

(2008) 09 SC CK 0085

In the Supreme Court Of India

Case No : Civil Appeal No's. 7357-7372 of 2001

Commissioner of Central Excise, Delhi

APPELLANT

Vs

Ishaan Research Lab (P) Ltd. and Others

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 209A, 9(2)
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 4(4)
Drugs and Cosmetics Act, 1940 — Section 3, 4

Citation : (2008) 230 ELT 7 : (2008) 10 JT 1 : (2008) 12 SCALE 270 : (2008) 13 SCC 349

Hon'ble Judges : V. S. Sirpurkar, J; Ashok Bhan, J

Bench : Division Bench

Advocate : K. Radhakrishnan, Alka Sharma, for B. Krishna Prasad, for the Appellant; Y. Lakshmikumaran and Alok Yadav for Y. Balachandran and Rajesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—This judgment will dispose of Civil Appeal Nos. 7357-7372 of 2001 as also the Civil Appeal No. 2517 of 2002.

2. All these appeals relate to the order passed by Customs Excise and Gold (Control) Appellate Tribunal, New Delhi whereby the Tribunal held that 22 products manufactured by M/s. Ishaan Research Lab Private Limited (hereinafter referred to as "IRLP") are covered under the Central Excise Tariff Sub-heading 3003.30 and not under Chapter 33 of Central Excise Tariff and thus the said products would invite the duty as "Ayurvedic medicines" at the rate of 10% advalorem and not at the rate of 40% advalorem as claimed by the Revenue Department. The Revenue Department's claim was that these products were cosmetics such as skin beautification creams, lotions, moisturisers, shampoos, etc., and were as such the "cosmetics" and "toilet preparations" chargeable to 40% duty. The Tribunal further held that IRLP and M/s. Ishaan Marketing Private Limited (hereinafter referred to as "the IMPL") were not related persons in terms

of Section 4(4)(c) of the Central Excise Act and as such the price at which IRLP sold the products was to be adopted as the basis for determining the assessable value. Similarly, the IRLP and IRL Marketing Pvt. Ltd. (hereinafter referred to as "IRL (M)") were also not related persons and as such the price at which the IRLP sold the goods would form the basis for determining the assessable value. The Tribunal further held that the extended period of limitation was not applicable in all the cases. Resultantly, the Tribunal held that the duty demand on the products which were held to be cosmetics by the Commissioner, Central Excise was to be re-quantified with the normal period of limitation of six months, adopting the price of IRLP as the basis of the computation of the assessable value. The Tribunal, however, left open the question of penalty on IRLP to be decided by the Commissioner, Central Excise. The Tribunal further set aside the penalties imposed upon IMPL, IRL (M) and Smt. Vinita Jain under Rule 209A of Central Excise Rules in view of the finding that the IRLP, IRMP and IRL(M) are not the related persons as also the finding that the extended period of limitation was not applicable. Lastly the Tribunal set aside the confiscation of land and machinery.

3. The proceedings in these cases were initiated by Show Cause Notice dated 10.4.1996 covering the period of 1st April, 1991 to 16th January, 1996, demanding a total duty of Rs. 3,10,17,993/- and imposed a penalty of Rs. 1 crore on IRLP, Rs. 25 lakhs on IMPL and Rs. 35 lakhs on one Ms. Vineeta Jain. The second notice was given on 30.9.1996 covering a period of 17.1.1996 to 31.3.1996 demanding a duty of Rs. 60,16,359/-. The Third Notice was dated 31.12.1996 whereby the duty of Rs. 1,15,68,744/- was demanded and a consolidated penalty under Second and Third Show Cause Notices was imposed to the tune of Rs. 40 lakhs on IRLP, Rs. 25 lakhs on IMPL and Rs. 40 lakhs on Ms. Vineeta Jain. Fourth Show Cause Notice was dated 2.5.1997 covering a period of 1.10.1996 to 31.3.1997 whereby the duty demanded was Rs. 92,82,309/- whereas the penalty imposed was Rs. 20 lakhs on IRLP, Rs. 15 lakhs on IMPL, Rs. 15 lakhs on IRL(M) and Rs. 20 Lakhs on Ms. Vineeta Jain. The last Show Cause Notice was dated 28.10.1997 covering the period from 1.4.1997 to 30.6.1997 wherein the duty demanded was Rs. 68,26,881/- and the penalty imposed was Rs. 10 lakhs on IRPL, Rs. 5 lakhs on IRL(M) and Rs. 2 lakhs on Ms. Vineeta Jain.

