M/S. Naturalle Health Products (P) Ltd vs Collector Of Central Excise, Hyderabad on 11 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 669, 2004 (9) SCC 136, 2003 AIR SCW 6288, 2003 (9) SCALE 542, 2003 (4) LRI 508, (2004) 14 ALLINDCAS 215 (SC), 2004 (2) SRJ 392, (2003) 8 JT 614 (SC), 2004 (14) ALLINDCAS 215, 2003 (7) SLT 117, (2003) 158 ELT 257, (2003) 111 ECR 513, (2004) 2 SUPREME 630, (2004) 1 RECCIVR 232, (2003) 9 SCALE 542, (2004) 13 INDLD 82

Author: Ar. Lakshmanan

Bench: P. Venkatarama Reddi, Ar. Lakshmanan

```
           CASE NO.:
Appeal (civil)  2072 of 1996
Appeal (civil)  10744 of 1996

PETITIONER:
M/s. Naturalle Health Products (P) Ltd.

RESPONDENT:
Collector of Central Excise,  Hyderabad

DATE OF JUDGMENT: 11/11/2003

BENCH:
P. Venkatarama Reddi & Dr. AR. Lakshmanan

JUDGMENT:
```

J U D G M E N T Dr. AR. Lakshmanan,J.

The points involved in both the appeals are one and the same and, therefore, they were heard together by consent of parties.

The issue involved in Civil Appeal No. 2072 of 1996 is:

> Whether or not medicated cough drops and throat drops manufactured by the appellants in accordance with and under the licence issued under the Drugs and Cosmetics Act, 1940 for the manufacture of "Ayurvedic Drugs" are classifiable as Ayurvedic Medicaments for the purpose of levy of central excise duty. The issue for determination in Civil Appeal No. 10744 of 1996 is:
>
> Whether the products "Sloan's Balm" and "Sloan's Rub" are ayurvedic medicines and are classifiable under Chapter Heading 3003-30 as contended by the appellants

attracting nil rate duty OR Classified under Chapter sub-heading 3003.10 chargeable to duty at 15% ad valorem.

The facts briefly stated in Civil Appeal No. 2072 of 1996 leading to the filing of this appeal are as under:-

The appellants - M/s Naturalle Health Products (P) Limited, Hyderabad filed the classification list as required under Rule 173-B of the Central Excise Rules, 1944 with the Assistant Collector of Central Excise claiming classification of their goods under sub-heading 3003.30 read with erstwhile notification No. 32/89-CE dated 01.03.1989. The appellants were issued a loan licence to manufacture for sale of Ayurvedic drugs under the Drugs and Cosmetics Act, 1940 and the said loan licence was renewed from time to time. A show-cause notice was issued by the Assistant Collector of Central Excise calling upon the appellants to show cause why the said goods should not be classified as Patent or Proprietary Medicaments under sub-heading 3003.10 of Central Excise Tariff attracting excise duty at the rate of 15% ad valorem. The appellants replied to the show-cause notice and denied that the said goods are not Ayurvedic Medicaments and submitted that the grounds raised in the show-cause notice were not relevant for determining the classification of the goods. The Assistant Collector, after giving a personal hearing, vide Order dated 14.03.1991 held that the said goods are classifiable as Patent or Proprietary Medicaments under sub-heading 3003.10 of the Central Excise Tariff and accordingly is assessable to duty thereon. The appeal filed by the appellants before the Collector of Central Excise was dismissed on 21.02.1992 upholding the Order dated 14.03.1991 of the Assistant Collector. The appellants challenged the said Order by filing Writ Petition No. 4030 of 1992 in the High Court of Andhra Pradesh which was dismissed on 12.03.1993 on the ground of alternative remedy. The appellants filed an appeal to the CEGAT on the grounds set out in their memorandum of appeal. The CEGAT, New Delhi by its final order dated 17.10.1995 by a majority of 2:1 dismissed the appeal and upheld the classification of the said goods as Patent or Proprietary Medicaments under sub-heading 3003.10 instead of appellant's claim as Ayurvedic medicine under sub-heading 3003.30. The Vice-President opined that the matter needs to be referred to a larger Bench keeping in view the importance of the issue involved in the industry as a whole. However, he agreed with the Member(Technical) on many points. Aggrieved by the said order, the appellants preferred the present appeal under Section 35 L(B) of the Central Excise and Salt Act, 1944.

