

# **Commnr. Of Central Excise vs M/S. Wockhardt Life Science Ltd on 22 February, 2012**

**Equivalent citations: AIR 2012 SUPREME COURT 1681, 2012 (5) SCC 585,  
2012 AIR SCW 2107, 2012 (3) AIR BOM R 704, (2012) 3 SCALE 334**

**Bench: Anil R. Dave, H.L. Dattu**

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.783-803 OF 2004

COMMNR. OF CENTRAL EXCISE ... APPELLANT

VERSUS

M/S.WOCKHARDT LIFE SCIENCES LTD...RESPONDENT

## **O R D E R**

1. These appeals are directed against the judgment and order passed by the Customs, Excise and Gold (Control) Appellate Tribunal, West Zonal Bench at Mumbai in Appeal Nos.E-1252-1271/02-MUM and E/3630-01-MUM dated 18.6.2003. By the impugned judgment and order, the Tribunal has reversed the findings and conclusions reached both by the Adjudicating Authority and the appellate authority.

2. The primary issue that falls for our consideration in these appeals is the classification of two products viz.

`Povidone Iodine Cleansing Solution USP and Wokadine Surgical Scrub for the purpose of levy of duty under the provisions of Central Excise Tariff Act, 1985 ('The Tariff Act' for short).

3. The assessee is the manufacturer of Povidone Iodine Cleansing Solution USP and Wokadine Surgical Scrub.

These two products have identical composition. The only difference between these two products is that Wokadine is a branded product whereas Povidone Iodine Cleansing Solution is a generic name. The assessees' claim before the authorities and also before the Tribunal is that the aforesaid

products are medicaments and, therefore, require to be classified under Chapter sub-heading 3003 of the Tariff Act, 1985, whereas the revenue's stand was that the products in question are detergents and, therefore, to be classified under chapter sub-heading 3402.90.

4. The Adjudicating Authority had issued nearly 20 show cause notices to the assessee for the period commencing from September, 1992 to December, 1999. In the show cause notices, it is alleged that the assessee has mis-

classified the product under chapter sub-heading 3003.10/20, instead of chapter sub-heading 3402.90 of the Act with an intent to evade the payment of the duty by suppressing vital facts regarding usage of the product and the same amounts to contravention of Rule 173B of the Central Excise Rules, 1944 (for short "Rules"). It is further stated in the show cause notices that the products in question are mainly used for the purpose of detergents rather than medicaments. Accordingly, the assessee was directed to show cause why the products in question should not be classified under chapter sub-heading 3402.90 and why the duty should not be demanded under Rule 9(2) read with proviso to section 11A (1) of the Central Excise Act, 1944 (for Short "the Act of 1944") along with interest thereon under Section 11AB of the Act of 1944 and penalty under Section 11 AC of the Act of 1944 read with Rule 173 Q of the Rules for short payment of excise duty.

5. After receipt of the show cause notices, the assessee had filed its detailed reply, inter alia, bringing to the notice of the adjudicating authority the contents of the products in question, their labeling on the commodity and the user to which the products are put. The assessee had also relied on the various shades of meaning that is attributed to the medicaments, in particular the expressions 'therapeutic and prophylactic' and had contended that those medicines are used for external treatment of a human-being. The assessee had also placed reliance on the Indian Pharmacopoeia, the United States Pharmacopoeia and the International Pharmacopoeia. The assessee had also contended that the 'Neutronix and Superamide' are other two products with which Povidone Iodine is mixed to contend that they are in the nature of vehiculars for the spreading of the medicament.

6. After receipt of the reply so filed, the adjudicating authority has proceeded to conclude, that, since the contents of Neutronix and Superamide are more than the medicament, namely; Povidone Iodine, the product in question requires to be classified as detergent and thereby, would fall under chapter sub-heading 3402.90 and it has also observed in its order that the product in question is primarily used as a cleansing solution and, therefore, cannot fall in the description of the medicament.

Accordingly, had confirmed the show cause notices issued earlier and, thereby, had directed the assessee to pay the difference in duty and also the penalty.