4. Commissioner, Central Excise, New Delhi, in respect of the first Show Cause Notice, confirmed the demand of duty amounting to Rs. 3,06,68,074.78 as Basic Excise Duty and Rs. 34,39,918.89 as Special Excise Duty under Rule 9(2) of Central Excise Act, 1944 read with proviso to Sub-section (1) of Section 11A of Central Excise Act on IRLP. He also directed the confiscation of land, building, plant and machinery used by M/s.IRLP with an option to redeem the same on payment of Rs. 25 lakhs. A further penalty of Rs. 1 crore was imposed on IRLP under Rule 173Q of Central Excise Rules. A penalty of Rs. 25 lakhs was imposed on IMPL under Rule 209A of Central Excise Rules. Lastly a penalty of Rs. 35 lakhs was imposed on Ms. Vineeta Jain. Thus, the Commissioner held that the classification would be under Chapter 33. He also held that IRLP and IMPL were

related persons and further that the Revenue was entitled to the extended period of limitation.

5. On the appeals filed before the Tribunal, the Tribunal allowed the claim of the IRLP in respect of as many as 22 products out of the total 92 products in respect of which the Show Cause Notices were given, they were at Sl. Nos. 3, 8, 9, 10, 17, 20, 21, 23, 25, 27, 28, 29, 34, 35, 36, 38, 39, 42, 45 and 46, The remaining 70 products were held to be the "cosmetic" and "toilet preparations" falling under Chapter 33 of the Scheduled under Central Excise Act. The Tribunal further held that IRLP and IMPL were not the related persons and further the extended period of limitation could not be made available to Revenue in all the cases.

6. In the present appeals we are concerned only with those 22 products which have been held by the Tribunal as falling under Sub-heading 3003.30. The appeals are basically filed by the Revenue challenging the above findings regarding the 22 products.

7. Shri K. Radhakrishnan, learned Senior Advocate, appearing on behalf of the Revenue initially very strenuously urged before us that the Tribunal was in error in holding the 22 products as Ayurvedic medicines and those falling under Entry 3003.30. According to him all these products were bound to be held as "cosmetics" and "toilet preparations" and were as such covered by Chapter 33 inviting the duty at the rate of 40%. Apart from the contentions raised in respect of classification of these items, the learned Counsel also addressed us on the question of valuation. The learned Counsel also invited our attention towards the aspect of limitation and urged that the Tribunal was not right in holding that some show cause notices were barred by limitation and that the Revenue would not be entitled to the extended period of limitation u/s 11A of the Central Excise Act.

8. We have, therefore, to decide on the three aspects, they being the Classification, Valuation and the Limitation.

9. We shall first take up the aspect of classification.

10. To begin with, we are concerned with the following 22 items:

- i) Bio-Apple
- ii) Bio Aloevera
- iii) Bio Bhringraj
- iv) Bio-cucumber
- v) Bio-coconut
- vi) Bio-costus
- vii) Bio-fruit

- viii) Bio-henna
- ix) Bio-Henna leaf
- x) Bio-kelp
- xi) Bio-milk
- xii) Bio-mud
- xiii) Bio-myristica
- xiv) Bio-margosa
- xv) Bio-peach
- xvi) Bio-pro xvii) Bio-quince
- xviii) Bio-saffron
- xix) Bio-soya
- xx) Bio-wheat
- xxi) Bio-wintergreen
- xxii) Bio-walnut

During the debate Shri V. Lakshmikumaran, learned Counsel for the Assessee fairly conceded that the products "Bio-Heena" and "Bio Heena Leaf" may not be called as Ayurvedic medicines and hence gave up his claim of the classification of these products under Chapter 30 and more precisely under Entry 3003.30. We are, therefore, not considering these products.

11. Again the learned Senior Counsel for the Revenue Shri Radhakrishnan very fairly conceded at the beginning of the debate itself that the following products would not be "cosmetics", they being:

- i) Bio-apple
- ii) Bio-fruit
- iii) Bio-mud
- iv) Bio-myristica

and as such would not fall under Chapter 33 and instead would be covered under Chapter 30, Entry 3003.30 inviting 10% duty and not 40%. We, therefore, leave these four more products out of consideration, barring 16 products, which we have to consider, they being:

- i) Bio Aloe vera
- ii) Bio Bhringraj
- iii) Bio-cucumber

- iv) Bio-coconut
- v) Bio-costus
- vi) Bio-kelp
- vii) Bio-milk
- viii) Bio-margosa
- ix) Bio-peach
- x) Bio-pro
- xi) Bio-quince
- xii) Bio-saffron
- xiii) Bio-soya
- xiv) Bio-wheat
- xv) Bio-wintergreen
- xvi) Bio-walnut

12. Shri Radhakrishnan, learned Senior Counsel, appearing on behalf of the Revenue took us through the various entries of Chapter 33 and more particularly Entries 3304 and 3305 which are as under:

3304 - Wadding, gauze, bandages and similar articles (for example, dressing, adhesive, plasters, poultices), impregnated or coated with pharmaceutical substances or put up in forms or packings for medical, surgical, dental or veterinary purpose.

