

(1999) 04 BOM CK 0005
In the Bombay High Court
Case No : Writ Petition No. 337 of 1998

M/s. Colfax Laboratories and another	Vs	APPELLANT
The State of Goa and another		RESPONDENT

Date of Decision : 01-04-1999

Acts Referred:

Central Excise Rules, 1944 — Rule 10
Central Excises and Salt Act, 1944 — Section 4
Customs Tariff Act, 1975 — Section 3
Drugs and Cosmetics Act, 1940 — Section 3
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 19, 2, 3, 6
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 11, 12, 60(1), 68

Citation : (1999) 3 BomCR 704

Hon'ble Judges : R.K. Batta, J;N.P. Chapalgaonkar, J

Bench : Division Bench

Advocate : Ashok H. Desai, A. Hidaytulla, Vikram Nankarni, M.P. Baxi, Ms. S. Kher, A.N.S. Nadkarni, A.Z. Sheerazi and S.M. Singbal, for the Appellant; M.S. Usgaokar, Advocate General and S.S. Usgaokar, for the Respondent

Judgement

R.K. Batta, J.—The first petitioner; M/s. Colfax Laboratories (India) Limited, is a Company registered under the Companies Act, 1956. The second petitioner, Mr. Eric Menezes is the Managing Director and Shareholder therein. The petitioners applied for licence to manufacture cosmetics, namely shaving cream, body talcum, hair cream, cologne for men and after shave lotion under trademark, "Old Spice", on 14th February, 1968, in terms of Drugs and Cosmetics Act, 1940. The licence to manufacture the said cosmetics was granted on 15th April, 1968, by the Licensing Authority under the Drugs and Cosmetics Act, 1940. The petitioners also applied for licence under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (hereinafter referred to as "the said Act"). The Licensing Authority, Commissioner of Excise, granted licence in Form L-1 on 1st April, 1969, for manufacture of "Old Spice" after shave lotion and "Old Spice" cologne for men, which were shown under "toilet preparations". In column 10 to the table attached to the application filed by the petitioners for licence, it was

stated that the petitioners hold licence under the Drugs and Cosmetics Act, 1940, for manufacture of toiletries. From the inception till the year 1984, the petitioners paid excise duty on "Old Spice" after shave lotions" on the basis that it was "toilet preparation". However, on 14th January, 1985 the petitioners filed an application before the Commissioner of Excise, Government of Goa, for re-classification of "Old Spice" after shave lotion as "medicinal preparation", falling under Tariff Item No. 1(i)(b) of the Schedule to the said Act for the purpose of excise duty. In this application the composition of "Old Spice" after shave lotion was specified and it was urged that the said product had antiseptic/astringent and antibacterial properties on account of which it was required to be classified as "medicinal preparation" under the said Act, for the purpose of excise duty. The Commissioner of Excise vide Notice dated 24th January, 1985 directed the petitioners to show cause as to why the said application for re-classification be not rejected. The petitioners filed detailed reply on 25th January, 1985, claiming that the product was not a "toilet preparation" but "medicinal preparation", for the purpose of levying excise duty under the said Act. Alongwith this reply formulation of "Old Spice" after shave lotion and "Old Spice" cologne for men were annexed. In support of the reply, literature on the subject and affidavits were also annexed. The Excise Commissioner, vide order dated 23rd March, 1985 held that the product after shave lotion has to be classified as "medicinal preparation" and not as "toilet preparation", under the said Act. The order was made effective from the date of issue. Subsequently, vide order dated 12th June, 1985 the Excise Commissioner classified the said product "Old Spice" after shave lotion as falling within the ambit of Item No. 1(i)(b) of the Schedule to the said Act. Thereafter, the petitioners made application for refund of excess duty paid after the said order dated 23rd March, 1985 and the Commissioner of Excise ordered refund of excess duty paid by the petitioners, vide orders dated 26th August, 1985, 27th November, 1985 and 27th December, 1985.

2. The petitioners' case is that till the year 1984 they had paid excise duty on the product in question under Tariff Item No. 4 of the Schedule to the said Act under mistake of law on the basis of licence obtained from the Drugs Controller as "toilet preparation". However, once they came to know about the judgment of the Apex Court in *Chimanlal Jagjivandas Sheth Vs. State of Maharashtra*, they applied for re-classification of the product in question as "medicinal preparation".

3. On 14th January, 1989, M/s. P.J.M. Pharmaceutical Pvt. Ltd., filed an application before the Drugs Controller, Government of Goa, for manufacture of following cosmetic products under Loan Licence with M/s. Colfax Laboratories (India) Limited, Ponda, Goa :--

"1. "Blue Stratos" after shave lotion 50/100 ml. splash and 50/100 ml, spray; 2. "Blue Stratos" after shave lotion 100 ml. Travel Pack; 3. "Blue Stratos" cologne 50 ml. spray; and 4. "Blue Stratos" lather shaving cream 30/70 gms."

This was approved by the Drugs Controller, Goa, vide Licence dated 13th February, 1989. The Excise Commissioner vide order dated 12th October, 1989,

approved the price inclusive of duty, the duty component in the price as well as the maximum price for the said products. Like petitioners, M/s. P.J.M. Pharmaceuticals Pvt. Ltd., started paying duty on the after shave lotions at the rate applicable to "medicinal preparations".

4. Thus, according to the petitioners, from the year 1985 till 1991 hundreds of consignments of after shave lotions had been cleared by the Department under the classification of "medicinal preparations". However, by Demand Notice dated 13th March, 1991 issued under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 (hereinafter called "the said Rules"), the petitioners were called upon to pay short levy amounting to Rs. 92,43,684.08p. in respect of "Blue Stratos" after shave lotion manufactured for M/s. P.J.M. Pharmaceuticals Pvt. Ltd. By another Demand Notice dated 15th May, 1991 issued under Rule 12 of the said Rules, the petitioners were called upon to show cause as to why duty amounting to Rs. 17,77,18,361.20p. should not be recovered from them in respect of "Old Spice" range of after shave lotions cleared from 1985 onwards.

5. The Demand Notice dated 13th March, 1991, was challenged by the petitioners by filing Writ Petition No. 109 of 1991. The Division Bench of this Court vide Judgment dated 22nd August, 1991 came to the conclusion that the principles of natural justice had not been effectively observed before taking decision to issue Demand Notice dated 13th March, 1991 and, as such, directed the Excise Commissioner to treat the said Demand Notice dated 13th March, 1991 as Show Cause Notice and the Commissioner was empowered to supplement the said Notice by any additional grounds or materials, if so desired.

6. The petitioners also challenged Demand Notice dated 15th May, 1991 by filing Writ Petition No. 351 of 1991 which was disposed of by Minutes of Order dated 23rd September, 1991 in the same terms as per Judgment dated 22nd August, 1991 in Writ Petition No. 109 of 1991.

7. Accordingly, Supplemental Memoranda dated 6th September, 1991 and 30th September, 1991, were issued by the Commissioner under which the after shave lotions were proposed to be classified as "toilet preparations". The petitioners filed reply and they were heard. Petitioners also filed synopsis of submissions.

