential item of toiletry in modern life. The manufactures of dentifrices like tooth-paste and tooth-powder invariably claim medicinal properties for their products and some of them do possess the medicinal properties claimed by their manufacturers. The fact remains that they are primarily used for dental cleanliness which is an essential act of toilet and surely not used as a medicine. He also observed that when medicinal properties are claimed even in respect of large number of items of cosmetics such as lotions, creams, snows and powders, that would not mean that such articles cease to belong to the range of cosmetics and become medicines. The act of brushing one's teeth with tooth-paste or tooth-powder is not certainly in the same nature as taking or using medicine. Soaps, scents and perfumes were separately listed because they were subject to different rates and he therefore, took the view that the intention of the framers of the notifications was to include all articles in the expressions "cosmetics and toilet requisites", as are popularly regarded as articles falling within that category but such of those articles as were intended to be taxed at different rates were separated and listed separately. He also took note of the fact that even the manufacturers of dentifrices like tooth-paste and tooth-powder regarded them as items of cosmetic and toiletry and he referred to Ciba which is a well-known company engaged in the manufacture of pharmaceuticals and cosmetics. He noticed the decision in Sarin Chemical Laboratory v. Commissioner of Sales Tax wherein it was decided that in common parlance, a tooth-powder is considered as a toilet article. That meaning accords with the dictionary meaning as well. He did not deal with the material produced by the appellant. He disposed of the same by stating that the voluminous, documentary evidences produced by the respondent before the first appellate authority pertains to the scientific definitions and the analysis tried to be carried out thereon. However, going into the scientific details would become necessary if the entry in the Schedule can be interpreted in two different ways or if there is any ambiguity. Otherwise, it is enough to know how the trader, the buyer, the seller and the consumer understand the issue. The Supreme Court in the case of Ramavatar Budhaiprasad v. Assistant Sales Tax Officer [1961] 12 STC 286 has held to the effect that the expressions should be construed with reference to the common parlance that is in the popular sense meaning the sense which people conversant with the subject-matter with which the statute is dealing would attribute to it. On that basis, he concludes that the orders made by the appellate authority should be set aside and that of the assessing authority made in exercise of powers under section 12A should be allowed. That is how these appeals are presented before this Court. 2. On behalf of the appellant, it is urged in support of the contention that the products Vicco Vajradanthi (paste and powder) and Vicco turmeric (cream) squarely fall under entry 5 of Part M. Our attention was drawn to the Drugs and cosmetics Act, 1940 which regulated the manufacture, distribution and sale of drugs and cosmetics. The Legislature

did not take note of the ayurvedic drugs until amendments were brought into effect by Act 13 of 1964 which came into force with effect from February 1, 1969 and in the State of Maharashtra from the January 15, 1971. Chapter IVA was introduced in the said Act providing for regulation, manufacture, distribution and sale, etc., of "ayurvedic drugs" which also came to be defined by a provision introduced by section 3(a) of the Act. Section 3(aaa) defines "cosmetic" and section 3(b) defines a "drug" and reference to these definitions would make it clear that the products falling in either or any of the aforesaid category cannot overlap and are mutually exclusive namely, if the product is a ayurvedic drug, it necessarily cannot be a cosmetic and vice versa. The definition also would make it clear that for being an ayurvedic drug, the product should necessarily have a prophylactic, remedial and curative properties/qualities as opposed to a cosmetic which does not have any of the qualities but has only the effect of improving the human appearance or freshness of the human body. 3. Under the provisions of section 18 of the Drugs Act, there is a prohibition for the manufacture of either a drug or a cosmetic without a valid licence and that Chapter is inapplicable to ayurvedic drug for which a licence is required to be obtained under section 33EEC of the Drugs and Cosmetics Act. Under rule 150A framed thereunder, the standard for cosmetics have been prescribed under the Schedule S and cosmetics mentioned therein will have to necessarily conform to the standard set by the Indian Standards Institution. If the cosmetic does not conform or adhere to the ISI specifications, it amounts to an