7. Aggrieved by the aforesaid order passed by the adjudicating authority, the assessee had carried the matter in appeal before the First Appellate Authority, who by his order dated 29.11.2001 had sustained the order passed by the adjudicating authority. According to the appellate authority, since the product in question is mainly used as a cleansing solution, the proper classification would be as a detergent and would fall under tariff entry 3402.90.

8. The assessee, being aggrieved by the order so passed, had carried the matter in appeal before the Tribunal. Even before the Tribunal, the assessee had produced copious material in the form of product literature and also the dictionary meaning of the expression "medicaments". The Tribunal, while appreciating the rival contentions of the revenue and the assessee, has considered the wide range of literature on the above products, their composition and user and accordingly has concluded that the 'Povidone Iodine Cleansing Solution USP' is used as an antiseptic and disinfectant. The Tribunal has further observed that the main contention of the revenue is that the addition of surface active agent and other substances would result in a product in which 'Prophylactic' qualities of Povidone Iodine would become subsidiary to its primary use as a washing solution. The Tribunal, while rejecting the revenue's contentions and accepting the assessee's stand, has observed that the presence of the surface active agent and other substances is only to ensure appropriate dispersible to the product and not to render its use as a washing or cleansing preparation. The Tribunal, while relying on the Affidavit dated 9.8.2002 filed by the Senior President (Marketing) of the assessee in order to show sale pattern of the goods, has observed that the product is not used as a general cleansing solution similar to medicated soaps used by ordinary persons, but it is only used in places where practice of surgery and medicine is being carried out. The Tribunal has further observed that the products are packed in opaque brown thick plastic bottles with plain labels, unlike, soaps and other products which are packed in bright attractive colors as used by ordinary household consumers. It has also observed that the labeling of the product shows that it is intended for preoperative use by the surgeon and his team or on the patient. The Tribunal after referring to the Explanatory Notes under heading 30.04 of the Harmonized System of Nomenclature relating to medicament, which covers Povidone Iodine as Polyvinyl Povidone Iodine and, the test laid down for classification of the product as medicament: has concluded that the product is purchased primarily for its therapeutic or prophylactic qualities and not for its qualities as organic surface active preparation. In conclusion, the Tribunal, while allowing the appeal, has held that the product in question is, primarily intended and also actually, used for its antiseptic properties, therefore, it is classifiable as medicament under Chapter 30 of the Schedule to the Act. It is the correctness or otherwise of the findings and conclusions reached by the Tribunal is the subject matter of these appeals before us.

9. We have heard Shri R.P. Bhatt, learned senior counsel appearing for the Revenue and Shri Ajay Aggarwal, learned counsel appearing for the Assessee. Both the learned counsel have dealt with the matter in detail and have also relied upon some of the decisions of this Court to buttress their submissions.

10. Shri R.P. Bhatt, learned senior counsel for revenue would submit that the product in dispute, namely; Povidone Iodine Solution or its patent and proprietary equivalent Wokadine surgical scrub, contains only 80 kg of Povidone Iodine and 250 kg of Neutronix in 1000 litres of demineralised water and is essentially used as a medicated detergent. He would contend that the said product predominantly contain surface active agents which are primarily used as a medicated cleaning agent for removal of dirt, bacteria, fungi etc. In this regard, he would further submit that the said product is admittedly used as an antiseptic agent for washing hands of surgeons and is also applied on the skin of the patients before operation. He would further contend that the said product is not a medicament in terms of Chapter Note 2(i) of the Tariff Act as it neither has "Prophylactic" nor

"Therapeutic" usage. He would contend that in order to qualify as a medicament, the goods must be capable of curing or preventing some disease or ailment. Therefore the said products cannot be classified under Chapter Heading 3003 of Tariff Act.

11. Shri Bhatt would further submit that Chapter Note 1(e) of Chapter 30 clearly excludes soap or other products of Chapter 34, containing added medicament, from their classification under Chapter 30. He would, therefore, submit that the product is more appropriately classifiable under the Chapter 3402 as an organic surface active agent/preparation, or cleansing preparation, irrespective of the fact that it contains certain percentage of medicaments.