The short facts are:

The appellants manufactured two medicaments known as "Sloan's Balm" and "Slaon's Rub" out of the ingredients which are mentioned in the texts on the Ayurvedic system of medicine and in accordance with the principles therein. According to the appellants, the issues in their appeal stand covered by the decisions in the case of Richardson Hindustan Limited vs. Collector of Central Excise, 1988

(35) ELT 424 (T) as confirmed by this Court reported in 1989 (42) ELT A100 and the decision in the case of Shri Baidyanath Ayurved Bhawan Private Limited vs. Collector of Central Excise reported in 1991 (51) ELT 502 and 1985 (22) ELT 844 which decisions have been confirmed by this Court in 1996 (83) ELT 492 The appellants filed Exhibit B1-B3 list of 'authoritative texts' in English, Hindi and Telugu on the Ayurvedic system of Medicament in which the ingredients of the two products are mentioned. They also filed Exhibits C1 and C2 Licences issued by the Director, Indian Medicines and Homeopathy, Hyderabad for the manufacture of Ayurvedic Medicine, namely, "Sloan's Balm and "Sloan's Rub". The appellants filed classification list in respect of the said products classifying the same under Chapter sub-heading 3003.30 as Ayurvedic Medicine attracting nil rate of duty. Two Show-cause notices were issued upon the appellants to show cause as to why the said products should not be classified under Chapter sub-heading 3003.10 as patent or proprietary medicine attracting duty at 15 % ad valorem. The appellants replied to the show-cause notice relying upon the Tribunal's decision in the case of Richardson Hindustan Limited (supra). The Assistant Collector, however, classified both the products under Chapter sub-heading 3003.10 chargeable to duty at 15% ad valorem. The appellants filed two appeals to the Collector of Central Excise (Appeals) and also filed before the Collector (Appeals), a report in respect of clinical trials conducted in respect of the said two products. The Collector of Central Excise remanded the case to the Assistant Collector for de novo adjudication. The Assistant Collector issued two revised show-cause notices. The appellants sent a reply to the show-cause notices. The Assistant Collector by two separate orders rejected the contentions of the appellants. Two appeals were filed before the Collector Central Excise (Appeals). The Collector of Central Excise allowed the appeals and set aside both the orders of the Assistant Collector and upheld that the products are ayurvedic medicines and are classifiable under Chapter heading 3003.30.

Aggrieved by the said order, the Collector of Central Excise filed an appeal to the CEGAT, which by its order allowed the appeal. Aggrieved by the said decision of the Tribunal, the present appeal has been preferred by the appellants - Akin Laboratories Ltd.

We heard Mr. V. Lakshmikumaran, learned counsel and Mr. Joseph Vellapally, learned senior counsel for the respective appellants and Mr. Raju Ramachandran, learned Additional Solicitor General for the respondent in both the appeals. Mr. Lakshmikumaran, learned counsel took us through the pleadings, exhibits marked and the relevant provisions of law and of the orders passed by the authorities concerned including the Tribunal and of this Court both for and against. Mr. Joseph Vellapally, learned senior counsel, also invited our attention to the relevant records and of the orders passed by the statutory authorities and of this Court in various decisions.

We have perused the pleadings, annexures and the decisions cited by both sides and heard elaborate arguments advanced by the counsel for both the parties.

Mr. Lakshmikumaran submitted that the authorities below rejected the appellant's claim on the basis of decision of the Tribunal in the case of Amrutanjan Limited vs. Collector of Central Excise 1991 (32) ECR 538. The order of the Tribunal in Amrutanjan Limited is, however, set aside by this Court in the case of Amrutanjan Limited vs. Collector of Central Excise reported in 1995 (77) ELT 500. He would, therefore, contend that the issue involved in the present case is covered by the judgement of this Court in the case of Amrutanjan Limited (supra). Notwithstanding the judgment of this Court in Amrutanjan Limited (supra), the Tribunal by a majority of two members to one dismissed the appeal and upheld the order of the lower authorities classifying the cough drops and throat drops as patent or proprietary medicines.

Before considering the arguments advanced by Mr. Lakshmikumaran, it is useful to narrate certain facts in regard to the products manufactured by the appellants. We have already noticed that the appellants are, inter alia, engaged in the manufacture of ayurvedic drugs including medicated cough drops and vaporet throat drops on job work basis for Procter and Gamble India Limited (hereinafter referred to as PGIL) to market them under the brand name Vicks. The said goods are manufactured by the appellants in accordance with and under a loan licence issued to PGIL for manufacture of ayurvedic drugs under the Drugs and Cosmetics Act, 1940.

According to the appellants in Civil Appeal No. 2072 of 1996, the following are the ingredients for the manufacture of the cough drops and throat drops:-

Vicks Medicated Cough Drops	Vicks Vaporat Throat Drops
Pudinah Arka	Pudinah Arka
Karpoor	Nilgiri Tel
Ajowan Ke Phool	Sugar base
Sugar base	

In the two appeals, the classification of the medicines manufactured by them are in dispute. According to the appellants in both the appeals, the goods manufactured by them are classifiable under Chapter sub-heading 3003.30 (heading 30.03). According to the Revenue, the goods manufactured by both the appellants are to be classified under Chapter sub-heading 3003.10 chargeable to duty at 15 % ad valorem. For ready reference heading 30.03 is reproduced hereunder:

Heading No. Sub-

Heading No. Description of Goods Rate of Duty 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 15% 3003.20 Medicaments (other than patent or proprietary) other than those which are exclusively used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-Chemic systems Nil 3003.30 Medicaments, including those used in Ayurvedic, Unani, Siddha, Homoeopathic or Bio-Chemic

systems Nil The effective rate of excise duty under Tariff sub - heading 3003.30 read with Notification 32/89 - C.E., dated 1.3.1989, is NIL.