offence under the Drugs Act. 4. The manufacturers of these products have been doing so long prior to January 15, 1971 and Chapter IVA of the said Act came into force and made applicable to ayurvedic drugs. Under rule 154 of the Drugs and Cosmetics Rules, before a licence to manufacture the products claimed by the manufacturer to be a ayurvedic drug is granted, the technical committee will have to examine the claim thereto and such committee will consist of experts on the subject namely, ayurvedic drug and it is upon such satisfaction the licence is granted for the manufacturer of the particular product determined as an ayurvedic drug by the said committee. The manufacturers of the said products approached the drugs authorities in the State of Maharashtra in which region the said products are manufactured and it is only on compliance with the said provisions of Chapter IVA read with rule 154 of the Rules, a licence to manufacture the aforesaid three ayurvedic drugs came to be granted in favour of the manufacturer. It is the contention of the appellant that this factual background is essential for proper appreciation of the matter in question. It was further contended that the decision in Commissioner of Sales Tax v. Vicco Laboratories [1968] 22 STC 169 (Bom) is not applicable to the facts of the present case for the following reasons : 1. That decision was rendered on February 20, 1968, when the concept of ayurvedic drug and the legal recognition thereto was not in existence and the decision could not, for the aforesaid reason, consider the provisions referred to earlier which was brought into the statute book only on January 15, 1971. 2. That the decision related to only one product out of three products with which we are concerned namely, Vicco Vajradanthi in the form of powder and is therefore, not an authority for the classification of the other products. 3. The

question whether the products were ayurvedic drugs could not and did not arise for determination. The only question that was raised and considered in that case is whether tooth-powder was or was not an article of toilet preparation. It was presumed that Vicco Vajradanthi was a tooth-powder. 4. After the introduction of Chapter IVA to the Drugs Act, the Commissioner of Sales Tax in spite of reference to the decision in [1968] 22 STC 169 (Bom) (Commissioner of Sales Tax v. Vicco Laboratories) considered the effect of the entries and answered the question that the said products are not preparation of toilet or cosmetic but are medicines. The relevant orders of the Commissioner of Sales Tax are referred to by way of supporting material. 5. The goods in question have been accepted in the States of Madhya Pradesh and Orissa and orders have been passed in respect of these products in relation to sales tax laws of the respective States. Similar view has been expressed by the Sales Tax Tribunal in Tamil Nadu also. 6. While dealing with the taxing statute with nearly similar entries like the Central Excises and Salt Act, the Bombay High Court on April 27, 1988 held the product namely, the tooth-paste, as not a tooth-paste or cosmetic but an ayurvedic medicine exigible to excise duty under the relevant entry of ayurvedic medicines. It is therefore submitted that the decision in [1968] 22 STC 169 (Bom) (Commissioner of Sales Tax v. Vicco Laboratories) need not be attached much importance. 5. Interpreting the entry in question, it was submitted that the toilet articles whether medicated or not would only mean that it applies to articles which are not medicines but which are only medicated. In the present case, the goods with which we are concerned is a medicine and therefore, the question of whether medicated or not would not arise at all. The expression "whether medicated or not" would not convert a medicine into a toilet article. It only means, essentially a toilet article shall not lose the character of toilet article merely because certain medicinal components have been added to it. By referring to the provisions of the Drugs Act, it was very seriously contended that much of the products which are ayurvedic drugs for the purposes of Drugs Act and definitely not cosmetics, then the manufacturers of the product who are not the holders of licence to manufacture cosmetic are committing a breach of the provisions of sections 18 and 27A of the Drugs Act which provides for punishment up to a period of five years. If interpretation is to be placed on the products in question in the manner as has been done by the department, it would lead to very serious consequence so far as the appellant is concerned. For purposes of understanding the expression "medicine or toiletry preparation", since no definition is given under the Act, the definition of these products given in the enactments such as the Drugs Act could be relied upon and for this proposition, learned counsel relied upon the decisions in Ramesh Chemical Industries v. Union of India (1980) ELT 598 and S. Srinivas v. Assistant Collector of Central Excise, Tiruchirapalli (1982) ELT 360. 6. It was further contended that, taking into consideration the effect of the Drugs Act and ISI (Specification of Marks) Act, 1952, by virtue of rule 150A of the Drugs and Cosmetics Rules, 1945 reads with section 27A of the Drugs Act, the manufacturers are manufacturing cosmetics firstly without a licence and secondly not in conformity with the ISI specifications. The manufacturer had approached the Indian Standard