In other words, he would contend that even if said products have added prophylactic effectiveness, they would be considered as cleansing agent and not medicaments for the purpose of classification in view of their primary and essential use which is cleansing and their prophylactic or therapeutic quality, by virtue of added medicament, is secondary in nature. He has placed reliance on some decisions of this Court in support of his submission that it is the primary functional properties and composition of the goods that would decide its classification under particular Chapter. We will refer to the decisions on which reliance is placed by learned counsel at an appropriate time.

12. Shri Ajay Aggarwal, learned counsel for the assessee, has meticulously taken us through the judgment of the Tribunal and supported its reasoning. He contended that the revenue in their show cause notices has admitted that the products in issue are antiseptic. He further submits that the products are medicament in which some carriers are added and therefore, it will fall under Chapter Sub-heading 3003 and not under Chapter 34.

13. In order to resolve the controversy that is raised before us, we need to notice first the entries which the revenue and the assessee relies upon to drive home their point of view.

The Tariff Items under Chapter sub-heading 3003 and chapter sub-heading 3402.90, at the relevant time, are extracted. The same reads as under:

Heading No.	Sub- heading No.	Description of goods
30.03		Medicaments veterinary medicaments)
		Patent or medicaments, other than those

(in

prop

medicaments which

3003.10 exclusively Ayurvedic, Unani,  
Siddha, Homeopathic or Bio-  
chemic.

Medicaments (other than patent  
or proprietary) other than those

3003.20 which exclusively used  
Ayurvedic, Unani,  
Homeopathic or Bio-

systems Medicaments, including  
those in Ayurvedic, Unani,  
Siddha, Homeopathic or Bio-  
chemic systems.

34.02 Organic Surface active agents  
(other than soap): surface-active  
preparations, washing  
preparations (including auxiliary  
washing preparations and  
cleaning preparations, whether or  
not containing soap.

3402.90      Other

18%

14. The chapter note 2 (i) of Chapter 30 to the schedule of Tariff Act pertaining to pharmaceutical products, define the meaning of the expression "medicament". It is as under :

Medicament" means goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within heading No. 30.02 or 30.04 which are either:

(a) products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or

(b)unmixed products suitable for such uses put up in measured doses or in packings for retail sale or for use in hospitals.

15. Chapter note makes it clear that the products, comprising two or more constituents which have been compounded together either for therapeutic or prophylactic uses, would fall within the meaning of the expression Medicaments. In the present case, it is not in dispute that along with the medicament, namely; Povidone Iodine, the assessee while manufacturing the products in question uses three other constituents, namely; Neutronix, Superamide and Sodium Hydroxide as a preservative.

16. It is also relevant to explore the meaning of the word `prophylactic' in medical parlance as well, in order to resolve the controversy before us. The word `prophylactic' derives from Greek word `prophylaktikos' which means "to take precautions against" or "to keep guard before". Dorland's Medical Dictionary 1364 (28th ed. 1994) defines "prophylactic" as "an agent that tends to ward off disease".

Merriam-Webster's Medical Desk Dictionary 579 (1993) defines it as "guarding from or preventing the spread or occurrence of disease or infection"; Mosby's Dictionary 1284 (4th ed. 1994) defines it as a biologic, chemical, or mechanical agent that prevents the spread of disease.

17. It is relevant to notice the composition, label and usage of the products whose classification is in dispute before us.

The label of the products would stipulate its formula and describe its usage. However, the labels of both the products are identical. Therefore, we would consider `Povidone Iodine Cleansing Solution USP' which is presented in a maroon coloured bottle of 500ml capacity on which a label has been

pasted which read as thus:

Povidone Iodine Cleansing Solution USP "Povidone Iodine Cleansing Solution USP to be used as a surgical scrub.

Broad Spectrum topical microbicidal effective against bacteria, fungi, protozoa, yeasts and viruses.