8. By Order dated 7th November, 1991 the Commissioner of Excise held that the Demands were substantially barred by limitation and that the correct classification of the said after shave lotions were required to be determined by the Standing Committee under Rule 68 of the said Rules. As against this Order, the respondents filed appeals in terms of Rule 127 of the said Rules before the Chief Secretary to the Government of Goa. The petitioners challenged the said Order dated 7th November, 1991 as well as the filing of the said appeals by the respondents by filing Writ Petition No. 84 of 1992. This petition was disposed of by a Division Bench of this Court by detailed Judgment dated 21st/22nd December, 1994. The learned Judges held that the Excise Commissioner and not the Standing Committee was empowered to classify the goods for the purpose of

assessment and levy of duty prescribed under the said Act. Regarding limitation, it was held that it was desirable to remand the case for fresh decision by the Commissioner, in accordance with law. The Excise Commissioner was, therefore, directed to decide all the issues including issue of classification in accordance with law after giving adequate opportunity of hearing to the petitioners. The Excise Commissioner vide Order dated 12th August, 1998, which is impugned in this writ petition, held that the said after shave lotions are "toilet preparations" and directed the petitioners to pay the excise duty as calculated in the Demand Notices dated 13th March, 1991 and 15th May, 1991, within 30 days of the service of the said Order. The petitioners challenge the said Order on various grounds and seek declaration that "Old Spice" and "Blue Stratos" after shave lotions manufactured by the petitioners are classifiable as "medicinal preparations" in terms of section 2(g) of the Act and liable to pay duty at the rate of Rs. 10/- per proof litre under Item No. I(i)(b) of the Schedule to the said Act. Therefore, they seek quashing and setting aside of the impugned Order dated 12th August, 1998 and further seek directions to the respondents to forbear from taking any steps in furtherance of or implementation of the impugned Order dated 12th August, 1998. In respect of interim relief claimed by the petitioners, order in terms of Minutes filed by the parties was passed. The petitioners subsequently sought for modification of the said Order and it was decided to hear the writ petition, which had already been ordered to be expedited while admitting the petition.

9. Learned Senior Counsel, Shri Ashok Desai made submissions on behalf of the petitioners and learned Advocate General argued on behalf of the respondents.

10. The controversy between the parties which is required to be resolved in this writ petition centres around the following issues:-

I. Whether after shave lotions manufactured by the petitioners are "medicinal preparations", or "toilet preparations", under the said Act?

II. Whether Demand Notices dated 13th March, 1991 and 15th May, 1991 are barred by limitation? and

III. Whether the quantification of duties done by the Excise Commissioner is in accordance with the Schedule to the said Act read with Section 4 of the Central Excise Act, 1944.

We shall deal with these issues one-by-one.

1. Whether after shave lotions manufactured by the petitioners are "medicinal preparations", or "toilet preparations", under the said Act?

11. In order to appreciate the arguments advanced by the learned Counsel on either side, it is necessary to first have a look at the relevant provisions applicable in that behalf. The said Act was enacted to provide for levy and collection of duties of excise on medicinal and toilet preparations containing alcohol, opium, Indian hemp or other narcotic drug or narcotic. Section 2(g) and

section 2(k) of the said Act define "medicinal preparations" and "toilet preparations", as under:-

"Section 2(g) : "medicinal preparation" includes all drugs which are a remedy or prescription prepared for internal or external use of human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals."

"Section__2(k)_" "toilet preparation" means any preparation which is intended for use in the toilet of the human body or in perfuming apparel of any description, or any substance intended to cleanse, improve or alter the complexion, skin, hair or teeth, and includes deodorants and perfumes."

Section 2(c) of the said Act defines "dutiable goods" as "medicinal and toilet preparations" specified in the Schedule as being subject to duties of excise levied under the Act. Section 3 is the charging section for levy of duties of excise at rates specified in the Schedule of dutiable goods manufactured in India. For better appreciation of the controversy, it is necessary to reproduce the Schedule:-

THE SCHEDULE

Item No.	Description of dutiable goods	Rate of duty
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Medicinal preparations

1. Allopathic Medicinal preparations:-

(i)

Medicinal preparations containing alcohol which are not capable of being consumed as ordinary alcoholic beverages --

(a) Patent or proprietary medicines.

Twenty per cent ad valorem or rupees six and sixty paise per litre of pure alcohol content, whichever is higher.

(b) Others.

Rupees six and sixty paise per litre of pure alcohol content.

(ii)

Medicinal preparations containing alcohol which are capable of being consumed as ordinary alcoholic beverages

(a) Medicinal preparations which contain known active ingredients in therapeutic quantities.

valorem or rupees thirteen and twenty paise per litre of pure alcohol content, whichever is higher.

(b) Others.

Twenty per cent ad valorem or rupees fifty-two and eighty paise per litre of pure alcohol content, whichever is higher.

(iii)

Medicinal preparations not containing alcohol but containing narcotic drug or narcotic.

Twenty per cent ad valorem.

2.

Medicinal preparations in Ayurvedic, Unani or other indigenous system of medicine -

(i)

Medicinal preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages.

NIL

(ii)

Medicinal preparations containing self-generated alcohol which are capable of being consumed as ordinary alcoholic beverages.

Rupees one and seventy-five paise per litre of pure alcohol content.

(iii)

All others containing alcohol which are prepared by distillation or to which alcohol has been added.

Rupees fifty-two and eighty paise per litre of pure alcohol content.

(iv)

Medicinal preparations not containing alcohol but containing narcotic drug or narcotic.

Twenty per cent ad valorem.

3.

Homoeopathic preparations containing alcohol.

Rupees thirteen and twenty paise per litre of pure alcohol content.

Toilet preparations

4.

Toilet preparations containing alcohol or narcotic drug or narcotic.

One hundred per cent ad valorem or rupees thirteen and twenty paise per litre of

pure alcohol content, whichever is higher.

Explanation I -

Explanation II -

Where any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the value as determined in accordance with the provisions of section 4 of the Central Excises and Salt Act, 1944 (1 of 1944).

Explanation III -"

The Schedule deals with medicinal preparations, namely Allopathic medicinal preparations, Ayurvedic, Unani or other indigenous systems of medicine, which are or are not capable of being consumed as alcohol, Homoeopathic preparations and toilet preparations. The rate of duty in case of Allopathic, Ayurvedic and Unani or other indigenous system of medicine varies depending upon whether the preparations contain alcohol, narcotic drug, or narcotic and whether they are capable of being consumed as alcoholic beverages. It is pertinent to note that in case of Homoeopathic and Toilet preparations, there is no classification made with reference to whether the preparation is capable or not capable of being used as ordinary alcoholic beverage. In case of "toilet preparations" the requirement is it should contain alcohol or narcotic drug or narcotic.

12. Section 6 of the said Act provides for licence for production or manufacture of any dutiable goods and lays down that no person shall engage in the production or manufacture of any dutiable goods, or of any specified component parts, or ingredients of such goods, or of specified containers of such goods, or of labels of such containers, except under the authority and in accordance with the terms and conditions of a licence granted under this Act.