3305 - Pharmaceutical goods, not elsewhere specified.

Learned Counsel contended that the said products contain certain other ingredients also which cannot be said to be "Ayurvedic medicines". In support of his claim he invited our attention to the Show Cause Notice dated 10.4.1996 and more particularly para 6(i) referring to the statement of one S.V. Rasalkar, Technical Director, M/s.IRLP who had furnished the list of about 29 ingredients used in the said 16 products. Our attention was also invited to para 6(vi) of the Show Cause Notice where the statement of Mr. Yakub Usman Kapadia is also referred. He also relied on the statement of one S.K. Handa, Manager (Account). Learned Counsel also heavily relied on other paras of the Show Cause Notice like para 10 to suggest that these products were generally being sold to the Hotels like Park Hotel, Hotel Taj Mansingh, Hotel Taj Palace, New Delhi, etc. Further a reference was also made by the learned Counsel and more particularly para 12 which refers to the literature published by M/s.IRLP on the Skin Care Naturals wherein it is suggested that the use of Biotique Products would make the skin beautiful and would help the user retain the bloom of youth. From this the main

argument was that all these products were only helpful as the cosmetics or toiletries and they were also understood to be the same. Learned Counsel took us painstakingly to Show Cause Notice to suggest that even IRLP was treating all these products as the products for enhancement of beauty and not as medicines much less Ayurvedic medicines. It was also contended that the user of non-Ayurvedic products in these products would essentially take these products out of the caption of "Ayurvedic Medicines". Learned Counsel very heavily relied on a decision of this Court in *Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, etc.* 1996(83)ELT492(SC) . In short, the main contention of the learned Counsel is that we must apply common parlance test for all these products which was accepted by this Court in that decision. According to the learned Counsel the Tribunal should have followed the law laid down to the effect that since 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. Learned Counsel, during his address, also referred to the leading decision of this Court in *B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara,*

13. As against this, the learned Counsel appearing on behalf of the Assessee Shri Lakshmikumaran heavily relied on the decision of BPL Pharmaceutical's case (supra). He urged that there is a line of decisions following BPL Pharmaceutical's case and pointed out that the decision in *Shri Baidyanath Ayurved Bhavan's* case and BPL Pharmaceutical's case were dealt with in another decision in *Commissioner of Central Excise, Nagpur Vs. Vicco Laboratories,* He also invited our attention to the decision in *Meghdoot Gramodyog Sewa Sansthan v. Commissioner of Central Excise, Lucknow* 2004 (174) ELT 14 (SC) following the decision in *The Commissioner of Central Excise, Allahabad Vs. Himtaj Ayurvedic Udyog Kendra,* . Our attention was also invited to some other decisions to which we would make reference hereinafter.

14. Shri Lakshmikumaran, during his address, took us through the Notes as also the definitions, more particularly covered u/s 3(a) and 3(h) of Drugs and Cosmetics Act defining drug and patent of proprietary medicines. Relying on these provisions and further relying on the provisions of Chapter 30 Note No. 2, the learned Counsel further pointed out that this controversy as to when a particular product should be covered under the "cosmetics" and as to when it should be held as "medicament" has been set at rest in BPL Pharmaceutical's case where the Court has crystallized the guiding principles. He pointed out that each of the product was having Ayurvedic medicinal herbs in it and even the labels on these products claim specifically the medicinal properties of the product. This is apart from the fact that on labels the product was specifically "NOT" described as "cosmetic product". He further pointed out that the reliance on the decision of *Shri Baidyanath Ayurved Bhavan's* case by the Revenue was also uncalled for as the relevant Entry at the relevant time in that case was:

All drugs, medicines, pharmaceuticals and drug intermediaries not elsewhere

specified".

He further pointed out that there was no definition of "medicaments" under Tariff Item 68 as it stood then unlike the definition contained in Note 2 to Chapter 30 which is applicable to the present case. He further contended that in Shri Baidyanath Ayurved Bhavan's case Tribunal has held that in common parlance the product in question could not be described as "medicinal preparation" and could only be described as "toilet preparation" on account of the fact that one of the ingredients Geru (red earth) was largely used as a filler or colouring agent and was not described as a medicine in common parlance.

15. Further contention raised by Shri Lakshmikumaran is that all the products in question have been manufactured under the Drugs Licence under the Drugs and Cosmetics Act and, therefore, the learned Counsel says that grant of Drugs licence for the manufacture of these products would answer that test in favour of the assessee. Learned Counsel also invited our attention to the decision of this Court in Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works, as also the Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur, to which decision one of us (Ashok Bhan, J.) was a party. Learned Counsel, therefore, urges 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 claimed and marketed as such.

