

(1999) 05 DEL CK 0037
In the Delhi High Court
Case No : C.W. NO.1320/98.

Manisha Pharma Plasto Pvt. Ltd.(M/s)	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 20-05-1999

Acts Referred:

Citation : (1999) 4 AD 172 : (1999) 79 DLT 771 : (1999) 50 DRJ 102 : (1999) 66 ECC 93 : (1999) 112 ELT 22 : (1999) ILR Delhi 501

Hon'ble Judges : Manmohan Sarin, J;Arun Kumar, J

Bench : Division Bench

Advocate : Mr. Sridharan, for the Appellant; Mr. Rakesh Tikku, for the Respondent

Judgement

Arun Kumar, J.—The question for consideration in the present writ petition is about the classification of Nycil Prickly Heat powder, i.e., whether it falls under heading 30.03 or it falls under heading 33.04 of the Central Excise Tariff.

2. The petitioner is engaged in manufacturing prickly heat powder called "Nycil" under a manufacturing license issued by the Drug Controller under the Drugs and Cosmetics Act, 1940. According to the petitioner, the said product is used for prevention and cure of ailments such as athlete's foot, dhobie itch, prickly heat and sores. The presence of the drug Chlorphenesin IP in the product helps in prevention and cure of such ailments because the said medicine has a strong anti-bacterial and anti-fungal agent. According to the drug licence, the composition of the petitioner's product is as under:

Chlorphenesin IP - 1% w/w Zinc Oxide IP - 16% w/w Starch IP - 51% w/w Talc Purified IP to - 100% w/w

3. The petitioner has challenged a circular No.356/72/97-CX dated 20th November, 1997 and an order dated 5th November, 1997 u/s 37B of the Central Excise and Salt Act, 1944. By these orders, the respondents have classified Nycil Prickly Heat powder for purposes of levy of excise duty under the heading 33.04 which covers "body or make-up preparations and preparations for the care of the

skin (other than Medicaments) including sunscreen or suntan preparations, manicure or pedicure preparations."

4. According to the petitioner prior to the impugned orders, its product Nycil was considered as falling under Chapter 30 and was classified under heading 30.03/sub-heading 3003.10 which includes patent or proprietary medicines. It is further pointed out that the matter of correct classification of prickly heat powders was referred by the Central Board of Excise and Customs to the Customs Co-operation Council at Brussels for its opinion. The Council referred the matter to the Harmonised Systems Committee (for short HSC) which considered the matter in its tenth session and opined as under:

5. "The Committee unanimously agreed with the view expressed by the Secretariat in paragraphs 32 and 33 of the working document that the prickly heat powders under examination should be classified as follows:

Heading Nycil 30.04 Shower to Shower 33.04 Johnson 33.04

6. The controversy as to whether Nycil powder is a drug or a cosmetic product has been going on since long. In the year 1966, the Government of India in exercise of its appellate powers held in an appeal that Nycil merited classification as a patent and proprietary medicine under Tariff item 14E and was not a cosmetic. Nycil thus continued to be taxed under the Act as a patent and proprietary medicine till 1985 when suddenly the controversy was again raked up. By an order dated 17th December, 1986, the Assistant Collector of Central Excise, Thane in exercise of his powers under Rule 173-B read with other provisions of the Act held that Nycil was patent and proprietary medicine falling under Tariff item 14E and was not a cosmetic under Tariff item 14F. Thus under the old tariff which was operative till 28th February, 1986, Nycil was held to be a drug and not a cosmetic.

7. The Central Excise Tariff Act, 1985 was enforced w.e.f. 28th February, 1986. Chapter 30 included pharmaceutical products and corresponded to erstwhile tariff item 14E whereas chapter 33 included cosmetic preparations and corresponded to erstwhile item 14F. The Central Board of Excise and Customs agreed to the classification of Nycil under chapter 30 holding that it was a drug. The controversy was raked up again in the year 1992 when the excise authorities issued show cause notice purported to classify Nycil under chapter 33 and demand differential duties. The basis for raking up the controversy was on account of reservations expressed by the Public Accounts Committee in this behalf. Accordingly the Government of India made a reference to the Customs Co-operation Council at Brussels in 1992 and sought its opinion. As already mentioned in earlier part of this judgment, the opinion of the Council was in favor of Nycil being classified under chapter 30 under heading 30.03. In view of this opinion, the Government of India issued a circular No.1/93-CX.3 on 17th March, 1993 through the Central Board of Excise and Customs to the following effect:

"The Board has accepted the recommendations of the Harmonised Systems Committee and, accordingly a copy of the same along with the background note, is enclosed for necessary action. The classification of all Prickly Heat Powders may, Therefore, be decided taking into account the above."

8. The Central Board of Excise and Customs again reiterated the position vide its order dated 3rd August, 1995 u/s 37B of the Act. It confirmed that Nycil powder would continue to be classified under Chapter 30 of the Tariff under heading 30.03.