13. Section 19 of the said Act empowers the Central Government to make rules to carry out the purposes of the said Act. Accordingly, the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, have been framed. Chapter VI of the said Rules provides for licensing. Section C of Chapter IV deals with Classification of Medicinal and Toilet Preparations Containing Alcohol. Rule 60(1) states that a list of medicinal preparations which are considered as capable of being used as ordinary alcoholic beverages, which are referred to as "restricted preparations", is given in the Schedule and all other medicinal preparations being manufactured from a date prior to 1st April, 1957, shall be considered to be not capable of being misused as ordinary alcoholic beverages which are referred to as "unrestricted preparations". Rule 94 provides that no licence for manufacture of medicinal and toilet preparations or renewal of such licence shall be granted to an applicant unless he holds the requisite licence under the Act (reference is to the Drugs and Cosmetics Act, 1940), for the manufacture of said medicinal preparations.

14. Learned Senior Counsel for the petitioners referred to the definitions of

"medicinal preparations" and "toilet preparations" and urged to start with, that it is settled law that where there is a statutory definition, the commercial understanding, trade parlance or popular understanding is irrelevant and in support of this proposition, he placed reliance on *Indo International Industries Vs. Commissioner of Sales Tax, Uttar Pradesh*, . According to him, the drug or medicinal preparation is intended to be used for treatment, medication or prevention of disease in human beings or animals and the expression "disease" is of wide amplitude. Relying upon various judgments, it has been urged that even substances intended to be used for or in the treatment, medication or prevention of disease are covered within the scope and ambit of "medicinal preparations".

15. In this respect reliance has been placed on a Judgment of the Apex Court in *Chimanlal Jagjivandas Sheth Vs. State of Maharashtra*, , wherein it is held that absorbent cotton wool, roller bandages and gauze are "substances" used for or in the treatment of disease. Of course, the case in question was under the Drugs and Cosmetics Act, 1940, wherein the definition of "drug" in section 3(b) is somewhat similar to the definition of "medicinal preparation" in section 2(g) of the Act in question.

16. In *Christine Hoden (India) Pvt. Ltd. Vs. N.D. Gadag and Others*, , it has been held by a Division Bench of this Court that sanitary pads are used to prevent infection and, as such, they must be classified as drugs within the definition in section 3(b) of the Drugs and Cosmetics Act, 1940.

17. Reliance has also been placed on *Abdul Moid and Others Vs. The State*, wherein it is held that Boroline, which is recommended to be used as "antiseptic" for prevention of infection in case of minor cuts and minor skin injuries, has to be classified as "drug" within the meaning of section 3(b) of the Drugs and Cosmetics Act, 1940 and it cannot be treated as cosmetic. For coming to the said conclusion, the recommended and actual use was taken into consideration, besides the formula mentioned on the carton, where it prima facie appeared that Boroline contained certain medicines.

18. In this connection, it has been further argued by the learned Senior Counsel for the petitioners, that in sections 2(g) and (k) of the said Act the expression used is "intended to be used/intended for use" and since excise is a tax on manufacture which is levied and collected from the manufacturer u/s 3 of the said Act, it is the manufacturer's intention of how the product should be used, which is relevant. In this connection reliance has also been placed on *Statesman Ltd. v. Assistant Collector of Central Excise & others* 1987(3) E.L.T. 3(Cal.). We are in agreement with the learned Senior Counsel for the petitioners that the intended use is relevant for the purposes of classification of the product for imposition of excise levy.

19. Learned Counsel has further urged before us that advertisement and labels which speak about the product are irrelevant for the purpose of deciding the classification of goods for the purposes of levy of excise duty. In this connection,

reliance has been placed on *Subhash Chandarnishant v. Union of India* & another 1979 E.L.T. (J. 212), *Blue Star Ltd. v. Union of India* & another 1980 E.L.T. 280(Bom.) and *The Deputy Commissioner of Agricultural, Income Tax and Sales Tax (Law) Board of Revenue (Taxes), Ernakulam v. Union Carbide Ltd., Madras-2*, 1976(38) S.T.C. 186(Ker.). We may here point out that the Apex Court in *B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara*, has taken into consideration that the product "Selsun" has been described and held out by the manufacturers to be a drug or a medicinal product and it is not held out to be a cosmetic or toilet preparation; that label, literature connected with the product are relevant factors to be taken into consideration besides other factors to decide whether the product is medicine or cosmetic.

20. It is in this context that the arguments advanced by the learned Advocate General for the respondents assume considerable relevancy for the purpose of the classification of the product. He has pointed out that the petitioners had applied for licence under the Drugs and Cosmetics Rules for production of cosmetics on 14th February, 1968 and one of the items specified therein is "Old Spice" after shave lotion and the licence which was issued by the Assistant Drugs Controller, Directorate of Health Services, Panaji, was for manufacture of cosmetics under the Drugs and Cosmetics Act, 1940. Even the licence dated 1st April, 1969 under the said Act and the said Rules was obtained for "toilet preparation" "Old Spice" after shave lotion and "Old Spice" cologne for men. The definition of "medicinal preparation" under the said Act is somewhat similar to the definition of "drug" under the Drugs and Cosmetics Act, 1940, though the term "toilet preparation" under the said Act is somewhat narrower than the term "cosmetics" under the Drugs and Cosmetics Act, 1940. Thus, the intention of the petitioners was to produce "Old Spice" after shave lotion and "Old Spice" cologne for men as "toilet preparations". Even in the Table attached to Form A.L.-I in column 11, the licence under the Drugs and Cosmetics Act is said to be for manufacture of toiletries. Even after the passing of the Order dated 23rd March, 1985, by the Excise Commissioner classifying "Old Spice" after shave lotion as "medicinal preparation", the licences continued to be renewed for manufacture of cosmetics/toiletries. The application for Loan Licence dated 14th January, 1989, filed before the Drugs Controller, Directorate of Health Services, Panaji, also was for manufacture of cosmetic products, namely "Blue Stratos" after shave lotion, cologne and shaving cream. The permission which was granted on 13th February, 1989, by the Drugs Controller was for manufacture of cosmetics. It is also relevant to note that the Superintendent of Excise vide letter dated 21st September, 1989, informed M/s. P.J. Pharmaceuticals Pvt. Ltd., with copy to the petitioners that with reference to their application for manufacture of cosmetic products, the permission for manufacture of cosmetic products, i.e. "Blue Stratos" was granted. It was specifically stated therein that the excise duty at 100% ad valorem shall be paid by the petitioners, as laid down under Tariff Item No. 4 of the Schedule annexed to the said Act and the Rules made thereunder, which means that the permission was granted to manufacture "toilet

preparation". The Notice published on 24th April, 1991, by the petitioners in "Navhind Times" for manufacture of "Old Spice" toiletries and likewise Notice dated 3rd December, 1990 published by the petitioners in "Navhind Times" to seek Fixed Deposits under the scheme, had clearly stated that the Company is engaged in the manufacture of cosmetics such as "Old Spice" shaving cream, after shave lotion, shampoo, hair creams, cologne, etc. This Notice has been approved by the Board of Directors on 3rd April, 1991, as can be seen from the Notice dated 1st April, 1991, published in the "Navhind Times" dated 24th April, 1991. All the above material which has been pointed out by the learned Advocate General does reflect the intended use of the after shave lotion as men's toiletries. This gives a clear indication as to what the manufacturer himself had interpreted as to the nature of its product in question, namely that it was in the nature of cosmetic/toilet preparation.