16. The learned Counsel also invited our attention to the decision of the Tribunal delivered in CCE, Pune v. Ramakrishna Vidyut Ltd. (Final Order No. 847/99-C dated 16.8.1999 of Tribunal) which was affirmed by this Court in Civil Appeal No. 2353 of 2000 (judgment delivered on 15.3.2005) holding that Mahabringaraj Hair Oil is classifiable under Tariff Item 3003 and not as a "cosmetic".

17. Going back to the List of Items in para 11, Item No. (ii) Bio Bhringraj would stand covered by that decision. On this backdrop we are thus left with 15 items. Shri Radhkrishnan also did not dispute this position regarding item No. (ii) Bio Bhringraj.

18. In BPL Pharmaceutical's case a clear cut distinction was made in the "cosmetics" and the "drugs". Observations made in para 31 are:

The contention based on Chapter notes is also not correct. One of the reasons given by the Authorities below for holding that Selsun would fall under Chapter 33 was that having regard to the composition the product will come within the purview of note 2 to Chapter 33 of the Schedule to Central Excise Tariff Act, 1985 is without substance. According to the Authorities the product contains only subsidiary pharmaceutical value and, therefore, notwithstanding the product having a medicinal value will fall under Chapter 33. We have already set out Note 2 to Chapter 33. In order to attract Note 2 to Chapter 33 the product must first be a cosmetic, that the product should be suitable for use as goods of Headings 33.03 to 33.08 and they must be put in packing as labels, literature and other

indications showing that they are for use as cosmetic or toilet preparations. Therefore, Note 2 to Chapter 33 is not attracted.

19. This Court in BPL Pharmaceutical's case (*supra*) was considering the question as to whether a product called Selsun Shampoo was a "cosmetic" and/or "toilet preparation" or a "medicament". The Court noted the main objections by Revenue as under:

(a) That the other manufacturers of similar type of product were holding the licence for cosmetics and bore the tag of cosmetics on the respective bottles.

(b) That the medicinal properties, i.e. Selenium Sulfide which was claimed to prevent Dandruff was only 2.5% and was only a minor constituent against the total composition of the product while the percentage of the remainder were of forming agent, flavouring agent, thickening agent and buffer etc.

(c) That in fact Selsun Suspension was an Anti Dandruff Shampoo.

(d) That its usage was also comparable to the other shampoos available in the market.

(e) That in common parlance the said product was known as Selsun Shampoo and was sold as such.

(f) That the product was not sold by the owner of the medical shop on presentation of Doctor's prescription.

(g) That the words "Dandruff Treatment Shampoo" were deleted which were there in the old bottles only with an intention to evade Central Excise duty and were substituted by the words "Selenium Sulfide Lotion USP Selsun the medical treatment for Dandruff".

20. This Court noted firstly the definitions in Chapter 30 and the language of Entry 3003 as also the relevant provisions in Chapter 33 and more particularly the HSN Notes under the heading "Essential Oils and Resin Oils: perfumery, cosmetic or toilet preparation". It also took into account the Entries at 33.05, 3305.90, 33.06, 3306.00 and 33.08. In para 17 it noted the previous Tariff Items as they stood prior to 1.3.1986 i.e., 314E and 14F - 14E being "Patent or Proprietary Medicines" and 14-F being "Cosmetics and Toilet Preparations". The Court also noted the label, literature and medicinal properties concerning the product in question and noted that the label gave out specifically that:

Firstly, it was a poison;

Secondly, there was a cautionary note that it should be used for external use and should be kept out of the eyes and away from children and also that it should be used immediately after bleaching, tinting or permanent waving of hair or on inflamed scalp;

Thirdly, it should be used twice weekly initially and then as often as necessary;

Fourthly, that it was a medical treatment for dandruff;

Fifthly, it contains Selenium Sulphide USP 2.5% w/v;

Sixthly, the hairs should be washed first and then the Selsun should be massaged into the scalp.

The Court also perused the literature which suggested that it was for the use of registered Medical Practitioner or a Hospital or Laboratory and that it further indicated that the product controls Dandruff and has beneficial effect on the scalp as it is helpful in controlling acne, otitis externa and Bleph-aritis. The Court also relied on the affidavits filed by the appellants. The Court found that the product was classified by the Excise Authorities as a patent and proprietary medicine accepting the decision of the Central Board of Excise and Customs rendered on 17.1.1981 and it was only because of the new Central Excise Tariff Act, 1985 that the entry was sought to be changed.