9. The opinion of the Harmonised Systems Committee was also accepted by the Central Excise and Gold (Control) Appellate Tribunal (for short CEGAT) in Collector of Central Excise Vs. Muller & Phipps (India) Limited with respect to Johnson's prickly heat powder. It will be recalled that the HSC had recommended Johnson prickly heat powder to be classified under heading 33.04. The Tribunal noted the importance and persuasive force of the opinion of the HSC. It was observed: that the Central Excise Tariff is now based on HSN. The Harmonised System Committee is the high powered body to ascertain international practice of classification of a particular product referred to it and recommends to the member nations the most appropriate classification of the product under HSN. The opinion and recommendation of the Committee cannot just be brushed aside simply because similar products are manufactured under drug license or sold under drug licence. The Harmonised System Committee after considering the various aspects of the practice of similar goods in the international market and studying the technical literature recommended that Johnson's prickly heat powder is cosmetic and preparation for skin care and, Therefore, classifiable under heading 33.04. The considered view of the high powered committee based on technical literature and the international practice was accepted.

10. This judgment of the Tribunal though in relation to a different product, i.e., Johnson prickly heat powder created a stir and resulted in the impugned circular and show cause notice being issued to the petitioner. The Board passed a fresh order dated 20th November, 1997 u/s 37B relying on the judgment of the CEGAT in the Muller & Phipps case overlooking the fact that the HSC had itself given opinion about Nycil prickly heat powder and Johnson prickly heat powder and had classified these products differently under heading 30.03 and 33.04 respectively. The product under consideration before the Tribunal was Johnson prickly heat powder and the Tribunal accepted the opinion of the HSC with respect thereto. The Board overlooked the fact that HSC had opined differently about Nycil prickly heat powder and had recommended that the same was liable to be included in the entry regarding Medicaments under the heading of the Tariff 30.03. A show cause notice dated 26th November, 1997 was also issued to the petitioner to the effect that their product was not a medicine and it falls under the chapter dealing with cosmetics, i.e., chapter 33 of the Tariff. The learned counsel for the petitioner has urged:

11. 1) That the product in question is a specialised product meant to be used for

treatment of prickly heat and other skin ailments. It is not a cosmetic or an ordinary talcum powder. In this connection it was further submitted that in interpreting the Statute like the Excise Act, resort should not be taken to the scientific and technical meaning attached to the expressions, but to the popular meaning, that is to say, the meaning attached to a product by its users. For this he relied on a judgment of the Supreme Court in *Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur*, In the context of the present case he submitted that no buyer or consumer buys Nycil prickly heat powder for use as a daily-use talcum powder. It is commonly understood as a powder meant to be used for treatment of prickly heat or other skin ailments. Our attention was also drawn to a judgment of the Calcutta High Court in *Union of India (UOI) Vs. G.D. Pharmaceuticals Ltd.*, wherein the observation of the Supreme Court regarding popular meaning attached to a product being considered was relied upon. The product under consideration before the Calcutta High Court was "Boroline" cream. The question arose as to whether Boroline containing Boric Acid with Zinc Oxide is a medicine or a cosmetic preparation. The point for consideration was almost similar as in the present case where it is for consideration as to whether Nycil prickly heat powder is a medical preparation or a cosmetic. With reference to Boroline it was observed that the product in question contains Boric acid with Zinc Oxide which cannot possibly be termed to be a cosmetic. Nycil prickly heat powder contains Chlorphenesin, a product specifically meant for treatment of skin disorders. Use of this drug in the product weighed with the HSC for treating Nycil prickly heat powder differently as compared to the other prickly heat powders which were before it for consideration for proper classification under the Tariff. The other two prickly heat powders were classified as per the HSC opinion under tariff heading 33.04 dealing with cosmetics whereas the HSC opined that Nycil prickly heat powder was liable to be classified as a drug under heading 30.03.

12. The learned counsel for the petitioner relied on a judgment of the Gujarat High Court in *B. Shah & Co. Vs. State of Gujarat* (1971) 28 STC 5. This was a judgment wherein the same product, i.e., Nycil prickly heat powder was treated as a medicine in the context of levy of sales tax. The Court observed that Nycil medicated powder with its special qualities and attributes, its character and composition and its recommended or intended use as advertised by the manufacturers, is a medicine within the meaning of the word in entry 13 of the Schedule C of the Bombay Sales Act, 1959.