21. It is further pointed out by the learned Advocate General that there is clear legislative intent to suggest that after shave lotion is a "toilet preparation". In this connection our attention is drawn to the Schedule appended to the said Rules. It gives a list of "medicinal" and "toilet preparations" containing alcohol which are capable of being consumed as ordinary alcoholic beverages. In this Schedule after shave lotion (product of M/s. Kemp & Co. Ltd., Bombay), is shown as "toilet preparation". We have already pointed out with reference to the Schedule under the Act that in case of "toilet preparations" for the purpose of duty it is not relevant whether the same are capable or not of being consumed as ordinary alcoholic beverages. What is relevant is whether it contains alcohol or narcotic drug or narcotic. The Schedule under the said Rules has been prepared as per Rule 60 read with Rule 68 of the said Rules by the Standing Committee. There is thus intrinsic evidence in the Schedule prepared under the Rules to indicate that the after shave lotion is a "toilet preparation".

22. The stand taken by the petitioners before the Excise Commissioner is that in every product of the Company's competitors manufactured in other States, as per the list furnished by the Company during the proceedings, the concentration of alcohol is less than 60%.

The details of the other after shave lotions given by the petitioners are :--

Name Alcohol content 1. Park Avenue 57% 2. Aqua Velva 52 to 60% 3. Monarch ASL 57% 4. Emani not specified 5. Saka 40% 6. Patricks 52 to 60% 7. Atlantis 51%

The petitioners' further stand before the Commissioner of Excise is that all other after shave lotions have a concentration of alcohol which is less than 60% and that is why they cannot have medicinal properties and hence, they could properly be called "toilet preparations", but since the petitioners' product in contrast contains alcohol at concentration of 62% and in fact actual test results show that it is 63% that the product of the petitioners has to be classified as "medicinal preparation". Thus, the criteria according to the petitioner Company for the

purpose of classifying whether after shave lotion is "medicinal preparation", or "toilet preparation" is the percentage of alcohol concentration and it is only in cases where the alcohol concentration is more than 60% that it can be classified as "medicinal preparation". Learned Advocate General therefore, pointed out that only because the alcohol concentration is about 60% the petitioners are claiming its product to be medicinal preparation". It may be pointed out at this stage that when the petitioners applied for re-classification of their product vide application dated 14th January, 1985, the contents of alcohol were given as 59% only and in reply to Show Cause Notice dated 25th January, 1985, formulation of the product was given in Annexure where the percentage of alcohol in "Old Spice" after shave lotion was said to be 59.50%. If that is so, on their own showing the re-classification of their product, namely "Old Spice" after shave lotion from "toilet preparation" to "medicinal preparation", would not be justified. Be that as it may, now the petitioner Company claims that its after shave lotion has 62% alcohol, 5% Propylene glycol and 0.5% benzyl alcohol. The rest of it, that is to say 32.5% is water. All these components, according to the petitioners, have medicinal properties on account of which the after shave lotion has to be treated as "medicinal preparation".

23. The quantity of benzyl alcohol in the after shave lotion in question is only 0.5%. As per Remington's Pharmaceutical Sciences, benzyl alcohol with 4% has anaesthetic value. According to British Pharmaceutical Codex, 1973, benzyl alcohol is a weak local anaesthetic with antiseptic properties. However, in the product in question, the quantity of benzyl alcohol is only 0.5% which is further diluted by water content of 32.5%, with the result that it is not likely to have any anaesthetic value.

24. Propylene glycol is a solvent, preservative and humectant, as stated in Remington's Pharmaceutical Sciences. According to Harry's Cosmetology, humectants and emollients are frequently added to after shave lotions at levels not exceeding 5%. Glycerol has the best humectant properties, but propylene glycol is often preferred because it has greater solvent power, lower viscosity and higher volatility. Humectant is used for retaining or preserving moisture and it helps to maintain the water content of the skin. Thus, it appears that propylene glycol has no medicinal properties as such, except that it helps in retaining or preserving moisture in the skin, which means that it only improves the skin by retaining or preserving moisture, which is one of the purposes of "toilet preparations".

25. According to the petitioners, the percentage of perfume in its after shave lotion is 1.65% as per its application dated 14th January, 1985, presented to the Excise Commissioner and 2.5% in the formulation given by the Company in reply to the Show Cause Notice dated 28th January, 1985, issued by the Excise Commissioner. Compared to this, in cologne for men of the petitioner Company, which admittedly is "toilet preparation", the percentage of alcohol is 67%, percentage of perfume is 3.99% and benzyl alcohol is 1.30%. According to

Harry's Cosmetology, the chemical composition of the perfume determines the maximum concentration at which it can be used in a particular water alcohol mixture. He further states that the commercial success of an after shave lotion is largely dependent on the perfume. The use of perfume in right proportion is thus crucial for the commercial success of the product. Perfume is thus an active ingredient for the purpose of classification of the petitioners' product. In this respect it was pointed out by the learned Senior Counsel for the petitioners, relying upon para 3 of the Judgment of the Apex Court in *B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara*, that insignificant quantity of perfume to suppress the smell will not take away the character of a product as a drug or medicine. This was a case wherein the classification of Selsun antidandruff preparation was in question. The ingredients of Selsun were as under:-

Selenium sulphide 2.5% Surfactant 17.0% Inter Stabilizer 5.2% Water 75.3%

It was noticed that Selenium Sulphide is the only active ingredient in the preparation and that the other ingredients merely serve the purpose of base, medium and disbursing agent. It was also noticed that Selsun was manufactured under drug licence certified by Food and Drug Administration as a medicine, put up as a medicine to be used under doctor's advice in accompanying literature and sold through chemist shops under doctor's prescription. It was understood as medicine in common parlance, as per copious material placed on record by the appellants. Pricewise, it was much costlier than other merchandise sold in the general merchandise shops. On perusal of the entire material the Apex Court found that the product in question having regard to preparation, label, literature, character, common and commercial parlance understanding, would fall under Sub-head 3003.19 as a medicine. It was also found that it had antidandruff properties and dandruff admittedly is a disease which requires treatment with the help of medicinal preparation.