Institute for having a ISI mark to its products. The technical committee for cosmetics examined the matter and opined that the three products in question are not cosmetics being ayurvedic drugs or medicines. Under the Drugs Act, the products in question have been recognised as ayurvedic products alone and not cosmetics and experts under the ISI Act have endorsed this opinion. Therefore, the sales tax authorities cannot propose to take a stand unsupported by any legal or factual foundation and in the absence of any material to dispel this material produced by the appellant to reach the conclusion that these products are not ayurvedic drugs or medicines but toiletry items. It was submitted that it is a settled proposition that views and opinions of the Sectional Committees of the ISI need to be accepted in view of the expertise possessed by them, unless there is strong evidence or any other reason to take contrary view and such material is not available in the present case. For this proposition, learned counsel relied upon the decisions in Union of India v. Delhi Cloth & General Mills Co. Ltd. , Porrits & Spencer (Asia) Limited v. Union of India (1980) ELT 679, Parry Confectionery Ltd., Madras v. Government of India (1980) ELT 468, Devidayal Rolling & Refineries Pvt. Ltd. v. A. V. Borkar, Superintendent, Central Excise (1983) ELT 338 and Empire Industries Limited v. Union of India . 7. Learned counsel also approached this matter from another angle as to how the parallel judicial authorities either under the sales tax law or analogous tax and enactments have considered these goods to which some reference has been made earlier. It was therefore submitted that, the factual and legal data placed before the court should be adequate enough to answer the question in favour of the appellant that the products squarely fall within the scope of entry 5 of Part M of the Second Schedule to the Act. In addition, material was sought to be placed in the shape of certificates issued by medical practitioners, doctors, chemists, druggists and lastly the consumers who are the persons who use the products as to whether they use or consider them as drug, medicine or a cosmetic. The appellant also relied upon certain views expressed by certain experts to state that Vicco turmeric is not treated as a skin cream much less a facial cream but is treated as a drug or medicine for the treatment of diseases or ailments like skin infection, eczema, itches, pimples, boils, dermatitis and so on. As regards Vicco Vajradanthi paste or powder, the common view of the persons is that the products are used as medicine for tooth decay, pyorrhea, swollen gums, bleeding gums and periodontal disorders. The appellant also pointed out that the cosmetic has the effect of beautifying or adorning or protecting which is not the purpose of a medicine which is used for remedying or curing diseases, the curative element used in such a treatment being a feature conspicuously absent in respect of cosmetics and in support of this proposition, learned counsel for the appellant relied upon the decisions in Dunlop India Ltd. v. Union of India AIR 1977 SC 597, Hindustan Aluminium Corporation Ltd. v. State of Uttar Pradesh and Venkateswara Stainless Steel & Wire Industries v. Government of India (1983) ELT 2217. It was further contended that the product is primarily used as a medicinal preparation and merely because it is being capable of being used for other purpose and is incidentally used as toiletry item will not take it away from the entry of medicines to be classed as a toiletry item and for this

proposition, learned counsel relied upon the decisions in Arya Vaidya Pharmacy v. State of Tamil Nadu , Adhyaksha Mathur Babu's Sakti Oushadhalaya Dacca (P) Ltd. v. Union of India , C.C. Mahajan and Co. v. State of Bombay [1958] 9 STC 133, State of Madras v. S.P. Vadivel Nadar and Sons [1968] 21 STC 448 (Mad.) and Commissioner of Sales Tax v. Murari Brothers [1980] 46 STC 88 (All.). As against the plethora of material placed by the appellant in support of their claim, the department had not placed any material to counteract the same and therefore, it was plainly illogical and irrational in concluding that the goods in question would fall under item toiletry and not under the item medicine. 