Formula:

Povidone-Iodine I.P. 7.5. w/v (Available Iodine 0.75% w/v) Phosphate Free"

Store in a cool place For External use only Usage:

1. For preoperative cleansing and degerming of surgeon's and operating team's hands

a) Wet hands and forearms with water. Pour about 5 ml of surgical scrub with the help of the 'elbow dispenser' on the palm and spread over both hands and forearms scrubbing thoroughly over all areas for about 5 minutes. Add little water to develop copious suds. Rinse thoroughly under running water.

b) Complete the cleansing with another 5 ml of surgical scrub in the same way.

2. For preoperative uses on Patients.

After the skin area is shaved, wet it with water. Apply Povidone Iodine surgical scrub on the skin and scrub, thoroughly for about 5 minutes. Rinse off by aid of sterile gauze saturated with water. Now paint the skin with Povidone-Iodine solution and allow to dry before incision."

18. The composition of the product per 1000 litres has been produced below:

S.No.	Ingredients	Quantity
1.	Povidone Iodine IP	80.21 Kgs.
2.	Neutronix S-60 (Anionic Detergent) (active content 58%)	250 Kgs.
3.	Superamide L-9 (foaming agent)	12 Kgs.
4.	Sodium Hydroxide	1.46 Kgs

(Preservative)

5.	Demineralised water	Balance
		quantity

19. The said product contains- Povidone Iodine: The 7.5% w/v of Povidone Iodine provides 0.75% w/v of available iodine which is functions as disinfectant. Neutronix: The 25% of composition of the product is Neutronix which is Anionics and used as detergents, wetting, emulsifying and dispersing agents. Further the content of Superamide is just 1.2% in the said product which serves as an excellent booster and stabilizer, viscosity builder and detergent with wetting and soil suspending properties.

20. The assessee has relied on various pharmacopeias to throw light on the essential composition of Povidone Iodine Solution including surface active agents and their respective functions. It is relevant to refer to these pharmacopeias in order to appreciate and analyze the functions of various ingredients contained in a Povidone Iodine Solution.

21. According to the US Pharmacopeia, Povidone Iodine is a complex of Iodine with Povidone. It contains not less than 9.0% and not more than 12.0% of available iodine calculated on the dried basis. Povidone Iodine cleansing solution is a solution of Povidone Iodine with one or more suitable surface active agents. It contains not less than 85% and not more than 120% of the labelled amount of the iodine. It may contain a small amount of alcohol. The only difference between the two is that while the first product has a suitable surface active agent, the second product does not have surface active agent.

22. The Japan Pharmaceutical Reference notes that Iodine Surgical Scrub is a disinfectant containing povidone-iodine with a foaming agent and a surfactant - which exerts disinfecting action by releasing iodine, which shows disinfecting effect against broad range of micro-organisms including bacteria, fungi and viruses.

23. Goodman & Gilman's book titled 'The Pharmacological Basis of Therapeutics' reads:

"The most widely used iodophor is povidone iodine, in which the carrier molecule is povidone..... A standard surgical scrub with a 10% solution (1% available iodine) will decrease the usual cutaneous bacterial population by about 85%.....

When the hands are contaminated by gram-negative bacteria, povidone-iodine is



more effective scrubbing disinfectant."

24. Remington's Pharmaceutical Sciences records that Povidone Iodine USP is a virtually non-stinging, film forming, water soluble iodine compound used as a topical antiseptic that essentially retains the non-selective broad range microbicidal activity of iodine. Povidone Iodine will rapidly kill bacteria (both Gram positive and Gram negative as well as antibiotic resistant organisms), fungi, viruses, protozoa and yeasts, to cause a substantial reduction of the microorganisms on the skin. Preoperatively, or as a post surgical antiseptic scrub, its microbicidal action is fast acting and is effective for a period of 6 to 8 hours. It is further stated that povidone-iodine antiseptic preparations are clinically indicated for the prevention and treatment of surface infections as well as to degerm the skin prior to injection and hyperalimentation procedures, for pre and post operative scrubbing and washing of hospital operating room personnel and for pre-operative skin preparation of the patient of surgery.