Mr.Lakshmikumaran, learned counsel for the appellant, submitted that the definition of Ayurvedic medicine in Section 3(a) of the Drugs and Cosmetics Act cannot be applied for the purposes of the classification of a product for Central Excise duty under the Central Excise and Salt Act 1944 and the Central Excise Tariff Act 1985 and that when there is no definition of any word in the relevant statute, the word must be construed in its popular sense i. e. how the common man who uses it, understands it. Arguing further the learned counsel for the appellant submitted that the Tribunal has not only ignored both the tests but has on the contrary based its order on the definition of Ayurvedic Medicine in Section 3(a) of the Drugs and Cosmetics Act. It is submitted the Chapter Note.2 which indicates the meaning of "medicament" and "patent" and "proprietary medicament" and "drugs" does not refer to Drugs and Cosmetics Act 1940 and that there is every reason to believe that the Legislature has intentionally adopted a different definition for medicament, drug and patent and proprietary medicament etc. It is further submitted that when the phrase `pharmaceutical product' is peculiar to Central Excise Schedule and does not mean medication in the Drugs and Cosmetics Act and even the word `drugs' used in Note 2(ii) has been used in the Central Excise Schedule only to show that it falls within the ambit of medicament and that too in a sense different from the one used in the Drugs and Cosmetics Act where it has a specific connotation for the purpose of that Act as it excludes Ayurvedic, Siddha or Unani drugs and includes not only medicines but other substances and devices; this is, however, not the case in the Central Excise Tariff. According to the appellants, the Tribunal failed to appreciate that the appellant's products which contained the Ayurvedic ingredients as aforesaid were prepared in accordance with the Ayurvedic principles. It is further urged that the formulations have been developed after referring to several authoritative Ayurvedic books and careful evaluation of actions, clinical trials etc., and that the formulations have been approved by the Director of Indian Medicine and Homeopathy, Government of Andhra Pradesh. It is further submitted that the Tribunal failed to appreciate that the onus of classification of a product is on the Excise Department and that the Excise Authorities are required to produce the evidence to support their stand. In the present case, no evidence whatsoever has been produced by the Excise Department and they have not even rebutted the evidence produced by the appellants.

Learned counsel for the appellants contended that as the classification of the goods in question has been determined by the competent authority under the Drugs Act who on application for licence to manufacture Ayurvedic drugs in the prescribed statutory form has issued a licence for manufacture and sale of Ayurvedic drugs, the Central Excise Authorities have to act on that basis and it is not open to the Central Excise Authorities to go beyond the same or sit in judgment thereon. According to Mr.Lakshmikumaran the expression "Ayurvedic drug" is not defined in the Act and the rules made thereunder, assistance of the Drugs Act can be taken to understand the scope of sub-heading 3003.30 of CET. It is submitted that the Tribunal has failed to appreciate that sub-heading 3003.10 excludes patent or proprietary medicaments other than those medicaments which are exclusively Ayurvedic, Unani, Siddha, Homeopathic or Bio-Chemic from the class of patent or proprietary medicaments covered thereunder. According to the appellant that merely because the word "Exclusively" appeared in sub-heading 3003.10, it does not mean that the same would take colour

and have the same meaning as the word "Exclusively" appearing in definition of "Ayurvedic drug" in Section 3(a) of the Drugs Act. In this context, it is submitted that the Tribunal has failed to appreciate that the word "Exclusively" appearing in sub-heading 3003.10 is used to cover Patent or Proprietary Allopathic Medicaments as distinct from Patent or Proprietary Ayurvedic, Unani and Siddha medicaments. On the other hand, the word "Exclusively" appearing in Section 3(a) of the Drugs Act was to distinguish the Ayurvedic medicaments from Patent or Proprietary Ayurvedic medicaments defined in Section 3(h) of the Drugs Act and not to distinguish between the Allopathic medicines on one hand and Ayurvedic, Unani and Siddha medicaments on the other hand. Therefore, it is submitted that the world "Exclusively" appeared in different context and for different purposes and under sub-heading 3003.10 and Section 3(a) of the Drugs Act and, therefore, the meaning of the word "Exclusively" appearing in 3(a) of the said Act cannot be borrowed or applied for the purpose of determining the scope and ambit of sub-heading 3003.10 as opined by the learned Member(Technical). It is also submitted that the Tribunal has failed to appreciate that the word "Exclusive" means exclusiveness qua the individual assessee and that this exclusivity is licensed by the Drug Controller and that as the said goods are marketed as Ayurvedic medicament in India, the same are "Exclusively Ayurvedic" qua that manufacturer. It is further argued that on a true and correct construction, sub-heading 3003.10 excludes Patent or Proprietary medicaments which are manufactured, sold and marketed as Ayurvedic medicaments in accordance with the license issued under the Drugs Act i.e. Patent or Proprietary Ayurvedic medicaments falling under Section 3(h) of the Drugs Act and, therefore, Section 3(a) has no application at all in construction of sub-heading 3003.10 of CET. It is submitted that since the sub-heading 3003.10 excludes Patent or Proprietary Ayurvedic medicament as defined in Section 3(h) of the Drugs Act, the word "Exclusively" does not and cannot have the same meaning as appearing in Section 3(a) of the Drugs Act which defines Ayurvedic Drugs and not Patent or Proprietary Ayurvedic drug and that as the goods are Patent or Proprietary Ayurvedic medicaments within the definition given in Section 3(h) of the Drugs Act, Section 3(a) of the Drugs Act does not apply at all in the present case. It is also submitted that the Tribunal (Member(J)) has erred in holding that the formulae and patent of the appellant company is registered in America which is without any evidence or material on record and that the Tribunal has proceeded on an erroneous footing by recording the alleged admission regarding the method of manufacture and/or marketing of the said goods as Allopathic medicine in America and thereby misdirected itself in law and on facts and that the formula of goods bearing the name "Vicks' as manufactured in America is different and, therefore, the same cannot be compared to the said goods as was apparent from the reference to Martindale.