8. Learned counsel summed up his argument by stating that we are interpreting a taxing statute. The burden is upon the department to show that at what rate the tax would be levied in respect of the products by proper classification thereto and such provisions will have to be construed strictly and if two views are possible, the one favourable to the assessee should be accepted and if there is any ambiguity, it should also be interpreted to the advantage of the assessee. On that basis, it was contended that these appeals were liable to be allowed. 9. After we heard the matter on an earlier occasion and put of further consideration, a decision in BPL Pharmaceuticals Ltd. v. Collector of Central Excise, Vadodara rendered by the Supreme Court is brought to our notice on behalf of the appellant. In that decision, the Supreme Court was concerned with "Selsun" anti-dandruff preparation containing 2.5 per cent of selenium sulphide which is the full therapeutic limit permissible under the pharmacopoeia. The said product was manufactured under the drugs licence as a medicine, put up as a medicine, used under doctor's advice and sold through chemist's shops and a doctor's prescription. It is understood as a medicine in common parlance on the basis of the material placed before the court. Pricewise it was found to be much costlier than other shampoos sold in the general merchandise shops. In those circumstances, the Supreme Court held that it was classifiable as a drug and not as a toiletry item or cosmetic. The Supreme Court stated that the manner in which the product is marketed was not of much significance because in order to take away entirely unpleasant smell of selenium sulphate, if any perfume is added and it is put up in an attractive plastic bottle or that at one time in the past the said product was described by the manufacturer as "Selsun shampoo" was immaterial. What was material was the true nature of the product and that could be ascertained having regard to the preparation, label, literature, character, common and commercial parlance understanding and the decisions of certain authorities who have knowledge of these goods. Learned counsel for the appellant strongly relied upon this decision to contend that in the present case, the situation being identical, the conclusion should not be different and that the products in question must be held to fall under the medicinal preparation and not toiletry preparation. 10. Learned Government Advocate on the earlier occasion and the learned Government Pleader today contended as follows : That the decision in [1968] 22 STC 169 (Bom) (Commissioner of Sales Tax v. Vicco Laboratories) must be given full weight and when in the case of the appellant's products itself the view taken is approved by the Supreme Court in Commissioner, Sales Tax v. Sarin Chemical Laboratory [1969] 24 STC 406

(All.), it is no longer open to the appellant to contend to the contrary. It is also urged that in somewhat identical cases arising in [1969] 24 STC 406 (All.) (Commissioner, Sales Tax v. Sarin Chemical Laboratory), the court was concerned with tooth-powder which was marketed as Sarin Dant Manjan used for cleaning the teeth, is an article of cosmetic or toilet requisite. The act of brushing one's teeth with tooth-paste or tooth-powder is not the same thing as taking or using medicine. In that decision, reliance was placed on [1968] 22 STC 169 (Bom) (Commissioner of Sales Tax v. Vicco Laboratories). This decision went up on appeal to the Supreme Court in Sarin Chemical Laboratory v. Commissioner of Sales Tax, U.P. [1970] 26 STC 339 and the Supreme Court upheld the decision of the Allahabad High Court. The court proceeded to analyse the matter with reference to the dictionary meaning of cosmetic and toiletry in the absence of any definition on such expression in the Act. They also approved the decisions in V. P. Somasundara Mudaliar v. State of Madras [1963] 14 STC 943 (Mad.) and Commissioner of Sales Tax v. Vicco Laboratories [1968] 22 STC 169 (Bom). It is therefore contended by the learned Government Pleader on behalf of the State that whatever may be the material that may have been placed in the context of excise enactment or for other purposes like the Drugs Act, so far as the sales tax enactments are concerned, it is clear that the courts have taken the view that the products in question are toiletry items and nothing else. Learned Government Pleader further elaborated that the entry in relation to toiletry items would include not merely toilet articles but, whether medicated or not also are covered by the same. Merely because a toilet article has certain medication in it would not render it a medicine or a medicinal preparation to fall outside that entry. He further contended that the entry will have to be read with Explanation VI to the Schedule. Learned Government Pleader referred to several decisions to explain the scope and effect of the clause in the enactment and the meaning to be given to the expression "toiletry items". In particular, we may refer to some of the decisions relied