13. The learned counsel for the petitioner next contended that the opinion of the HSC is binding on the authorities in view of the international trade concepts and India being a member of the World Trade Organisation. In this context he also relied on a judgment of the Supreme Court in *Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd.*, The following observations of the Supreme Court have bearing on the point on issue:

"It is significant, as expressly stated, in the statement of objects and reasons,

that the Central Excise Tariffs are based on the HSN and the internationally accepted nomenclature was taken into account to "reduce disputes on account of tariff classification." Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI glossary of terms has a different purpose and, Therefore, the specific purpose of tariff classification for which the internationally accepted nomenclature in HSN has been adopted, for enacting the Central Excise Tariff Act, 1985, must be preferred, in case of any difference between the meaning of the expression given in the HSN and the meaning of that term given in the glossary of terms of the ISI."

14. The above observations were reiterated by the Supreme Court in *The Collector of Central Excise, Hyderabad, Vs. M/s. Bakelite Hylam Ltd.*, observing:

"Hence for the interpretation of the New Tariff harmonised system of nomenclature and its explanatory notes are relevant. In the case of *Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd.*, this court, while considering the Central Excise Tariff Act, 1985, has held that looking to the statement of objects and reasons, the Central Excise Tariff under the 1985 Act is based on the Harmonised System of Nomenclature (HSN) and the internationally accepted nomenclature has been adopted to reduce disputes on account of tariff classification. Accordingly, for resolving any dispute relating to tariff classification, the internationally accepted nomenclature emerging from the HSN is a safe guide, this being the expressly acknowledged basis of the structure of the Central Excise Tariff in the 1985 Act and the tariff classification made therein. In case of any doubt, the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act."

15. The learned counsel argued that the HSC having opined in the present case that Nycil prickly heat powder is liable to be classified under heading 30.03 dealing with drugs, the matter should now be treated as beyond the pale of any controversy and the issue should be finally treated as closed.

16. Lastly the learned counsel for the petitioner relied on the fact that the department was itself treating the product in question as a medicament and was classifying the same under tariff entry 33.03 but for the controversy being reagitated in view of the judgment of the CEGAT in the case of *Muller & Phipps (supra)*, and so far as this judgment is concerned, the department has clearly misread the same because it has overlooked the fact that the Tribunal upholds the sanctity of the opinion of the HSC and it was as per the opinion of the HSC that Johnson Prickly Heat powder was held to be classifiable under the Tariff entry dealing with cosmetics. The department also overlooked the fact that the HSC had opined about the product in question, i.e, Nycil prickly heat powder that it should be classified under the entry dealing with drugs and not under the entry

dealing with cosmetic.

17. On the other hand, the learned Government counsel simply emphasised that Nycil is a talcum powder and will remain so. The mere fact that some medicine was added to it will not make any difference so far as the question of its classification under the appropriate tariff entry is concerned. The basic character of the product remains the same, i.e., a powder which is a cosmetic product.

18. We have carefully considered the entire matter. In our view firstly, the product in question satisfies the common parlance or popular meaning test, i.e., popular meaning attached to a product by a consumer. The product is not used by consumers as a daily-use talcum powder. It is a product normally used for the specific purpose of treating prickly heat and as soon as the ailment is treated, the use of the product is discontinued. To illustrate the point further we have the analogy of Boroline cream as in the Calcutta High Court judgment in Union of India Vs. G.D. Pharmaceuticals Limited (supra). The SLP against this judgment was dismissed by the Supreme Court. Boroline cream was held to be a medical preparation not classifiable as a cosmetic. Another example of similar nature could be the specialised dental creams which are available for treatment of gum ailments. The use of these specialised dental creams is for specific purpose and for a limited period. Rather the dentists advise that such medicated dental creams should not be used for long because they may desensitise the gums. The product in question contains a particular medicine namely, Chlorphenesin IP. The inclusion of this medicine in the composition makes all the difference as found by the HSC. It was because of use of this medicine in Nycil prickly heat powder that the HSC classified it differently as compared to Johnson prickly heat powder and Shower to Shower powder.

19. We also find force in the submission made on behalf of the petitioner that the opinion of the Harmonised Systems Committee has lot of weight and should ordinarily be taken as binding. As its very name suggests, the Committee is meant to harmonise the conflicting interpretations of products and their formulae in the member countries in view of international trade. In the present case it has to be noted that not only the HSC opinion goes against the respondent the respondents themselves were all along classifying the product in question under the category of medicaments and not as cosmetics. We find no merit in the submission made on behalf of the respondents that the product is basically a powder and will always retain as its basic character as a talcum powder even if some medicine is added to it, the base being purified talc. It is the addition of medicines which changes its basic character.

20. The result is that this petition succeeds. We hold that Nycil prickly heat powder is liable to be classified under tariff heading 33.03 and not under the heading 33.04 dealing with cosmetics. The circular dated 20th November, 1997 and the decision of the Central Board of Excise and Customs dated 20th November, 1997 holding that Nycil prickly heat powder is to be classified under heading 33.04 are hereby quashed so far as the product of the petitioner is

concerned. It follows that the show cause notice dated 26th November, 1997 also stands quashed. In the facts and circumstances of the case, there will be no order as to costs.