Mr.Raju Ramachandran, learned Additional Solicitor General in reply to the arguments advanced by the counsel for the appellant submitted that the Tribunal has rightly held that the cough drops and throat drops cannot be classified as "Exclusively" Ayurvedic medicaments as its product is not manufactured in accordance with the formulae prescribed in Ayurvedic texts and, therefore, the Tribunal has rightly held that though the ingredients may be Ayurvedic, the formulation is not Ayurvedic and, therefore, cannot be classified under sub-heading 3003.10. According to Mr.Raju Ramachandran, a bare perusal of the three sub-headings, namely, 3003.10, 3003.20 and 3003.30 would indicate that the first sub-heading covers all patent or proprietary medicaments, the second sub-heading covers other medicaments which are not patent or proprietary and the third sub-heading covers medicaments used in Ayurvedic, Unani, etc. systems and, therefore, it is

important to note that sub-heading 3003.30 uses the word "used in" ....."systems". It is submitted that a system of medicine pre-supposes a systematic practice of medicine where there is a patient and practitioner. For a medicament to qualify to fall under this sub-heading it is necessary to establish that a practitioner of Ayurvedic medicine prescribes the medicine in question in the normal course of his treatment and in both the present appeals, the Tribunal has not found that this has been established and, therefore, this Court would not interfere with question of facts.

In regard to the word "Exclusive" which is used both in sub-headings 3003.10 and 3003.20 Mr. Raju Ramachandran would submit as follows:-

> "The word "exclusive" is used both in sub headings 3003.10 and 3003.20. If what falls under 3003.30 is a "classical" Ayurvedic medicine (because that is what will be prescribed by an Ayurvedic practitioner practising the Ayurvedic system of medicine) then the expression "exclusively Ayurvedic" must again be the same classical Ayurvedic product which means it must fulfill both the ingredients of Section 3 (a) of the Drugs and Cosmetics Act, namely that its ingredients must all be those specified in the authoritative text books, and the formulae of its manufacture must be strictly in accordance with the formulae prescribed in those text books. Admittedly, the said formulae are not followed in both the cases and, therefore, the products in question cannot fall under sub heading 3003.30."

Replying to the argument of the counsel for the appellant that since classical Ayurvedic products can never be patent or proprietary medicines, the exclusion clause in sub-heading 3003.10 would be meaningless unless it comprehends neo-Ayurvedic products such as theirs. Mr.Raju Ramachandran contends that this exclusion is by way of abundant caution only to indicate that classical Ayurvedic products falling under sub-heading 3003.30 would not fall under sub-heading 3003.10, and it is well known that often expressions are used by way of abundant caution or clarification which does not mean that they are surplusage. In any event, even if the Court were to come to the conclusion that these words are surplusage, there need not be any inhibition in this regard. It is further submitted that these words occur not in a substantive section of the statute but in a sub-heading of a classification, which is part of a statute and if it is accepted that it is only classical Ayurvedic medicaments which would fall under sub- heading 3003.30, the interpretation placed by the Revenue on 3003.10 must also be correct. It is submitted that the onus of proving that the goods fall within the exception would surely be on those who claim that exception and in the instant case this onus has not been discharged inasmuch as it has not been found that these are medicines used exclusively in the Ayurvedic system of medicine. Referring to the judgment of this Court in the Himtaj Ayurvedic Hair Oil reported in 2003 (154) ELT 324 (SC), it is submitted by learned counsel for the respondent that the said cases were decided as a culmination of show cause notices issued by the Revenue seeking to classify the product in question as a perfumed hair oil and not as a medicament. There was, therefore, no occasion for the Revenue to ever argue on their appropriate classification within Chapter heading 3003, namely, 3003.10 or 3003.30. It is, therefore, submitted that the observation both of the Tribunal and of this Court in the Himtaj Hair Oil cases have to be understood as obiter dicta, do not preclude this Court from arriving at an independent conclusion.