25. In Martindale's The Extra Pharmacopoeia, states that Povidone-Iodine is an iodophore which is used as a disinfectant and antiseptic mainly for the treatment of contaminated wounds and pre-operative preparation of the skin and mucous membranes. It is stated that solutions of Povidone-Iodine gradually release iodine to exert an effect against bacteria, fungi, viruses, protozoa, cysts and spores.

26. In Satoskar and Bhandarkar's Pharmacology & Pharmacotherapy, it reads:

"Iodophors are developed by complexing iodine with surfactants like non-ionic detergents. The detergents act as solubilizers and carriers, combining detergent property with anti-bacterial activity. They owe their germicidal activity to the slowly released elemental iodine."

27. The expression "therapeutic" or "prophylactic" is not defined under the tariff entry. Therefore, useful reference can be made to the dictionary meaning to these expressions.

In fact the assessee, in his reply to the show cause notices issued, had relied upon the meaning of the expression "therapeutic" and "prophylactic" from Webster's New 20th Century Dictionary, Chambers English Dictionary, Webster's New 20th Century Dictionary. In our view, reference to all other dictionary meanings may not be necessary. We intend to confine ourselves only to the aforesaid three dictionaries.

In that the meaning of the expression "therapeutic" and "prophylactic" is stated as under:

"To prevent, to guard against it, before, in medicine, preventive protecting against disease."; "Guarding against disease, a preventive of disease; a condom;

preventive treatment against diseases." and; "Serving to cure or heal, Curative concerned in discovering and applying remedies for diseases."

28. Before we discuss the issue posed before us, it would be useful to make reference to observation made by this Court in the case of ICPA Health Products (P) Ltd. Vs. Commissioner of Central Excise, Vadodara, (2004) 4 SCC 481, wherein this Court, after referring to the meaning of the expression "prophylactic" from the Concise Oxford Dictionary, 9th Edn., has noted that the expression "prophylactic" means a medicament intended to prevent diseases, a preventive medicine or course of action.

29. It is the specific case of the assessee before the adjudicating authority that the products in question are primarily used for external treatment of the human-beings for the purpose of the prevention of the disease. This is not disputed by the revenue, but their stand appears to be since the products in question are primarily used as detergents/cleansing preparation, they cannot be brought under the definition of medicaments. As we have already noticed, medicaments are products which can be used either for therapeutic or prophylactic usage. Since the product in question is basically and primarily used for the prophylactic uses, in our view the Tribunal was justified in coming to a conclusion that the adjudicating authority and the first appellate authority were not right in classifying the products under chapter sub-heading 3402.90 and, therefore, had classified those products under chapter sub-

heading 3003.

30. 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 Bors. v. State of A.P., 1994 Supp (3) SCC 122]. 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 D.C.M. v. State of Rajasthan, (1980) 4 SCC 71]. 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, (2009) 12 SCC 413; Commissioner of Central Excise, Delhi v. Ishaan Research Lab (P) Ltd. (2008) 13 SCC 349]. 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. CEE, Nagpur (2006) 3 SCC 266; State of Goa v. Colfoax Laboratories (2004) 9 SCC 83 ; B.P.L Pharmaceuticals v. CCE, 1995 Supp (3) SCC1]

31. However, there cannot be a static parameter for the correct classification of a commodity. This Court in the case of Indian Aluminium Cables Ltd. v. Union of India, (1985) 3 SCC 284, has culled out this principle in the following words:

"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..."

32. 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, (2005) 2 SCC 460; Alpine Industries v. CEE, New Delhi (1995) Supp. (3) SCC 1; Sujanal Chemo Industries v. CEE & Customs (2005) 4 SCC 189; ICPA Health Products (P) Ltd v.

CEE (2004) 4 SCC 481; Puma Ayurvedic Herbal (Supra);

Ishaan Research Lab (P) Ltd.(Supra) ; CCE v. Uni Products India Ltd., (2009) 9 SCC 295].

33. 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 v. Collector of Customs, (1990) 2 SCC 203; Commissioner of Customs v. G.C. Jain, (2011) 12 SCC 713]. 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, (1989) 3 SCC 343; HPL Chemicals v. CCE, (2006) 5 SCC 208; Western India Plywoods v. Collector of Customs, (2005) 12 SCC 731; CCE v. Carrier Aircon, (2006) 5 SCC 596]. In CCE v. Carrier Aircon, (2006) 5 SCC 596, this Court held:

"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."