upon by the learned Government Pleader. In Commissioner of Sales Tax v. Shri Sadhna Aushadhalaya [1963] 14 STC 813 (MP) the court was concerned with hair-oil. In that the court was concerned with Maha Bhringraj hair-oil. It was noticed therein that Bhringraj hair-oil was manufactured by the assessee, dealing with ayurvedic preparations but was held to be a toilet article and there was no justification for treating the oil as a "medicinal preparation" merely because the assessee manufactures the oil following a formula given in an ayurvedic treatise and the fragrance of the oil is disagreeable. The court therein took the view that a "toilet preparation" is any preparation which is intended to affect and conceivably improve the bodily appearance of the person. The words "cosmetics" and "toilet", are the words of every day use and must be construed not in any technical or scientific sense, but as understood in common parlance and is commercial language, and therefore, took the view that the hair-oil manufactured by the assessee was a "toilet article" and falls within the meaning of the term "cosmetics". Learned Government Pleader referred to the decision in V. P. Somasundara Mudaliar v. State of Madras [1963] 14 STC 943 (Mad.) wherein, under the Madras Sales Tax Act, the scope of item 51 of the First Schedule to the Act as in force in

1959 was considered. It was held therein that the tooth-powder does not come within the scope of item 51 thereof and it is used for cleaning the teeth and not for enhancing the beauty of a person and it cannot be included in the category of goods such as "powders, cosmetics or toilet requisites" mentioned in the Act. The decision in Commissioner of Sales Tax v. Vicco Laboratories [1968] 22 STC 169 is relied upon and the argument advanced on behalf of the State is Vicco Vajradanthi was held to be a dentifrice in the form of powder used for cleaning teeth and is a toilet article. In the decision in State of Gujarat v. Prakash Trading Company , after referring to Sarin Chemical Laboratory v. Commissioner of Sales Tax , the Supreme Court further elaborated the meaning of the expression "cosmetics", "toilet" and "toiletry items" with reference to the dictionary. The court held that in the absence of any special definition of "toilet articles" the reasoning adopted in Sarin Chemical Laboratory's case should be adopted in every case, to which we have made a reference. The court held that a tooth-paste is a toilet article within the meaning of entry 21A of Schedule E to the Bombay Sales Tax Act as amended by Gujarat Act and it is also noticed that shampoo is a kind of liquid soap and it has all the essential ingredients of soap and hence, that item was also held to be a toiletry article. It was lastly contended that Vicco Vajradanthi contains certain extracts of Babhul, Jambhul, Lavang, Manjistha, Dalchini, Bor, Vajradanti, Acrod, Khair, Patang, Akkal Kadha, Bakul, Jesthamadh, Kabab, Chini (Chirfal), Anant Root, Ajwan, Maifal, and Trifala, and merely because certain herbs, roots and barks of trees are used, the same cannot be treated as medicinal or pharmaceutical preparation and herbs, roots and barks in common parlance may be drugs or medicines but are not medicinal preparations and therefore, he submitted that the goods in question must be treated as toiletry item and are exigible to tax as decided by the revisional authority. Learned Government Pleader also submitted that the material placed by the appellant before the authorities or before this Court would not be of much avail to them because there is a clear pronouncement on the matter by the Supreme Court and the High Courts and only when matters are in doubt and fresh investigation needs to be made, such material will have to be looked into and at this stage. 11. The entry with which we are concerned in these cases read as follows : "Toilet articles (whether medicated or not) except toilet soaps and such other toilet articles as may be specified by the State Government by notification in the official Gazette." and the other entry is relating to medicinal and pharmaceutical preparations (other than those specified elsewhere). The products with which we are concerned in these cases are, Vicco Vajradanthi paste and powder and Vicco turmeric which is a cream. In view of the decision in Commissioner of Sales Tax v. Vicco Laboratories [1968] 22 STC 169 of the Bombay High Court having held that the dentifrices in the form of powder used for cleaning teeth is a toilet article and that conclusion was based on dictionary meanings of the expressions "toilet, toiletry articles or preparations". This view having been approved by the Supreme Court in Sarin Chemical's case [1970] 26 STC 339 and the view expressed in Sarin Chemical's case having reiterated in State of Gujarat v. Prakash Trading Company , we would have had no difficulty in treating Vicco Vajradanthi in the form of powder as only a toiletry item.