Referring to the case of Vicks Vapourub which confirms the judgement of the Tribunal it is submitted by the learned counsel for the respondent that it does not again militate against the contention of the Revenue. In that case, the matter was remanded to see whether in common parlance the product in question was an Ayurvedic medicine and as already stated the common parlance test is accepted by the Revenue itself, but what is required to be seen is whether the said test is satisfied in the present case and the answer to that question must be in the negative.

Referring to the judgment of this Court in Amrutanjan case, Mr.Raju Ramachandran submitted that the said decision does not preclude the contention of the Revenue and all that the decision holds is that the fact that certain ingredients were of a synthetic nature would not mean that the products became non-Ayurvedic and that the said decision do not deal with the interpretation of sub-heading 3003.30 vis-`-vis 3003.10 .

We have given our anxious consideration to the points urged by the learned counsel for the appellants and learned counsel for the respondent with reference to the pleadings, provisions of law and the decisions of the Tribunal and of this Court.

It is not in dispute that the products in question are Vicks Medicated cough drops and Vicks Vaporub throat drops. The appellants manufacture these products under Ayurvedic Drug Licence. All the ingredients contained in these products are admittedly mentioned in authoritative Ayurvedic Text Books mentioned in Schedule III to the Drugs and Cosmetics Act. However, the formula of preparing the products is proprietary to the appellant in C.A.No.2072/1996. The appellant submitted that the ingredients contained in the products are manufactured from natural herbs like menthol etc., but purified to the pharmaceutical grade. The appellant claims the classification of the products in question as patented/proprietary Ayurvedic medicaments under heading 3003.30 while the Central Excise Department seeks to classify the said products under heading 3003.10.

We have perused the orders passed by the Assistant Commissioner and the Commissioner (Appeals) who decide the appeals against the assessee in C.A.No.2072/1996 on two grounds, namely:-

> (i) The products are not manufactured according to the formula in any authoritative text books on Ayurved; and
>
> (ii) The judgment of the CEGAT in the case of Amrutanjan Ltd.

Madras Vs. CCE Madras reported in 1991 (32) ECR 538 is applicable to the appellant.

We have perused the order in Amrutanjan case passed by the CEGAT wherein the Tribunal held that the products were having pharmaceutical name but the assessee was using Hindi name only to claim classification as Ayurvedic Medicine. This order of the Tribunal was overruled by this Court in the case of Amrutanjan Ltd. vs. CCE reported in 1995 (77) ELT 500 (SC). Unfortunately, the Assistant Commissioner and the Commissioner (Appeals) relied on the overruled judgement of the CEGAT, because the judgment of this Court was not available at the time they decided the matter. The Tribunal distinguished the same. It was held by this Court in Amrutanjan's case that the ingredients,

which are used in preparation of ayurvedic medicines even if they are used after refinement or bringing them to pharmaceutical quality, they do not become synthetic in nature. It is immaterial that the same articles bearing a different nomenclature are also known and used in allopathic system. Though the question whether the formula for preparation should be in accordance with authoritative ayurvedic texts was not dealt with by Their Lordships, the appellant's claim gets considerable support from this decision. By the same token of reasoning, the drugs in question can also be treated as ayurvedic medicaments as there is no dispute that all the ingredients find place in the books on Ayurvedic medicine.

Extensive arguments were advanced by the counsel appearing on either side on the heading 30.03 and sub-headings 3003.10, 3003.20 and 3003.30 we have reproduced the arguments advanced by them in the paragraphs (supra).

Learned counsel for the appellant invited our attention to the order passed by the Tribunal in the case of Richardson Hindustan Ltd. Vs. CCE reported at 1998 (35) ELT 424. The Tribunal in that case held that there is no definition of Ayurvedic medicaments in the Central Excise and Salt Act or in the Central Excise Tariff Act. Although Ayurvedic medicines have been defined in Section 3 (a) of the Drugs and Cosmetics Act, the same cannot be applied for the purpose of classification of a product for Central Excise duty in view of the judicial pronouncements on the subject. The Tribunal held as under:-

> "It is now a settled principle of law that when there is no definition of any word in the relevant statute, the word must be construed in its popular sense i.e. the meaning as understood by the people conversant therewith. The appellants have produced opinions from physicians, certificates from consumers and certificates from retail sellers to show that, in the common parlance, Vicks Vaporub and Vicks Inhaler are treated as Ayurvedic medicines. The registration certificate issued by the D.G.T.D. and the manufacturing licence issued by the licensing authority also show the appellants' product as Ayurvedic medicines. The categorisation made by these authorities have persuasive value. Further, the ingredients ov Vicks Vaporub are Pudine ke phool, Karpur, Banafshah and Sarala Drava. The ingredients and other quantum are mentiioned on the product's labels. In the case of Vicks Inhaler, the appellants have also filed photocopies of certain slokas from the books of Ayurvedic medicines describing the nasal inhaler device. The products will, therefore, merit classification under Tariff Heading "3003.30 - Medicaments including those used in the Ayurvedic system of medicines" if all the ingredients of the products find mention in authoritative book(s) on Ayurvedic medicines. The matter is , accordingly, remanded to the Assistant Collector for de novo examination from this aspect."