34. In our view, as we have already stated, the combined factor that requires 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.

35. The learned senior counsel for the revenue has placed reliance on several decisions of this Court in support of his argument that the products requires to be classified as medicament only when they are intended or meant to cure a disease or prevent the occurrence of disease. He further submits

that the disease can only be prevented when there are some symptoms of disease. We intend to refer to those decisions relied by learned senior counsel Shri Bhatt to sustain the submissions made before the Court.

36. In B.P.L. Pharmaceuticals Ltd. v. CCE, (Supra), the issue before this Court was regarding the classification of the "Selenium Sulfide Lotion USP" manufactured and sold by assessee under the brand name "Selsun shampoo".

According to the manufacturers this shampoo was a medicated shampoo containing 2.5% Selenium Sulfide' w/v as the only active ingredient which was meant to treat a disease of the hair, namely; dandruff, and the rest of the ingredients of the shampoo merely serve the purpose of a bare medium. The revenue contended that the product contains 2.5% w/v of Selenium Sulfide which is only of a subsidiary curative or prophylactic value and therefore, notwithstanding the product having a medicinal value will fall under Chapter 33. This Court held that having regard to the preparation, label, literature, character, common and commercial parlance, the product was liable to be classified as a medicament under Chapter sub-heading 3003.19. This decision would not assist the revenue because this Court held after considering various factors that selsun shampoo is a medicament as it has therapeutic property to treat dandruff unlike ordinary shampoo which could be of common use by common people.

37. In Alpine Industries v. CCE, New Delhi (Supra), the issue which arose for the consideration of this Court was whether the product 'Lip salve' is classifiable as a medicament under Chapter Sub-Heading 30.03 or as 'preparation for care of skin' under Chapter Sub-heading 33.04. The stand of the assessee was that the product in question was supplied exclusively to the military for use while serving at high altitude. They claimed, by relying on various literatures based on the composition of the product that it was used as "medicament" and therefore, sought classification under Chapter Sub-Heading 30.03. The stand of the revenue was that it was used as "a preparation for care of skin" to protect the skin on the lips against damage by natural factors. This Court after considering the various medical and pharmaceutical literatures held that the Entries are not to be understood in their scientific or technical sense, but by their popular meaning for the purpose of interpretation. This court had observed that for the purpose of classification, the commercial parlance theory has to be applied and the chemical ingredients of the product are not decisive. This Court after considering the nature of the product and the use to which it is put had observed that the 'Lip salve' is used for "care of skin" and not "cure of skin" and just because it has some curative effect, its primary use is not curative, therefore it is not medicament and also needs no prescription from a doctor.

This Court also held that it is neither prescribed by any doctor nor obtainable from the chemist or pharmaceutical shops in the market. This decision would not assist revenue as this Court had arrived at a conclusion that the product is not medicament but cosmetic after considering the commercial parlance test and primary user of the product.

38. In ICPA Health Products (P) Ltd. v. CCE (Supra), this Court has considered the issue of classification of surgical scrubs, namely' Hexiprep, Hexiscrub (Surgiscrub) and Hexiaque, manufactured by the assessee which was used as a skin disinfectant to paint the skin before surgery

and as a wound disinfectant. It was admitted that Hexiprep is used to paint the skin as required to disinfect the skin before surgery. Hexiaque is used as a skin disinfectant to paint the skin before surgery and as a wound, abrasions and minor cuts disinfectant. Hexiscrub is used on hands and forearms of surgeons for rapid hand disinfection prior to surgery. The assessee claimed the classification of these products as medicament under Chapter sub-heading 3003.10. Whereas, the revenue contended that these products should be classified as disinfectants under Chapter sub-heading 38.08. This Court had considered the report of the Chemical examiner who opined that the products therein contained 'chlorhexidine gluconate solution BP' which had therapeutic properties. However, he also opined that they were used as disinfectant, therefore should be classified under Chapter sub-heading 38.08. This Court after considering the label and usage of products therein and dictionary meaning of the word 'prophylactic' had observed that the products therein were used to disinfect the skin prior to surgery, to clean the wound and minor cuts, and therefore, they have prophylactic usage and classifiable under Chapter sub-

heading 3003.10.