26. Coming back to the alcohol content of 62% in the after shave lotion in question, in the light of the stand taken by the petitioners before the Excise Commissioner, it is to be seen whether small increase in the percentage of alcohol above 60% could be sufficient justification for classifying the product in question as medicinal preparation. It is no doubt true that alcohol is an astringent and produces cooling effect on the skin on account of rapid evaporation and also acts as a cleansing agent for the skin, To some extent it acts as an antiseptic and it is said to be germicidal in concentration of 60-90% as per Remington's Pharmaceutical Sciences. At optimum concentration (70%) by weight, it is said to be good antiseptic for skin. However, when the concentration is 62% and diluted in water to the extent of 32% the antiseptic qualities would undergo change. According to Harry's Cosmetology although alcohol solutions reduce facial flora, tests in virtue demonstrate that they are unable to inhibit the growth of bacteria and fungi on agar plates. Some inhibitory action is found with fragranced alcoholic solutions.

27. The Excise Commissioner who is the authority for the purpose of classification under the said Act, has by a detailed order, after taking into consideration the various aspects, classified the product in question as "toilet preparation". After shave lotion is, in fact, used for toileting the face after shave. It basically cleanses and improves the skin. Perfume in after shave lotion plays a predominant role in its commercial success.

27A. Apart from the above factors which we have taken into consideration, the classification for the purposes of duty should rest mainly on the definition, if any, given in the statute and the intended use of the product and the actual use to which it is put will have to be considered. On this touchstone, we do not have any doubt that after shave lotion is a toiletry preparation. Even if the product may have some ingredient which may also be of some ancillary medicinal effect. But that does not change the basic nature of the product.

27B. We, therefore, hold that the conclusion arrived at by the Excise Commissioner classifying product in question as toiletry preparation does not call for any interference.

II. Whether Demand Notices dated 13th March, 1991 and 15th May, 1991, are barred, by limitation?

28. We shall now deal with the second issue of controversy relating to the question of limitation, which has been raised by the petitioners in connection with the Notices dated 13th March, 1991 and 15th May, 1991. Whereas, according to the learned Senior Counsel for the petitioners, Rule 11 of the said Rules is applicable to the Notices in question under which the recovery beyond six months prior to the date of Notices is not permitted, but, according to the learned Advocate General, the Notices in question would fall under Rule 12 of the said Rules in which case, the recovery is permissible within reasonable period which depends upon the facts and circumstances of each case. He further pointed out that whenever a question relating to inordinate delay in respect of the Demand Notice is raised, the facts and circumstances are required to be looked into by the authority in order to decide whether the Notice has been issued within reasonable period. In the instant case, no such contention has been raised by the petitioners before the Excise Commissioner. In order to appreciate the submissions made by the learned Counsel on either side it is necessary to look into the Rule 11 and Rule 12 of the said Rules, which are as under:

"Rule 11 :---Recovery of duties or charges short-levied or erroneously refunded.

When duties or charge have been short-levied through inadvertence, error, collusion or mis-construction on the part of an Excise Officer, or through mis-statement as to the quantity or description of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to such cause erroneously refunded, the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or repay the amount paid to him in excess, as the case

may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account current, if any, or from the date of making the refund."

Rule 12:---Residuary powers for recovery of sums due to Government. Where these Rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the Collecting Government under the Act or the Rules, such duty, deficiency in duty or sum shall, on written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify."

29. It is also necessary at this stage to reproduce the two Notices dated 13th March, 1991 and 15th May, 1991 for the purpose of better appreciation of the submissions made in this respect:

"Government of Goa Office of the Commissioner of Excise Panaji, 13th March, 1991. No. CE/4-2579-89-90/ P.O.N./3927

NOTICE U/R 12 OF MEDICINAL & TOILET PREPARATION (EXCISE DUTY) RULES. 1956

Whereas M/s. P.J.M. Pharmaceuticals Pvt. Ltd., Panaji Goa, had applied to this office vide Letter No. P.J.M.P./1223 dated 2-2-89 for permission to use premises of M/s. Colfax Laboratories India Pvt. Ltd., Goa to manufacture Blue Stratos after shave lotion in various sizes and packings.

And WHEREAS vide letter No. S.H./P.J.M.P./1224 dated 2-2-89 M/s. Colfax Laboratories India Pvt. Ltd., Panaji, Goa had given no objection for this manufacture and had undertaken to pay excise duty as specified by the State Excise Department,

And WHEREAS it has been discovered that M/s. Colfax Laboratories India Ltd., as well as M/s. P.J.M. Pharmaceuticals Pvt. Ltd. wrongly represented to this office in their various applications that the rate of duty payable on Blue Stratos products was at Rs. 10/- per proof litre only.

And WHEREAS by inadvertence this office accepted the said misrepresentation made by M/s. Colfax Laboratories India Ltd. and M/s. P.J.M. Pharmaceuticals Pvt: Ltd. and consequently the duty due and payable was wrongly calculated,

And WHEREAS the duty so short levied amounts to Rs. 92,43,684.08 (Rupees Ninety Two lakhs Forty Three Thousand Six Hundred and Eighty Four and Eight paise only.

Now THEREFORE, vide powers conferred under Rule 12 of the Medicinal & Toilet Preparation (Excise Duties) Rules, 1956 and all other powers enabling me so to act I hereby require M/s. Colfax Laboratories Pvt. Ltd., Panaji, Goa, to pay the balance of Excise Duty due on cosmetic product Blue Stratos after shave lotion and Atomiser amounting to Rs. 92,43,684.08 (Rupees Ninety Two Lakhs Forty

Three Thousand Six Hundred and Eighty Four Rupees and Eight paise only) within one month of receipt of this notice. The duty is calculated as per annexure. A1-5" to this Notice."

"No.C.E/Conf-44/91-92/711 Government of Goa, Office of the Commissioner of Excise, Panaji, Goa. Dated: 15th May, 1991.

NOTICE UNDER RULE 12 OF THE MEDICINAL AND TOILET PREPARATIONS (EXCISE DUTIES) RULES, 1956.

Whereas M/s. Colfax Laboratories (India) Limited a Company registered under the Companies Act, 1956 having their registered office at Rua de Ourem, Panaji (hereinafter called the "said Company") were granted licence by the Commissioner of Excise to produce toilet preparations, namely Old Spice range of after shave lotions/ Atomiser"s (hereinafter called the "said products") :

And whereas the said Company was required to pay excise duty for the said products as prescribed for toilet preparations under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955:

And whereas, the duty so prescribed was paid from the date of commencement of production of the said products till the end of March, 1985;

And whereas, it has been found that from 1-4-1985 till date, the said Company has short paid the excise duty then that legally leviable on the said products as per the provisions of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955;

And whereas, the arrears of duty due on the said products from 1-4-1985 till date amount to Rs. 17,77,18,361-20 (Rupees seventeen crores, seventy seven lakhs, eighteen thousand, three hundred and sixty one and paise twenty only) as per the calculations shown as Annexure I to this notice.

Now, therefore, in exercise of the powers conferred by Rule 12 of the Medicinal and Toilet Preparation (Excise Duties) Rules, 1956 and all other powers enabling me in this behalf, I, Anshu Prakash, Commissioner of Excise, hereby require M/s. Colfax Laboratories (India) Ltd. Panaji, Goa, to pay the balance of Excise Duty, due on the said products amounting to Rs. 17,77,18,361-20 (Rupees seventeen crores, seventy seven lakhs, eighteen thousand, three hundred and sixty one and paise twenty only) within 30 days from the date of receipt of this notice, to Excise Inspector, Ponda Taluka, at his office in Ponda.