This decision has been affirmed by this Court while dismissing the appeal filed by the Revenue. The order reads thus:-

> "Having regard to the facts and the circumstances of the case and in view of the findings made by the Tribunal and the points upon which it has remanded the matter

to the Assistant Collector, we are of the opinion that the Tribunal has proceeded in the facts of this case on a correct basis and the order of the Tribunal does not call for any interference. The appeal fails and is, therefore, dismissed accordingly."

We are told that after remand, the adjudicating authority classified Vicks Vaporub and Inhaler under sub-heading 3003.30.

At the time of hearing, our attention was drawn to circular No.25/91 dated 3.10.1991 issued by the Department after the decision in Richardson Hindustan's case (supra) laying down the twin tests, namely (i) that the product should be known as Ayurvedic medicament in the common parlance and (ii) the ingredients should be mentioned in Ayurvedic text books. It is beneficial to reproduce the circular for better understanding of the case. The circular reads thus:-

"Circular: 25/91 dated 03-Oct-1991 Ayurvedic medicine Classification of [Chapter 30] CircularNo.25/91, dated 3-10-1991 Government of India Central Board of Excise & Customs New Delhi Subject: Central Excise - Chapter 30 - Classification of the products claimed as Ayurvedic medicine under the C.E.T.A., 1985 - Classification regarding Representation have been received from manufacturers of Ayurvedic preparations that they have been facing problems in different Central Excise Collectorates in the matter of identification/classification of such products. The doubts relate to the question as to whether the products claimed to be Ayurvedic medicine, are in fact so, and whether those would merit classification under Sub-heading No.3003.30 of the Schedule to the Central Excise Tariff Act, 1985.

2. According to the guidelines already in vogue, each medicament used in the various systems of treatments eg. Ayurvedic, Unani and Siddha, has to be examined on merits and, in specific cases of doubts, the Collectors are required to make a reference to the Board, who take up the matter with the Drugs Controller of India.

3. The Government have further examined the matter in the light of parameters prescribed by the Tribunal in their Order No.116/88-C dated 10-2-1988 in the case of M/s Richardson Hindustan Ltd. v. C.C.E., Hyderabad. The Tribunal held that a preparation would merit classification as an Ayurvedic medicine, if in the common parlance, it is known as an Ayurvedic medicine and all its ingredients are mentioned in the authoritative book(s) on Ayurvedic medicines. It has also been observed that the aforesaid two tests been upheld by the Hon'ble Supreme Court in the case of Civil Appeal No.2127 of 1988-C.C.E., Hyderabad v. M/s Richardson Hindustan Ltd. - Supreme Court's Order dated 10-1-1989.

4. The Government have accepted the above referred two tests for determining the classification of the products claimed to be as Ayurvedic medicine (excluding herbal or ayurvedic cosmetic) and these may accordingly, be kept in view while deciding similar cases.

5. The classification may be brought to the notice of the lower field formations and the trade interests may also be suitably advised.

6. All pending assessments of the type indicated above, may be finalised on the above details."

It is seen from the above circular that the Government have accepted two tests for determining the classification of the products claimed to be the Ayurvedic medicines and the statutory authorities were directed to keep this in view while deciding similar pending assessments of the type indicated in the circular and be finalised on the above basis. It is also seen from the circular that the aforesaid two tests have been upheld by this Court in the case of C.A.No.2127 of 1998 - C.C.E., Hyderabad vs. M/s Richardson Ltd. Order dated 10.01.1999.

Thus, it is seen that the CEGAT's decision and the circular of the Board does not lay down any tests regarding the formulae of manufacture as per authoritative Ayurved text books.

However, Mr.Raju Ramachandran argued that the circulars of the Department on which the appellants place reliance do not advance their case and that the circulars only indicate that the Government has accepted the two tests for determining a medicine as Ayurvedic medicine and that the acceptance of these tests do not absolve the assessee from the onus of proving the exclusive character of drug as Ayurvedic medicament and that the said onus the appellants have failed to discharge, we are unable to countenance the said submission. As already noticed, the Government have issued a circular on the basis of the representations received from the manufacturers of Ayurvedic preparations and the doubts in regard to the question whether the products claimed to be Ayurvedic medicines are, in fact, so and whether they would merit classification under sub-heading 3003.30 of the Schedule to the Central Excise Tariff Act, 1985. The Government of India after examining the matter in the light of the parameters prescribed by the Tribunal in their Order passed in M/s Richardson Hindustan Ltd. vs. C.C.E., Hyderabad which has been upheld by this Court in C.A.No.2127 of 1998 have issued the circular clarifying the correct position in regard to the classification and reiterating the said two tests. This argument of Mr. Raju Ramachandran, therefore, has no force and is liable to be rejected. Strong reliance was also placed by the appellant's counsel on the decision of the larger Bench of the CEGAT in the case of Himtaj Ayurvedic Kendra vs. CCE reported in 2002 (139) ELT 610. In that case the Revenue contended that Himtaj Oil will be classified under Heading 33.05 as Perfumed Hair Oil. The larger Bench of the Tribunal held that it is a medicament falling under Chapter 30 and it is a patented Ayurvedic medicament falling under sub-heading 3003.30. The Larger Bench after considering number of orders passed by the CEGAT including the order passed in Naturalle Health Product (Impugned order in the present appeal reported in 125 ELT

765) came to the conclusion that sub-heading 3003.30 took in both classical as well as patent or proprietary Ayurvedic medicaments.