39. In *State of Goa v. Colfax Laboratories (Supra)*, the issue before this Court was that whether the After Shave Lotion (ASL) known as "Old Spice" and "Blue Stratos" are classifiable as toilet preparations or medical preparations.

The assessee relying on various pharmacopoeia took the stand that the product was "medicinal preparation" due to the high percentage of alcohol content (above 60%). The revenue contended that the use of after shave lotion was in the form of "toilet preparations" and not "medicinal preparation". The revenue also pointed that the assessee had obtained the license for manufacture of ASL as a cosmetic product and not as a medicinal product. This Court while rejecting the assessee's contention held that the high composition of alcohol in the product is not a relevant factor for ASL to be considered a medicament. This Court further observed that in order to come within the ambit of "medicinal preparations", the article must be used for the purpose of either curing or mitigating the disease after its symptoms have appeared or in prevention of any disease and therefore, on a plain interpretation ASL cannot be considered to be within the ambit of "medicinal preparation". Thus, in that case, this Court did not rely on the composition of the product but relied on the principal use and the common understanding of the product in the market as the test for classification, in other words, the classification of commodity does not depend on the incidental character that the commodity takes but on its primary character.

40. In *CCE, Nagpur v. Vicco Laboratories*, (2005) 4 SCC 17, the point in consideration before this Court was that whether the products, namely; Turmeric skin cream, vajradanti toothpaste and tooth powder manufactured by the assessee would be classifiable as Pharmaceutical products under Chapter 30 or cosmetics under Chapter 33 of the Tariff Act. In that case, the assessee's products were classifiable as pharmaceutical products before and after the enactment of the Tariff Act. However, the revenue issued show cause notices on the basis of the decision of this Court in *Shree Baidyanath*, (1996) 9 SCC 402 alleging that the products are understood as cosmetics in common parlance.

The revenue further contended before this Court that the product was classifiable under Chapter 33 as a cosmetic as there was no need for a medical practitioner's prescription and the same was sold in general/departmental store. The assessee took the stand that products were classifiable under Chapter 30 as being pharmaceutical product. This Court held that mere decision of a court of law without more cannot be a justification enough for changing the classification without a change in the nature of a product or a change in the use of the product, or a fresh interpretation of the tariff heading by such decision. This Court has held that the Show cause notices having issued on the misapprehension of the tests laid down in Shree Baidyanath cannot be sustained, even though, the adjudicating authority had found from the market survey that the products are understood as cosmetics in common parlance.

This Court also held that the product cannot be treated as cosmetic only because it was not sold by chemists or under doctor's prescription. We are afraid that decision would assist the revenue as the show cause notices in that case were issued on the misapprehension of the test laid down in the Shree Baidyanath and this Court further observed that the decision in Shree Baidyanath was based on its peculiar facts.

41. In *Sujanil Chemo Industries v. CCE & Customs (Supra)*, the question of classification of the product "licel", manufactured by the assessee, was raised before this Court.

The assessee claimed, on the basis of the reports of chemical examiners and the Department of Dermatology and Venereology, that the product is an insecticide and is classifiable under Chapter Sub-heading 3808.10 whereas the Department contended that the product is classifiable as medicament under Chapter Sub-heading 3003.10. This Court after referring to Chapter Note 1(d) of Chapter 38 which excludes "medicaments under Heading 30.03 or 30.04" from its ambit and considering the definition of 'medicament' in terms of Chapter Heading 2(i) of Chapter 30, had observed that in normal parlance, a product may be considered to be an insecticide but if that product has any therapeutic and prophylactic use then for purposes of classification that product would fall under Chapter 30 instead of Chapter 38. This Court observed that Licel cures the infection or infestation of lice in human hair which is a disease; therefore, it is thus therapeutic. This Court further observed that Licel is also prophylactic inasmuch as it prevents disease which will follow from infestation of lice.