21. In para 26 of the above judgment there is a specific reference to the argument by the learned Counsel for the Revenue that the relevant chapter applicable would be Chapter 33 and not Chapter 30. The Court went on to distinguish between the terms "cosmetic" and "drug". It noted the definition of cosmetics and drugs which is as under:

A 'cosmetic' means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic.

AND

A 'drug' includes all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatments, mitigation or prevention of any disease or disorder in human being or animals, including preparations applied on human body for the purpose of repelling insects.

It then recorded a finding that the product in question was not intended for cleansing, beautifying, promoting attractiveness or altering appearance and held that it was intended to cure certain diseases as mentioned. The court came to the further conclusion that merely because the product was described as "Selsun Shampoo" it would not conclude the controversy.

22. In para 31 the contention raised on the basis of the Chapter Notes was considered wherein the court gave an unequivocal finding that in order to attract Note 2 to Chapter 33, the product must first be a cosmetic product and that it should be used as such and it should also be put in such packing as declaring it to be a cosmetic product. We have already quoted the part of the finding in para 31 in para 19 of this judgment. The emphasized portion is more than telling. In

that very para the court also rejected the claim that merely because there was a very small percentage of medicament and the rest of the contents were not having medicinal value would also be of no use. The court again relied on the earlier decision by the Central Excise Authorities in accepting the decision of the Central Excise Board and Excise and Customs wherein the product was treated as patent and proprietary medicines. The Court relied on as many as 13 reasons, some of these reasons are extremely relevant for our case also, e.g.:

Firstly, the court held that the product was useful for a treatment of a disease;

Secondly, it held that it was manufactured under a drug licence;

Thirdly, it held that the Foods and Drugs Administration had certified it as a drug;

Fourthly, that the Drug Controller had opined that Selenium Sulphide present in Selsun was in a therapeutic concentration;

Fifthly, that it was included as a drug in the National formulary, US Pharmacopeia and the Merck Index;

Sixthly, that it fulfils the requirement of a drug as understood in the common parlance;

Seventhly, that it was certified in standard books and treaties;

Eighthly, it was marketed as a patent; and

Ninthly, that its literature referred to it as drug and the literature was addressed to the physician.

The Court on this basis went on to hold the product as medicinal product and further held that it would fall under Tariff Item 3003.19. A very heavy reliance was placed and since this happens to be a leading judgment which was followed throughout for more than 10 years, we are specifically referring to the details of the judgment.

23. We need not dilate on the judgment further in view of our observations and our detailed references made but we must reiterate that the judgment does consider the relevant Entries of Chapter 30 including the Entry under the heading 3003 as also 3003.19. It also refers to the HSN Notes in detail and also notes the pre-amendment position, i.e., before 1.3.1986 when the relevant entries came on the anvil. The judgment is also very relevant to note that the labels on the bottles are extremely relevant in coming to the conclusion as to whether the product is cosmetic or a drug. It further reiterates that merely because there is very small percentage of ingredients having therapeutic or prophylactic value and merely because the product can be used otherwise for beautification, it does not ipso facto become a cosmetic preparation.

24. Shri Radhakrishnan, however, wanted to use this judgment in the light of the earlier referred judgment in Shri Baidyanath Ayurved Bhavan's case (supra). His argument was that the common parlance test was accepted as one of the

relevant tests in this judgment though the product was manufactured as a drug under the drug licence. It is true that the common parlance test has been referred to in this judgment, however, it is in entirely different context and again the judgment does not entirely depend upon the common parlance test as in *Shri Baidyanath Ayurved Bhavan's case* (supra). The judgment instead notes and holds that even if the product is known as Shampoo and could be used as shampoo that by itself will not be a deciding factor. We would have a further opportunity to compare this judgment and refer to its findings as the judgment has been referred to and followed right till today in number of decisions.