The Tribunal observed thus:-

> "We are not able to agree with the view taken in 2000 (125) ELT 765 that sub-heading 3003.10 would take in patent or proprietary ayurvedic medicaments. According to us, subheading 3003.30 took in both classical as well as patent or proprietary ayurvedic medicaments. "

The larger Bench of the Tribunal have thus interpreted the world "Exclusively Ayurvedic" occurring in sub-heading 3003.30 to say that it means those ayurvedic medicaments whose ingredients are mentioned in authoritative text books on Ayurveda mentioned in Annexure to the Drugs and Cosmetics Act, 1940. This decision has been affirmed by this Court in CCE Allahabad vs. Himtaj Udyog kendra reported in 2003 (154) ELT 323 (SC). In this case the question was whether Himtaj Oil was classifiable under sub-heading 3003.30, that is, Ayurvedic medicament or 3003.10, that is, Perfumed Hair Oil. The GEGAT has held that Himtaj Oil is classifiable as an Ayurvedic medicament. In doing so, it has followed the decision of the larger Bench of CEGAT reported in 2002 (139) ELT 610. This Court in the judgment in C.A.No.1512 of 2001 reported in 2003 (154) ELT 324 Commissioner of Central Excise, Calcutta vs. Pandit D.P.Sharma held that Himtaj Oil is classifiable as an Ayurvedic medicament and thus approved the larger Bench decision of CEGAT.

In D.P. Sharma's case, the Assistant Collector accepted the respondents' case that the Oil fall under sub-heading 3003.30 but so holding the Assistant Collector, inter alia, relied on the following material:-

(a) Drug licence issued by the Drug Controller.

(b) A letter issued by the Superintendent of Ayurvedic Department, benaras which stated that the product was an Ayurvedic medicine.

(c) A study report of the institute of Postgraduate Education and Research in Ayurved, Calcutta on "Himtaj oil" which classified this oil as an Ayurvedic product which relieved pain in headaches and migraine and also provided relief against dandruff.

(d) A report prepared by the Range Officer, based on market inquiries conducted by him with dealers, wholesalers, retailers, customers, chemists and druggist, which showed that all treated "Himtaj oil" as an Ayurvedic Medicament.

(e) A re-testing Report of the Chief Chemist, New Delhi which stated that no Ayurvedic perfumery could be detected in "Himtaj oil".

(f) SSI Registration Certificate obtained for manufacturing Ayurvedic oil The Revenue filed an appeal to the Commissioner (Appeals) who allowed the appeal of the Revenue and held that there was no evidence to prove that the product was being ordinarily prescribed by medical practitioners or that it was used to deal with specific disease. The Commissioner (Appeals) held that there was nothing to show that common man used the product as medicine. A further appeal was filed by the assessee before the CEGAT which allowed the appeal. Considering the report of the Range Officer, this Court held that the dealers, wholesalers, retailers, customers, chemists and druggists all

considered "Himtaj oil" to be an Ayurvedic medicament and apart from that, the other material relied upon by the Assistant Collector also clearly shows that "Himtaj oil" is an Ayurvedic medicament. In this view of the matter, this Court dismissed the appeal filed by the Revenue.

The same ratio has been laid down in the other judgment of this Court in the case of Commissioner of Central Excise, Calcutta vs. Sharma Chemical Works reported iin 2003 (154) ELT 328 (SC). In that case, this Court held that the mere fact that a product is sold across the counters and not under a Doctor's prescription, does not by itself lead to the conclusion that it is not a medicament and that merely because the percentage of medicament in a product is less, does not also ipso facto mean that the product is not a medicament. This Court further held as under:-

> It is settled law that the onus or burden to show that a product fall within a particular Tariff Item is always on the revenue. Mere fact that a product is sold across the counters and not under a Doctors prescription, does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr.Lakshmikumaran that merely because the percentage of medicament in a product is less, does not also ipso fact mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It cold not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda text books. Of course the formula may not be as per the text books but a medicament can also be under a patented or proprietary formula. The main criteria for determining classification is normally the use it is put by the customers who use it. The burden of proving that Bhanphool Oil is understood by the customers as an hair oil was on the revenue. This burden is not discharged as no such proof is adduced. On the contrary we find that the oil can be used for treatment of headache, eye problem, night blindness, reeling, head weak memory, hysteria, ammenesia, blood pressure, insomnia etc. The dosage required are also set out on the label. The product is registered with Drug Controller and is being manufactured under a drug licence.
>
> From the above, it is clear that a patent Ayurvedic medicament could be one where all the ingredients find mention in the authoritative text books on Ayurveda, though the formula for prepaation of the medicament is not in accordance with the formula given in those text books. It is not in dispute that all the ingredients are mentioned in the authoritative text books on Ayurveda. In fact, in the case of appellant in Civil Appeal No. 2072/1996, the products satisfy the definition in Section 2(h) of Drugs & Cosmetics Act as "patent or proprietary" Ayurvedic medicines also. Further, the manufcture of this medicament is being done under the Ayurvedic drug licence issued by competent authority.
>
> The Vice-President and one of the Members of the Tribunal observed that the products in question are mentioned in Martindale's "The Extra Pharmacopoeia"