This notice is issued without prejudice to additional duty due and recoverable on Old Spice products manufactured without price intimation and/or approval or on products manufactured without permission.

Sd/- -Anshu Prakash- COMMISSIONER OF EXCISE

Encl. Annexure I. To, M/s. Colfax Laboratories (India) Pvt. Ltd., Rua de Ourem, Panaji, Goa-403 001. By Regd-A.D. Post. Copy to: The Excise Inspector, Excise

Station, GOA."

30. Learned Advocate General has urged before us that Rule 11, is attracted only when short levy is on account of inadvertence, error, collusion or mis-construction on the part of Excise Officer or it is the result of misstatement as to the quantity of such goods or as to the description of such goods on the part of the owner. According to him, none of the ingredients mentioned in Rule 11 has been set out in the Show Cause Notice dated 15th May, 1991 and the said Notice in question squarely falls within the residuary powers contained under Rule 12 under which the Notice for recovery can be issued for any reason for short levy, It is not disputed that the residuary powers under Rule 12 would come into play only if the Rule 11 is not attracted to the Notices in question.

31. In respect of the Notice dated 13th March, 1991, it is urged by learned Advocate General that though it speaks of wrong representation on the part of P.J.M. Pharmaceuticals Ltd. to the authority, yet, Rule 11 does not visualize wrong representation on behalf of the assessee as ground for its applicability, but on the contrary, the ground is restricted to mis-statement as to the quantity or description of such goods and the case under consideration does not relate either to mis-statement relating to quantity or as to description of goods. It is further pointed out that Rule 11 contemplates that there should be short-levy through inadvertence of the officer and not on the basis of acceptance of mis-representation by inadvertence by the authority concerned. In other words, contribution on the part of the assessee in the matter of inadvertence, error or mis-construction has not been contemplated in Rule 11, except in the case of collusion. Hence, even in the case of Notice dated 13th March, 1991, Rule 11 is not applicable and it is Rule 12 which is attracted in the facts and circumstances of the matter.

32. It is further urged by learned Advocate General that the Excise Commissioner had no independent power to do classification only, but the classification is permissible for the purpose of levy of duty. Therefore, the Order dated 23rd March, 1985 of the Excise Commissioner is without jurisdiction and being nullity, it has to be ignored. This point, in fact, was raised before the Division Bench of this Court in Colfax Laboratories (India) Limited and Another Vs. The State of Goa and Others, , and was squarely dealt with in the said Judgment. The learned Advocate General had, in the said writ petition, submitted that there is no scope for any independent classification of goods either under the said Act or the said Rules independently to that of the Drugs and Cosmetics Act, 1940. This submission of the learned Advocate General was rejected and it was held that the Excise Commissioner is competent to classify the goods for the purpose of duty under the said Act and the Rules. Even otherwise, it is elementary that if the authority is competent to determine the classification, it would also have power to do re-classification. Whether re-classification is justified or not and whether the same could be taken into consideration while determining the question of reasonable period under Rule 12 is a different matter altogether.

33. On the other hand, it was urged by learned Senior Counsel for the petitioners that classification of after shave lotion as "toilet preparation" in pursuance of the said Notice could only be prospective and at any rate no recovery could be made for a period beyond six months prior to the date of Notice, since Rule 11 is clearly attracted to both the Notices in question. In this connection, reliance has been placed on Zenith Tin Works Private Limited Vs. Union of India and others, ; ACME Metal Industries Put. Ltd v. S.S. Pathak, the Inspector, Central Excise & others 1980 E.L.T. 156 (Bom.) and New National Chemical and Pharmaceutical Works Vs. State of Rajasthan and Others, .

34. In Zenith Tin Work Pvt. Ltd. v. Union of India & others (supra), which deals with recovery of short levy under Rule 10 of the Central Excise Rules, 1944, it has been laid down, following the Judgments of the Apex Court that Rule 10 has to be confined to cases where demand was made for short levy wholly by one of the reasons given in that Rule due to which an assessment had to be re-opened. In such eventuality when Rule 10 is applicable, the provisions of Rule 10-A are excluded.

35. In ACME Metal Industries Pvt. Ltd. v. S.S. Pathak, the Inspector, Central Excise & others (supra), it was pointed out that if the goods are cleared at nil rate of duty obviously due to inadvertence of the Inspector of Central Excise in not enforcing the provisions of Notification No. 74/70, it will be short levied through inadvertence or error on the part of the office and, therefore, the demand for short levy would fall within the provisions of Rule 10 of the Central Excise Rules and Rule 10-A which is a residuary provision will have no application.

36. In New National Chemical and Pharmaceutical Works, Bharatpurv. State of Rajasthan & others (supra), it was pointed out that where short levy is on account of inadvertence, error, collusion or mis-construction on the part of the Excise Officer, recovery beyond six months from the date on which it was short paid, is not permissible. It was further held that Rule 12 of the said Rules would not be attracted as the case directly falls under Rule 11 of the said Rules.

37. The learned Advocate General has relied upon Pharm Products Ltd., Thanjavur and Others Vs. District Revenue Officer, Thanjavur and Others, . In that case, under the said Act and the Rules, the manufacturer had failed to take licence and failed to pay duty, as a result of which, it was held that Rule 12 would apply and the limitation of six months contained in Rule 11 would not be attracted. This case, does not, in any manner, help the respondents.

38. The question to be determined is whether the notices in question fall under Rule 11 of the said Rules and in case the Notices are covered by Rule 11, then obviously Rule 12 would be attracted. Where Rule 12 is attracted, the authority can exercise the power thereunder within the reasonable period as laid down by the Apex Court in Government of India Vs. Citedal Fine Pharmaceuticals, Madras and Others, . The Apex Court while dealing with Rule 12 of the said Rules, has laid down that in the absence of any period of limitation under Rule 12, the

authority has to exercise powers within a reasonable period. What would be the reasonable period would depend upon the facts of each case. No hard and fast rules can be laid down in this regard as the determination of the question will depend upon the facts of each case and the assessee can challenge the inordinate delay in issuance of Notice of Demand which has to be decided by the authority that is to say, whether in the facts and circumstances, cum-notice or demand for recovery was made within a reasonable period.