But a perusal of the decisions in these cases would make it clear they have all rested on the dictionary meaning and no more. The courts were not concerned in these cases with the nature of the article, the ingredients thereof, the use to which they are put with specific reference to extra information as to how the goods were treated in the market as such particularly, the circumstances that the manufacturers of the goods in question having applied for a licence under the Drugs Act as an ayurvedic drug and the same having been obtained and the goods marketed as such, the goods having been subjected to an examination by the Technical Committee of the ISI (Specification of Marks) Act, 1952 and the goods having been held not to be a cosmetic or toiletry item but only as a drug, the matter needs closer examination. As the matter stood prior to 1971 and when the Drugs Act stood amended and became enforceable in Maharashtra in relation to ayurvedic drugs also, the position took a different complexion altogether. Therefore, all those decisions that have been rendered prior to January 15, 1971 were in the context of dictionary meanings to such expressions as "toiletry items". There is no material before any one of the authorities in those cases as to the nature of the goods much less any licence obtained, under the Drugs Act or expert opinion furnished by the Technical Committee of the ISI, to classify it as a cosmetic or a toiletry item. In the absence of such material forth coming, the court had no other view possible to take in those circumstances. After the goods in question had been treated as ayurvedic drugs for the purpose of the Drugs Act, the excise authorities functioning under the Central Excises and Salt Act for purposes of classification of the goods and levy of tax, examined the matter and took the view that they were drugs and not cosmetics or toiletry items though they had earlier taken the view to the contrary. Even the Commissioner of Sales Tax in Bombay though was bound by the decision in [1968] 22 STC 169 (Commissioner of Sales Tax v. Vicco Laboratories), on re-examination of the matter with reference to later developments, took a different view. That is the view now expressed in the States of Kerala, Orissa and Madhya Pradesh, so also in Tamil Nadu by the Tribunal. In the face of this material, when the goods are manufactured as drugs and marketed as drugs and only when the customer buys the same if it is to be treated not as a drug but as a cosmetic or a toiletry item, it surpasses our comprehension as to how the same could be treated as such. Apart from the fact that the goods in question have been expressed to be in the nature of medicinal preparation either by the doctors or by the customers who have been using the same, there is other material in these cases on which reliance could be placed such as the statutory authorities constituted under the Drugs Act, the ISI (Specification of Marks) Act, 1952 and the Excise Act along with the views of the sales tax authorities in different States. That material is sufficient to come to the conclusion that the goods in question in these cases are drugs or medicinal preparations and not toiletry items. 12. However, the learned counsel for the State contended that reading of the entry in relation to medicinal preparations would make it clear that if the same are not specified elsewhere, they would be covered by that entry and in these cases, a toiletry item since medicated falls in the category of toiletry item and not in the category of medicinal preparation. He has sought support with

reference to Explanation 6 in the Second Schedule as well. Explanation 6 in the Second Schedule does not carry the matter anywhere except to repeat as to the types of uses to which a toiletry item could be put. It is stated therein that such article is intended for use in the toilet or the human body or in perfuming apparel of any description or any substance intended to cleanse, for use in the toilet or the human body or in perfuming deodorants and perfumes. What is of substance in these matters is the true nature of the goods in question. If in truth the said goods are medicinal preparations, merely because such goods are used for other purpose would not change its character while if the goods are in substance toiletry items and if they also have some medicinal ingredients added to them, it would not cease to be so. The specific case put forth by the appellant is that they are medicines or medicinal preparations and that is why they were put to the necessity of obtaining licence under the Drugs Act. If the goods in truth are medicines or medicinal preparations, the same cannot be described to be a toiletry item by reason of the nature of the use to which they may be put otherwise. Though a tooth-paste, a tooth-powder or a skin cream by itself may not be characterised as medicinal preparation, if such goods attract the provisions of the Drugs Act, and are classified as such, certainly the same will have to be treated as a medicinal preparation and not as a toiletry item. However the learned counsel appearing for the State submitted that the goods in question are not such preparations which could be obtained from a chemists shop under