published in U.K. and it is also a patented medicine in USA and and marketed there as Allopathic medicine. These facts were not alleged in the show-cause notice. In the absence of any material on record as to how the products are treated and understood in U.K., U.S.A. etc. the observations of the learned Members of the Tribunal are not warranted. Even if it is a patented medicine in U.S.A., it does not cease to be an exclusively Ayurvedic medicine if it has the characteristics of such medicine. It is also relevant to note that after remand by the Tribunal in Richardson Hindustan case (which was confirmed by this Court), we are told that 'Vicks Vaporub' and Inhaler have been held to be Ayurvedic medicines coming under classification No.3003.30. If those two products having the same brand name 'Vicks' are treated as Ayurvedic medicines falling under classification No. 3003.30 after applying the tests laid down by the Tribunal, there is no reason why the same classification should not apply to the products in the present case. As submitted by the appellant, the ingredients used in these products have sources as natural herbs and extracts taken from such herbs and have been purified to the pharmaceutical grade before using the same. We would also like to point out that the comment of one of the learned Members that, admittedly, the assessee is not using genuine and pure Ayurvedic ingredients is wholly incorrect. There is no such admission anywhere. The assessee has been throughout contending that the ingredients used are mentioned in authoritative Ayurvedic text books and they are natural products from herbs and plants which were only refined.

In terms of the order passed by the CEGAT in the case of Richardson Hindustan Ltd. vs. Collector of Central Excise (1988 (35) 424 (Tribunal) which has been affirmed by this Court and similar view taken in other cases referred to supra, the following clear propositions and findings emerge:-

"(a) That the words 'Ayurvedic Medicine' not having been defined in the Central Excise and Salt Act, 1944 or the Central Excise Tariff Act, 1985, the common parlance test would have to be resorted to find out whether a medicine is treated as an Ayurvedic medicine by the public;

(b) That it is necessary that the ingredients of Ayurvedic Medicine should be mentioned in authoritative books on Ayurvedic Medicines."

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 C.A.No. 2072 of 1996, the affidavits of Ayurvedic practitioners were filed before the adjudicating authority to establish that these products are recognised and being used in Ayurvedic system of medicine. The Assistant Collector ignored them with a cryptic observation that they are 'self-serving'. No other authorities including the Tribunal have considered such material. No evidence to the contra has been relied upon by the Department. When we come to the appeal of Akin Laboratories Pvt. Ltd., the assessee filed affidavits from doctors, users and stockists and also furnished clinical trial report from Government Ayurvedic Hospital, Hyderabad. The label of the product showing it as Ayurvedic medicine was also relied on. The Collector(Appeals) gave a finding that both the tests i.e., common parlance and ingredient tests are satisfied. The affidavit evidence was not rebutted by the Department by producing any contra evidence. As against the clear finding of the appellate Collector, the Tribunal merely commented that a few certificates given by a doctor or owner of a medical shop does not advance the case of the assessee. The Tribunal allowed the Revenue's appeal following the decision in Naturalle Health Products Pvt. Ltd. (Appellant in C.A.No. 2072 of 1996) In our view, the Tribunal has completely misdirected itself in law and on facts by being influenced by the unimportant factors like the mention of similar names of goods in Martindale and patent of the same in USA and failed to take into account the relevant factors like the issue of licence to manufacture Ayurvedic drugs under the Drugs Act, the popular understanding of the products, the law laid down by this Court in the cases referred to above and the circular issued by the Government of India in the light of Richardson Hindustan case. The Tribunal placed undue reliance on the definition of Ayurvedic medicament in Section 2(a) of the Drugs Act. In our opinion, all the products ought to be classified as Ayurvedic medicaments under sub-heading 3003.30 of the Central Excise Tariff.

For the foregoing reasons, we have no hesitation to allow both the appeals and set aside the orders impugned in these appeals passed by the CEGAT, New Delhi, in apeal No. E/1062/93-C and the Appeal No. E/53/95-C. While admitting the appeal, this Court stayed the impugned order on condition that the bank guarantee given pending the disposal of the appeal before the CEGAT be kept alive. Now that the appeals by the appellants are allowed, the appellants are at liberty to get the bank guarantee discharged with immediate effect. In the facts and circumstances of the case, we say no orders as to costs.

New Delhi;

.