This Court referring to its earlier decision in *ICPA Health Products (P) Ltd. v. CCE (Supra)* has concluded that this product for its therapeutic and prophylactic usages would be classified as medicament under Chapter Sub-heading 3003.10. We are of the opinion that decision would not come to rescue of the revenue as this Court in that decision has clearly observed that the licel prevents as well as cures the infection or infestation of the lice.

42. In *Puma Ayurvedic Herbal (P) Ltd. v. Commissioner of Central Excise, Nagpur (Supra)*, the issue before this Court was that whether the ayurvedic goods manufactured by the assessee are classifiable under the Central Excise Tariff Act, 1985 as cosmetics under Chapter 33 or as medicaments under Chapter 30. The assessee contended that their products are manufactured as per the Ayurveda pharmacopoeia and other text books and have curative, therapeutic or

prophylactic value which are meant to give relief in body ailments and they are not items of cosmetics.

The assessee further relied on the twin test: Whether the product is used as medicament in common parlance; and whether the ingredients used in the product are mentioned in the authoritative ayurvedic textbooks. The assessee further contended that the use of the product by the customers should be taken into account for determining the classification of products as these as the products which have special and distinct use for treating a particular ailment and are not items of common use. The revenue argued that even if a product had some curative or prophylactic value, it will still be cosmetic on the basis of Note 2 of Chapter 33 of the Central Excise Tariff Act which excludes cosmetics and toilet preparation having subsidiary curative and prophylactic value. This Court while appreciating the assessee's contention observed that revenue has miserably failed to prove that the products in dispute are not medicament and not understood as medicament by the common man. This Court had upheld the twin test for classification of ayurvedic products relied by the assessee and observed that the primary role or use of the product has to be taken into account for the purpose of classification, even though, it may happen that while treating a particular medical problem, after the problem is cured, the appearance of the person concerned may improve. This Court further held that it is not necessary for the medicament to be sold only under doctor's prescription and its availability across the counter in shops is not relevant for its classification as medicament. This Court held that, therefore, the fact that use of medicinal element in a product was minimal does not detract from it being classified as a medicament. This Court concluded that the products in dispute are medicinal products which are intended to treat certain medical conditions of the human body and improvement in appearance is subsidiary, therefore, are liable to be classified as medicaments falling under Chapter 30. This case would not assist revenue as this Court had applied a primary user test of the products in question which has certain medicinal ingredient.

43. In Commissioner of Central Excise, Delhi v. Ishaan Research Lab (P) Ltd. (Supra), the issue before this Court was whether the products manufactured by the assessee would fall under Sub-Heading 3003.30 as medicament or under Chapter 33 as cosmetics. The assessee contended that each of the products was having ayurvedic medicinal herbs in it and even the labels on these products claim specifically the medicinal properties of the product. The assessee further urged that even if the user of product leads to improvement in appearance of a person that by itself cannot bring it into the category of "cosmetics" if otherwise the product is having a medicinal value and is marketed as such. According to the revenue, all these products were understood to be the "cosmetics" in common parlance and not actually the "ayurvedic medicines" for various reasons, the said products should have been held to be covered under Chapter 33. This Court after inspecting the labels of the product has held that the assessee had claimed in each of the label regarding its medicinal properties and, the product is not a cosmetic. This Court also observed that the common parlance test is not "be all and end all", and held that the miniscule percentage used is also not a deciding factor. This Court concluded that the products in question are medicinal products and, therefore, are covered by Chapter 30 and not under Chapter 33. That case would not assist revenue as this Court after taking into account the labels on the products observed that these products have medicinal ingredients and are marketed as ayurvedic medicines not cosmetics, however it incidentally improve the appearance, and also held that the common parlance test by itself is not

conclusive.

44. In view of the above, we reject the Revenue's appeals and confirm the order passed by the Tribunal with no order as to costs.

Ordered accordingly.

.....J. (H.L. DATTU) .....J. (ANIL R. DAVE) NEW DELHI;

FEBRUARY 22, 2012