prescription of a doctor. It is no doubt true that if certain goods have to be sold by a chemist alone under the prescription of a doctor, undoubtedly, such goods would fall in the category of medicinal preparation. If such goods could also be obtained in shops of ordinary merchandise or in chemist shop also but, nevertheless if they are medicines or medicinal preparation, it would not cease to be so. The necessity of obtaining a prescription for selling of such goods only by a chemist would arise in case of any goods where the law requires to be so particularly, where the goods as such have harmful effects on the system of the human body. In other cases, there will be no such restrictions placed at all. In those cases, the goods could be sold either in a pharmacy or a druggist shop or any another shop. Therefore, that test may not be a clinching one in a case of this nature. In the view we have taken we are fortified by the decision of the Supreme Court in BPL Pharmaceuticals Ltd.'s case [1997] 104 STC 164; (1995) 77 ELT 485. The Supreme Court in that case, was concerned with Selsun suspension, the facts of which have already been referred to. In that case, the material considered by the Supreme Court was that it was a drug for the purpose of the Drugs Act and the definition given in the Drugs and Cosmetics Act could not be ignored and the manner in which the said goods were treated for the purpose of Central Excise Tariff Act were taken note of. In that decision, the manner in which the goods were treated by the sales tax authorities were also taken note of. The nature of the curative effect was considered; that it was manufactured under the Drug Licence; the Food and Drugs Administration had certified it as a drug; it was included as a drug in the National Formulary and Merck Index; it fulfilled the requirements of a drug as understood in common parlance; that it was sold on medical prescription and used as a medicine

and it was a medicated shampoo and certain other technical literature. Apart from that, the manner in which the sales tax authorities treated the same was also considered. In the present case, therefore, we cannot ignore the manner in which the goods have been treated under the Drugs Act and we cannot also hold that the goods are medicated toiletry items, one more feature that was noticed in the decision was that the excise department had made enquiry in the trade and found that other shampoos such as Clinic, Tata and Halo were much cheaper and they were marketed and known as a mere beauty aid to render their hair silky, soft and healthy but, on the other hand several precautions were mentioned in the use of the goods. In the present case, learned counsel for the appellant has placed material before this Court to show that the cost of Vajradanthi paste is much higher than either Colgate, Cibaca, Forhans, Babul or Promise and the cream is also much costlier than Fair & Lovely or Ponds. 13. In the view we have taken, it is wholly unnecessary to refer to the decisions relied upon by the learned counsel on either side in any great detail for, none of those decisions except in BPL Pharmaceuticals case the effect of obtaining licence under the Drugs Act has been considered. It is rather unfortunate in these cases that the revisional authority did not examine the matter in the perspective with which it should have been done particularly, with reference to the material that was placed before him. He merely proceeded to hold assuming that the goods are toiletry items and concluded. 14. Before parting with the case, it may be necessary to refer to one decision of this Court on which very strong reliance had been placed on behalf of the respondents. In L. M. Rajappachetty & Bros. v. Commissioner of Commercial Taxes , this Court was concerned with herbs, roots and barks of trees and whether that could be considered as medicinal or pharmaceutical preparation or not. This Court took the view that herbs, roots and barks of trees in common parlance are drugs and medicines and not medicinal preparations. The assessee in that case was a dealer in dried herbs, roots and barks of various types of trees which are used for curing certain types of diseases. Therefore, in that decision, the court was not concerned with goods where the herbs, roots and barks of various types of trees were put in any particular combination or proportion along with other chemical ingredients in order to render the same for use as a preparation. That was why this Court held herbs, roots and barks in their raw form could not be classified as medicinal preparation but only as medicine. That is not the position in these cases at all. In these cases, we have referred to the various percentages and different kinds of ingredients that go in the preparation of Vajradanthi and such a preparation cannot be said, by any stretch of imagination, a mere herb, root or bark of tree as was done in Rajappachetty's case . Therefore, that decision cannot be of any assistance to the State. Hence, we allow these appeals setting aside the order made by the Commissioner in revision and restore the order made by the appellate authority in appeal. No order as to costs in the circumstances of the case. 15. Appeals allowed.