39. Notice dated 13th March, 1991, though purported to have been issued under Rule 12 of the said Rules, states that the petitioners as well as M/s. P.J.M. Pharmaceuticals Pvt. Ltd., wrongly represented to the office of respondent No. 2 in their various applications that the rate of duty payable on "Blue Stratos" products was at Rs. 10/- per proof litre only and this misrepresentation was inadvertently accepted by the Excise Officer and the duty due and payable was wrongly calculated. In connection with this Notice, it is pertinent to note that by letter dated 21st September, 1989, the Superintendent of Excise had informed M/s. P.J.M. Pharmaceuticals Pvt. Ltd., with reference to application dated 14th January, 1989, that the Commissioner of Excise had granted permission for manufacture of cosmetic product "Blue Stratos" in view of the Loan Licence issued by the Drugs Controller, Government of Goa. In this letter, it was specifically stated that the excise duty at the rate of 100% ad valorem shall be paid by M/s. Colfax Laboratories (India) Pvt. Ltd. as laid down under Tariff Item 4 of the Schedule annexed to the said Act and the Rules made thereunder. A copy of this letter was sent to the petitioners. However, surprisingly, the Excise Officer vide letter dated 12th October, 1989, informed M/s. P.J.M. Pharmaceuticals Pvt. Ltd, that the Commissioner of Excise had approved the price of the product in question as per letter No. P.J.M.P./S.E./0352 dated 9th October, 1989 (wrongly stated 5th October, 1989). In this letter dated 9th October, 1989, price including duty due and maximum price was shown. The duty shown appears to be at Rs. 10/- per proof litre. Reading the two letters dated 21st September, 1989 from the Superintendent of Excise and the letter dated 12th October, 1989, from the Excise Officer, there is a clear case of collusion of the Department in not realising the duty as 100% ad valorem as referred to in letter dated 21st September, 1989. In case of collusion, Rule 11 of the said Rules would be directly attracted. Besides this, it is also a case of total inadvertence on the part of the authority in short levying the excise duty. It would have been a different case if the Excise Authority had pointed out in letter dated 12th October, 1989 that the duty at 100% ad valorem was not required to be realised on account of the order of the Excise Commissioner dated 23rd March, 1985 classifying the product in question as "medicinal preparation" read with Order dated 12th June, 1985, classifying the said product under Item 1(i)(b) of the Schedule,. Thus Rule 11 is clearly attracted to Notice dated 13th March, 1991, and the applicability of Rule 12 is ruled out.

40. Coming to the Notice dated 15th May, 1991, it is stated in the said Notice that the Company has short paid the excise duty than what was legally leviable

with effect from 1st April, 1985, till date. From 1st April, 1985, the excise duty was being paid under the Order of the Excise Commissioner dated 23rd March, 1985, read with Order dated 12th June, 1985 and this Order was not challenged by anyone. The said Notice also states that the Company was required to pay excise duty for the said product as prescribed for "toilet preparations" under the said Act. This means that the Department in the said Notice is essentially pleading a case of mis-construction while passing the Order dated 23rd March, 1985 and 12th June 1985 by the Excise Commissioner under which the duty with effect from 1st April, 1985, was recovered on the basis of "medicinal preparation". This action would bring the Notice dated 15th May, 1991, within the scope and ambit of Rule 11 of the said Rules.

41. In view of the above, we hold that Notice dated 13th March, 1991 and 15th May, 1991, though purported to have been issued under Rule 12 have to be construed as having been issued in the exercise of powers under Rule 11 of the said Rules. Consequently, the respondents shall be entitled to recover the short paid duty on account of erroneous classification of the goods in question and/or erroneous calculations of the duty leviable. As a result, the respondents shall be entitled to recover the short paid duty on the goods cleared, for which the duty was short paid, within a period of six months immediately preceding the date of each of the Notices.

III Whether the quantification of duties done by the Excise Commissioner is in accordance with the Schedule to the said Act read with section 4 of the Central Excise Act, 1944.

42. We now come to the last limb of controversy between the parties which relates to the quantification of the excise duty in terms of Schedule to the said Act read with section 4 of the Central Excise Act, 1944. The Schedule prepared with reference to section 3 of the said Act provides for rate of duty on the dutiable goods under the said Act. Explanation II of the Schedule provides that where any article is chargeable with duty at a rate dependent on the value of the article, such value shall be deemed to be the value as determined in accordance with the provisions of section 4 of the Central Excise Act, 1944. ("and Salt", has been omitted by Finance (No. 2) Bill 1996). Section 4 of the Central Excise Act, 1944, as applicable to the facts under consideration, reads as under:-

"4. Valuation of excisable goods for purposes of charging of duty of excise.

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to value, such value shall, subject to the other provisions of this section, be deemed to be -

(a) the normal price thereof, that is to say, the price at which such goods are ordinarily sold by the assessee to a buyer in the course of wholesale trade for delivery at the time and place of removal, where the buyer is not a related person and the price is the sole consideration for the sale;

Provided that -

(i)----- (ia)----- (ii) where such goods are sold by the assessee in the course of wholesale trade for delivery at the time and place of removal at a price fixed under any law for the time being in force or at a price, being the maximum, fixed under any such law, then, notwithstanding anything containing in Clause (iii) of this proviso, the price or the maximum price, as the case may be, so fixed, shall, in relation to the goods so sold, be deemed to be the normal price thereof;
(iii)----- (b)----- (2)----- (3)----- (4)----- (a)----- (b)----- (i)----- (ii)-----
(iii)----- (ba)----- (c)----- Explanation:----- (d) "value" in relation to any excisable goods, -

(i) where the goods are delivered at the time of removal in a packed condition, includes the cost of such packing except the cost of the packing which is of a durable nature and is returnable by the buyer to the assessee.

Explanation: In this sub-clause, "packing" means the wrapper, container, bobbin, pirn, spool, reel or warp beam or any other thing in which or on which the excisable goods are wrapped, contained or wound;

(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or contracted for sale;

Explanation: For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of-

(a) the effective duty of excise payable on such goods under this Act, and

(b) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods,

and the effective duty of excise on such goods under each Act referred to in Clause (a] or under Clause (b) shall be,-

(i) in a case where a notification or order providing for any exemption (not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty u/s 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production of manufacture of such goods) from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(ii) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods.

(e) "wholesale trade" means sales to dealers, industrial consumers. Government, local authorities and other buyers, who or which purchase their requirement otherwise than in retail."

43. Learned Senior Counsel for the petitioners, has, after placing reliance on the Judgment of the Apex Court in *Government of India and Others Vs. Madras Rubber Factory Ltd. and Others*, urged that in case of a product which has a cum-duty price, the assessment is required to be done on the basis of wholesale price less excise duty payable, as provided u/s 4(4)(d)(ii) of the Central Excise Act, 1944. On the other hand, learned Advocate General has urged that in the Show Cause Notice issued to the petitioners, the chart annexed to the Show Cause Notice takes into account price indicated by the manufacturer after excluding the duty and it is on this price that the excise duty has been worked out. According to the learned Advocate General if the price of the product is Rs. 10/- and the duty is to be paid ad valorem, then the duty would be equal to the price, namely Rs. 10/- which is to be added to the price. If the assessee chooses to sell the product at Rs. 10/-, including the excise duty, he has to suffer for the same.