25. On the heels of this judgment came the further judgment of this Court in *Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works*, . In that judgment the product called Banphool Oil was in question. CEGAT had held it to be classified under Tariff Item 3003.30, i.e., Ayurvedic Medicament. This was challenged by the Revenue. It is to be noted that after the judgment in *BPL Pharmaceutical's case* (supra) which did not relate to Ayurvedic product, this was by far the first judgment in respect of the product claimed as Ayurvedic Medicament. This Court went into the questions in detail. It was argued that 98% of Bhanpool Oil consists of "til oil" and remaining 2% are Ayurvedic ingredients like amla, chandan camphor, etc., and also that it was being sold across the counter and was not stored just by chemists but even by ordinary grocers. In short, it was submitted that in common parlance it was not called as perfumed hair oil. The court also referred to the law laid down in *Shri Baidyanath Ayurved Bhavan's case* (supra) and *Alpine Industries Vs. Collector of Central Excise, New Delhi*, and took stock of the arguments that the common parlance test as laid down in these two cases was the only relevant test. On the other hand it was pointed out by the assessee that Chapter 30 dealt with all types of medicines and not only Ayurvedic medicines. It was further urged that the medicaments could be as per the formula set out in various pharmacopoeias or they could be under some patented formula of a particular party and further the product having medicinal properties in very small percentage did not matter. If the percentage of such ingredients having medicinal properties was more, it could be harmful to the human body. It was also argued directly on the lines of the *BPL Pharmaceutical's case* (supra) that merely because there were fillers/vehicles in order to make that medicament palatable and/or usable did not take it out of the entry of medicament. Example was given of Vicks Vaporub which contained 98% Paratin Wax and only 2% of methol. It was also pointed out that every ingredient in Banphool Oil was contained in various pharmacopoeias and text books which deal with Ayurvedic medicines and further pointed out that even in "*Bhavaprakash*", "til oil" was mentioned as Ayurvedic ingredient. It was also pointed out that there was a Board Circular dated 5.12.1991 providing that in case of any doubt, the matter should be referred to the State Drug Licensing Authority concerned with Ayurveda and that if a further reference is necessary then it should be sent to Advisor, Ayurveda/Sub Commissioner in the office of the Drug Controller of India. It was also pointed out that accordingly Banphool oil

was sent for the opinion of the Drug Controller and that the Drug Controller by his letter dated 13.5.1985 opined that Banphool Oil was an "Ayurvedic preparation". The Court also approved of the further arguments that the onus of establishing that the product falls within a particular item is always on the Revenue and if the Revenue did not lead evidence then the onus is not discharged. The argument raised in BPL Pharmaceutical's case (supra) about the label claiming that it was a medicament was also pressed in service. The Court also took note of Chapter Notes 2 and 6 of Chapter 33. The Court thereafter extensively quoted from the BPL Pharmaceutical's case (supra) which was heavily relied upon in the present case. Even the decision in Amrutanjan Ltd. Vs. Collector of Central Excise, was also referred to. It is to be remembered that in that decision this Court had come to the conclusion that merely because a product contained the ingredients not known to Ayurveda would not by itself make it a non-Ayurvedic product. The following observation in para 12 are extremely relevant in the present controversy:

Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessary be covered by fillers/vehicles in order to make the product usable. It could 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 book 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 to by the customers who use it. The burden of proving that Banphool 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, amnesia, blood pressure, insomnia etc. The dosages required are also set out on the label. The product is registered with Drug Controller and is being manufactured under a drug licence.

(emphasis supplied)

26. Following the above judgment this Court held in favour of the assessee in Calcutta Chemicals Co. Ltd. Vs. Commissioner of C. Ex., Chennai, reported in 2003(154)ELT326(SC) in respect of Maha Bringaraj Oil to which we have already made a reference and also in the decision in Commissioner of Central Excise, Calcutta-IV Vs. Pandit D.P. Sharma, reported in 2003(154)ELT324(SC) in case of Himtaj Oil. Thus in the aforementioned judgment this Court followed the law laid down in BPL Pharmaceutical's case (supra) even after noting the judgment in Shri Baidyanath Ayurved Bhavan's case (supra). We, therefore, cannot and would not accept the argument by Shri Radhakrishnan that we must ignore all these judgments in preference to Shri Baidyanath Ayurved Bhavan's case (supra). These judgments were then followed in Meghdoot Gramodyog Sewa Sansthan v. Commissioner of Central Excise, Lucknow 2004 (174) ELT 14 (SC). Again the product in question was Ayurvedic hair oils like Bhringraj Tail, Trifla Brahmi tail

and Neem herbal sat. The aforementioned judgments by Variava, J as also the judgment in BPL Pharmaceutical's case (supra) were approved. This was an appeal by the assessee against the Tribunal's judgment holding that these products were the "cosmetic products" and were, therefore, covered by Chapter 33 where the Tribunal had held that the appellant- assessee had not produced any evidence to show except for certain letters from the doctors that the products were prescribed by the medical practitioners as medicines; secondly there was nothing to show that the patients were kept under observation and/or the results said to have been achieved by the use of the products were obtained by keeping the patients in hospitals over a period of time and thirdly the packing of the products would indicate that the products were cosmetic and not medicines or drugs. All these three arguments were rejected by this Court and the law laid down in the aforementioned judgments by Variava, J. was followed.

27. On the heels of judgment in Meghdoot Gramodyog Sewa Sansthan' case (supra) came the judgment in Commissioner of Central Excise, Nagpur Vs. Vicco Laboratories, . This was the closest decision given by the Three Judge Bench of this Court. Same question came for consideration. The products which fell for consideration were the turmeric skin cream and vajradanti toothpaste and tooth powder. The products in this case were initially classified as patent or proprietary medicines not containing alcohol, opium, Indian hemp or other narcotic drugs or other narcotics other than those medicines under heading 14-E of the First Schedule of the 1944 Act. Again the basis of show cause notice was the decision in Shri Baidyanath Ayurved Bhavan's case (supra). The test applied by the Revenue was: firstly, whether the products were being used daily and were sold without prescription by a medical practitioner and secondly, whether the products were available in General Store Department/Grocery Shops. In para 4, the Court came to the conclusion that a mere decision of a court of law without more cannot be 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. The said decision was distinguished on the ground that the aforementioned tests were not applicable there. In para 5 it is pointed out by the court in the following words:

The court did not itself affirmatively hold that what was laid down by the Tribunal as a test to be 'ordinarily' followed was invariably to be the sole test for determining whether a product is to be proved as a medicine or as a cosmetic.

The Court then went on to approve the law laid down in BPL Pharmaceutical's case (supra) and other cases, namely, Sharma Chemical Works (supra) and Meghdoot Gramodyog Sewa Sansthan' case (supra) and ultimately held in favour of the assessee and against the Revenue.

28. Lastly the same question came to be considered in details in Puma Ayurvedic Herbal (P) Ltd. Vs. Commissioner, Central Excise, Nagpur, though on the question of valuation. One of us (Ashok Bhan, J) was a party to this decision. The products which fell for consideration were namely, Puma neem facial pack (Neemal), Puma

Anti- pimple herbal powder (Pimplex), Puma herbal facial pack (Herbaucare), Puma herbal remedy for facial blemishes, Puma hair tonic powder (Sukeshi), Puma anti-dandruff oil (Dandika), Puma Shishu Rakshan tel, Puma neel tulsi, etc. After referring to the decisions referred to above and other decisions like CCE v. Richardson Hindustan Ltd. (2004) 9 SCC 156; Commissioner of Central Excise, Calcutta-IV Vs. Pandit D.P. Sharma, ; Naturalle Health Products (P) Ltd. Vs. Collector of Central Excise, Hyderabad, , Amrutanjana Ltd. Vs. Collector of Central Excise, BPL Pharmaceuticals Ltd. v. CCE 1995 Supp (3) SCC 1, Muller and Phipps (India) Ltd. Vs. The Collector of Central Excise, Bombay-I, ; Dabur India Ltd. Vs. Commissioner of Central Excise, , Manisha Pharma Plasto Pvt. Ltd.(M/s) Vs. Union of India, , the court came to the conclusion that the word "medicament" was not defined anywhere while the word "cosmetic" is defined in the Drugs and Cosmetics Act, 1940. The court specifically held that the extent of the quantity of medicament used in a particular product and the fact that the use of the medicinal element in the product was minimal does not detract from it being classified as a medicament. It also held in para 22 that it was not necessary that the item must be sold under a doctor's prescription. Similarly, availability of the product across the counter in shops is not relevant as it makes no difference either way. As regards the Chapter Notes, the court found that the use of the word "subsidiary" in the said note, i.e., Note No. 2 of Chapter 22 was overlooked by the Revenue. It was also held that Revenue had failed to make any case in support of its stand that all the products fell under Chapter 33. However, the court rejected the claim of the assessee in respect of some of the products like herbal massage for women and Puma scalp tonic powder. We have gone through this judgment in extensor and even at the cost of repetition we may note that the judgment in BPL Pharmaceutical's case (supra) was approved and relied upon.

29. All these cases would, therefore, suggest that the products in question were found to be and rightly held to be covered under Chapter 30 and not Chapter 33. We must immediately point out that the expert opinion was pressed into service before the Tribunal of Dr. V.N. Pandey who had in details analysed all these products and noted that the products contained the elements having Ayurvedic medicinal value. It was also noted rightly by the Tribunal that all these products were produced under the drugs licence issued under the Drugs and Cosmetics Act. Shri Radhakrishnan could not dispute this fact.