44. These submissions of learned Advocate General are without any merit since in the matter under consideration, admittedly, the respondents had cleared the product under price list approved by the Excise Commissioner by letter dated 3rd October, 1989, wherein price inclusive of duty, duty at the rate of Rs. 10/- per proof litre, which was indicated separately, as well as printed price, at which the product was to be sold by the retailer. Therefore, the price inclusive of duty was shown for the purpose of assessment. Accordingly, this price has to be taken as "cum-duty-price". Section 4(1)(a) provides that when duty of excise is chargeable on any excisable goods with reference to value, the normal price at which such goods are sold shall be deemed to be the value of such goods, subject to other provisions of section 4. Clause (d) of sub-section (4) of section 4 provides that the value will include the cost of packing of goods except for the cost of packing which is of a durable nature and is returnable by the buyer to the assessee. Sub-clause (ii) of Clause (d) categorically lays down that the value in relation to any excisable goods will not include the amount of duty of excise, sales tax and other taxes, if any, payable on such goods. If it was not so, it will amount to levying duty on the excise duty, which may be already included in the price of the goods. Of course, if the wholesale price does not include excise duty payable on goods, then there will be no question of deduction of any duty for determination of value in relation to any excisable goods. Therefore, when the duty is imposed ad valorem, calculation of duty shall have to be made on the basis of the value of any excisable goods.

45. The Apex Court in *Government of India v. Madras Rubber Factory Ltd.* (supra) has quoted with approval para 22 of the Judgment in *Assistant Collector of Central Excise and Others Vs. Madras Rubber Factory Ltd.*, , relating to method of computation of assessable value in a "cum-duty price". The formula laid down by the Apex Court therein is:--

Assessable value = cum-duty selling price - permissible deductions - (1 + Rate of excise duty) It has been laid down therein that the first permissible deductions like trade discount, cost of secondary packing, sales tax and other taxes should be deducted. After the said deductions, the quantum of excise duty has to be arrived at on the same, minus permissible deductions. The following observations of the Apex Court in this respect do not leave any scope for controversy on this aspect:--

"The selling price which is a cum-duty price would be the sum total of the assessable value, the permissible deductions and the excise duty. Putting this as a mathematical formula the selling price (cum- duty price) is equal to assessable value plus permissible deductions plus excise duty. Cum-duty Paid Selling Price " Assessable Value + Excise duty + Permissible deductions. Again Excise duty is computed as a ratio of the assessable value where duty is ad valorem. For the purposes of ascertaining of the assessable value, if three of the components namely the cum-duty selling price, the quantum of permissible deductions and the rate of excise duty are known, the proper and appropriate method of determining the assessable value would be the following formula:--

Assessable = cum-duty selling price value - permissible deductions - (1 Rate of excise duty).
..... The cum-duty paid sale price being available for computation and a known value of deductions permitted being also known, the assessable value and the excise duty as a ratio of the assessable value can be only decided by first deducting the permissible deductions, from the cum-duty paid selling price and thereafter computing the value in accordance with the equation mentioned above.

.....
..... In ordinary cases where the factory price is not a cum-duty price, the first step in arriving at the assessable value is to deduct the permissible deductions and thereafter to compute the excise on an ad valorem basis. The excise duty cannot be computed unless the permissible deductions are first made. The assessable value is arrived at only after the permissible deductions are made. Excise duty is a ratio of the assessable value. Ad valorem excise duty is computed only on assessable value after arriving at such assessable value by making proper permissible deductions. Excise duty cannot be computed without proper determination of the assessable value, namely assessable value exclusive of permissible deductions. Even in the cum-duty sale price, the same principle must be followed to arrive at the assessable value. To compute an excise duty as a predetermined amount without making the permissible deductions for reducing the cum-duty selling price is a fallacy both legally and mathematically as demonstrated above. The ad valorem excise duty can only be computed after reducing the assessable value by permissible deductions and then applying the tariff rate to the assessable value. To reverse this sequence is to misinterpret the scheme and mode of levy of excise duty on the assessable value."

Illustration as to how this has to be done is given in para 22 of the Apex Court's Judgment in Assistant Collector of Central Excise v. Madras Rubber Factory (supra) quoted in Government of India v. Madras Rubber Factory (supra).

46. In the matter under consideration, the price list which was approved by the Excise Commissioner shows the price inclusive of duty and duty at the rate of Rs. 10/- per proof litre is also separately shown, besides printed price. In view of our findings that the products in question are "toilet preparations", duty at the rate of Rs. 10/- per proof litre was incorrectly shown and this duty has to be 100% ad valorem. To give a hypothetical illustration we shall take price inclusive of duty at Rs. 22/-, out of which first permissible deduction shall have to be worked out. If permissible deductions are Rs. 2/- then the rate of excise duty shall have to be worked out at Rs. 20/-. In case there are no permissible deductions, then rate of excise duty shall have to be worked out at Rs. 22/-. Applying the formula laid down by the Apex Court, assessable value shall have to be arrived as under :--

Illustration 1:

Where there are permissible deductions:

Assessable value = cum-duty selling price = Rs. 22/- permissible deductions (Rs. 2/-) i.e. Rs. 20/- (1 + rate of excise duty) (1 + 1 = 2) since the excise duty payable is 100% ad valorem. Rs. 20/- / 2 = Rs. 10/-. Thus the excise duty in this case would be Rs. 10/- out of the cum-duty price. Illustration. 2:

Where there are no permissible deductions:

Assessable value = cum-duty selling price = Rs. 22/- - permissible deductions - Nil - (1 + rate of excise duty) (1 + 1 = 2) Rs. 22/- / 2 = Rs. 11/-. Thus the excise duty would be Rs. 11/- out of cum-duty price. In simple words, the formula where there are no permissible deductions can be stated as under :--

Wholesale price at 100% duty Value of the which goods are - ad valorem = excisable actually sold goods, meaning thereby 50% of the wholesale price and 100% of the value arrived at by application for the aforesaid formula.

47. For the aforesaid reasons, the following order is passed:--

We hold that the preparations marketed under the brand-names "Blue Stratos" after shave lotion and "Old Spice" range of after shave lotions are "toilet preparations" within the meaning of section 2(k) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. We hold that the Revenue had the right to recover short paid duty on account of erroneous classification of the aforesaid goods, or erroneous calculation of the duty leviable and hold to this effect only the Notices dated 13th March, 1991 and 15th May, 1991, valid. However, we hold that these Notices will have to be construed to be in the exercise of the powers under Rule 11 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956, and thus Revenue would be entitled to recover short-paid duty on the goods cleared for which the duty was short-paid within a period of six months

immediately preceding the date of each of the Notice.

48. We hold that the phrase, "ad valorem", appearing in the column, "rate of duty", in the Schedule appended to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, refers to the value of excisable goods and, therefore, it will have to be worked out by applying the formula as laid down in section 4(4)(d) of the Central Excise Act, 1944. No dispute is raised before us about the wholesale price at which the goods in question were sold. Therefore, the excise duty will have to be deducted from this price and the figure arrived at would be value of the excisable goods. If the duty leviable is "ad valorem", 100%, then it would be in the following formula:

Wholesale price at 100% duty Value of the which goods are - ad valorem = excisable goods actually sold meaning thereby 50% of the wholesale price and 100% of the value arrived at by application of the aforesaid formula.

49. Rule made absolute in the above terms. There will be no order as to costs.

50. Rule made absolute.