30. Further it was obvious from the labels of the products which we have ourselves inspected in the court that there is a claim made in each of the label of the medicinal properties of the product. It is also found that there was a specific claim that this is not a cosmetic product. In this behalf Shri Radhakrishnan took us through the show cause notice and tried to point out that the products were sold to the Hotels, Beauty Parlours etc. Our attention was also invited to various orders as also to the literature and it was tried to be suggested that these products were treated to be the cosmetic products, if not by the assessee, at least by the customers. We have already pointed out that the common parlance test is not "be all and end all" of the matter on the basis of which the case of Shri

Baidyanath Ayurved Bhavan's case (supra) was decided. We have further pointed out that thereafter firstly the entry was amended and in series of decisions this Court has held that merely because the product could be put to cosmetic use that would not by itself make it a cosmetic product provided there was a rightful claim made that it was an Ayurvedic product on the factual basis, and it contained the medicinal Ayurvedic medicament. The miniscule percentage used is also not a deciding factor and this Court has, in series of decisions, held that the miniscule percentage does not change the nature of the product from medicament to the cosmetic products. In the wake of all these decisions it would have to be held that the products referred to above, excepting in respect of which Shri Lakshmikumaran has conceded, were the medicinal products and as such were covered by Chapter 30 and not under Chapter 33.

31. Even at the cost of repetition we must observe that there has been no attempt on the part of the Revenue to prove that these products are cosmetic as has been held in BPL Pharmaceutical's case (supra). In that view we are of the clear opinion that the Tribunal was right in holding these products to be the medicinal products and we approve of the findings of the Tribunal in that behalf regarding the classification of the product.

32. That brings us to the second aspect of "valuation". Shri Lakshmikumaran has specifically made a statement as regards the valuation in the following terms:

(1) Wherever IRPL had sold products to the IMPL as also to independent third parties including Hotels, the least price charged to the third parties may be taken as the basis for the sales made by IRPL to IMPL for arriving at the assessable value for such products.

(2) Wherever the products were never sold by IRPL to the independent third parties, but only to IMPL, the wholesale price of IMPL charged to the wholesale dealers for such products, may be taken as the basis for arriving at the assessable value.

(3) While arriving at the assessable value, discounts, freight excise duty, sales tax and other taxes and other permissible deductions u/s 4 should be allowed in accordance with the law.

To this Shri Radhakrishnan has no objection. We, therefore, hold accordingly.

33. Lastly, the question was raised regarding the limitation. In view of our findings that these products were genuinely Ayurvedic medicaments, it would not be necessary for us to go into that question. However, since the parties have argued the question, we would consider the same.

34. The Show Cause Notices in this case were given on 10.4.1996, 30.9.1996, 31.12.1996, 2.5.1997 and 28.10.1997. The Revenue sought to take advantage of the extended period of limitation. On 10.4.2008 this Court had passed the following order in respect of limitation:

As far as the question of limitation is concerned, following the decision of High Court of Allahabad in the case of Shahnaz Ayurvedics Vs. Commissioner of Central Excise, , it was held that the extended period of limitation is not applicable. Against the said decision of the High Court of Allahabad, a petition being SLP (C) No. 21585 of 2004 [CC 8996/04] was filed in this Court in the case of Commissioner of Central Excise, Noida v. Shahnaz Ayurvedics and Anr. 2004(174) ELT A34 which was dismissed on 8th October, 2004.

To enable us to compare the similarity between the products in question in the present case and the products which were in question before the High Court of Allahabad in the case of Shahnaz Ayurvedics (supra), we direct counsel for the respondents to produce the literature of the 22 products in question. We also direct counsel for the appellant to place on record the literature of the products which were in question in the case of Shahnaz Ayurvedics (supra) in the High Court.

35. Accordingly, the counsel produced the literature of the product which was comparable to the products in Shahnaz Ayurvedics v. Commissioner of Central Excise, Noida 2004 (173) 338 (All.). We have seen the literature ourselves. Though Shri Radhakrishnan contends that there is no similarity between the products mentioned in Shahnaz Ayurvedics case (supra) and the products of the IRPL, we do not agree. It is obvious that the products in the present case are comparable, if not identical with the products in Shahnaz Ayurvedics case (supra). We, therefore, have no reason to take a different view that was taken by the Allahabad High Court and against which the SLP was dismissed by this Court. We also do not agree that there was any mis-statement of facts or suppression of material facts. It was contended that since the appellants sold their products to boutiques, beauty parlours, hotels and traders, they should be held as "cosmetics". We have already taken stock of this argument and rejected the same. In that view we affirm the findings of the Tribunal regarding the limitation. In our opinion the Tribunal has considered all the facts brought before it and has come to the final findings in the following words:

This would also go to show that a dispute prevailed in the matter of classification of such products. In the above circumstances, the appellants cannot be held to be guilty of suppression or mis-statement and hence the charge of suppression is not sustainable. We, therefore, hold that the proviso to Section 11A(1) of the Central Excise is not applicable to these 3 cases, and hence set aside the demand covered by adjudication order No. 5/98 as time barred.

We are satisfied with the reasoning given by the Tribunal and affirm the same.

36. Accordingly all the above Appeals are dismissed. However, in the facts and circumstances of the case we do not propose to inflict any costs.