
(1992) 07 MP CK 0011
In the Madhya Pradesh High Court
Case No : M.P. No. 1297/89

Panama Chemical Works

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-07-1992

Acts Referred:

Central Excise Rules, 1944 — Rule 173B, 173B(2), 173B(5), 52A(5), 9(2)
Central Excises and Salt Act, 1944 — Section 11A
Constitution of India, 1950 — Article 226, 227
Drugs and Cosmetics Act, 1940 — Section 18, 18(1), 3, 3(1)
Drugs and Cosmetics Rules, 1945 — Rule 154(2)

Citation : (1992) 40 ECC 173 : (1992) 62 ELT 241

Hon'ble Judges : S.D. Jha, J;A.G. Qureshi, J

Bench : Division Bench

Advocate : A.M. Mathur, for the Appellant; B.S. Neema, for the Respondent

Final Decision : Allowed

Judgement

A.G. Qureshi, J.—This order shall govern the disposal of M.P. No. 1297 of 89 (Panama Chemical Works and Manoj Kumar) and M.P. No. 682 of 1991 (Panjon Pvt. Ltd. and Anr. v. Union of India and 3 Ors.).

2. M.P. No. 1297 of 1989 has been filed by the petitioners against the respondents under Articles 226 and 227 of the Constitution of India seeking the relief of quashing the show cause notice Annexure-P19 being without jurisdiction and barred by limitation hence being illegal and biased. During the pendency of this petition the petitioners in M.P. No. 682 of 1991 started the manufacture of the same product which was the subject matter of the earlier petition. They, therefore, submitted a classification list for suitable classification of the Ayurvedic product "SWAD" for treating it as an Ayurvedic preparation, whereupon the respondent No. 4, Superintendent, Central Excise, issued a show cause notice dated 8-1-1991 to the petitioner Company that why the product SWAD be not classified as confectionery instead of Ayurvedic medicine. Thereafter a corrigendum was also issued by the Superintendent, Central Excise. Then the

Assistant Collector, Central Excise, Indore issued a notice of show cause to the petitioner Company as to why the product be not classified as a confectionery. The petitioner Company requested the Authorities to extend the time for submission of reply in view of the pendency of a similar petition on similar grounds before this Court. But the Assistant Collector refused to stay the proceedings. Hence a writ petition was filed by the petitioner seeking the issuance of a writ restraining the Assistant Collector, Central Excise and the Superintendent, Central Excise, Indore from taking any further action on the show cause notices Annexures P-6, P-7 and P-8 being illegal and without jurisdiction.

3. As the main petition which was pending before this Court is M.P. No. 1287 of 1989, the facts leading to this petition may be briefly stated. The petitioner M/s. Panama Chemical Works manufactures an Ayurvedic product at their factory at Niranjapur. As a part of their preparation they manufacture a product called SWAD tablets. According to the petitioners the SWAD tablet is used as therapeutic prophylactic purposes and is an Ayurvedic product and as such the product falls under Chapter 30 of pharmaceutical products, Heading 30.03, sub-heading 3003.30. SWAD tablets are medicaments as defined in note 2(i) to Chapter 30. These tablets have been prepared in accordance with the ingredients mentioned in the authoritative text book of Ayurved called Bhavprakash. There are two commentaries on this book by well-known Ayurvedic experts, which have also been stated in the petition. The petitioner Company after taking the ingredients from the book, evolved its own formula and got it patented in the name of SWAD tablets from the Drug Controller of M.P. under the Drugs and Cosmetics Act. The formula of the tablet was filed before the Controller, Food and Drug Administration, M.P., Bhopal on 6-6-1986 and it was approved on 18-7-1986. The approval letter is Ex. P-2. A classification list was filed by the petitioner firm before the Superintendent, Central Excise on 25-8-1986 (Annexure-P3). On demand by the Authorities the necessary papers of purchase etc. were submitted by the petitioners, vide Annexure-P4. The licence issued by the Controller, Food and Drug Administration was also submitted on 26-9-1986 by Annexure-P5. Thereafter the Assistant Collector, Central Excise provisionally approved the classification list on 15-10-1986 under Rule 9B of the Central Excise Rules, 1944. Thereafter enquiries were made by respondents Nos. 3 and 4 under Rule 173B of the Central Excise Rules regarding the final approval of the classification list, wherein the formula of the tablet was also sought. The petitioner firm sent all the necessary details, vide Annexure P-8. As such, after making due enquiry the classification was approved by the letter dated 9-1-1988, vide Annexure P-9.

4. However, the enquiries continued and a query about the glucose sugar was made by Annexure P-10 which was replied by Annexure P-11. Again, vide Annexure P-12 the quantity of sugar was asked to which letter Annexure P-13 was sent by the petitioners. Thereafter the production of sugar syrup and its value was asked for by letter Annexure P-14. The petitioner filed reply to the said

letter, vide Annexure P-15. Thereafter the Inspector of the Central Excise, Range 5, took the sugar syrup and the SWAD tablet for test on 26-12-1988 and 6-2-1989, respectively vide Annexures P-16 and P-17. Other documents were also sought by the Inspector, whereupon all the necessary documents sought were supplied. As such, all through there has been no mis-statement or suppression of any material facts in relation to the process and manufacture of SWAD by the petitioner.

5. The Collector, Central Excise, respondent No. 2, issued a show cause notice u/s 11A of the Central Excise Act to the petitioner firm to show cause why the SWAD tablet be not classified under sub-heading 1704.90 relating to sugar confectionery instead of sub-heading 3003.30 relating to pharmaceutical products and why an amount of over one crore be not recovered under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A of the Central Excises and Salt Act, 1944 and why penalty under Rules 9(2), 52A(5) and 173B(2) of Central Excise Rules be not imposed for contravention of the said Rules. The notice is Annexure P-19, which is challenged in this petition on various grounds.

6. Firstly it has been contended by the petitioners that the classification list was finally approved on 9-1-1988 after due enquiry under sub-rule (2) of Rule 173-B. The Assistant Collector acts as a quasi judicial authority. The power to modify classification list is provided in sub-rule (5) of Rule 173B. As such without modification of the classification list show cause notice for recovery under Sections 11A and 173B of the Central Excise Act and Rules, is illegal.

7. Secondly it has been stated that the classification list once approved finally cannot be received because the approval of the classification is a quasi judicial function and there is no power of review under the Act. Thirdly it has been stated that Section 11A applies to recovery of duty not paid/not levied or short paid/short levied and not to change a classification list. The- classification list can be changed only under sub-rule (5) of Rule 173B after affording an opportunity of hearing to the other party. It is only after the change of the classification list that a notice for recovery can be made.

8. Fourthly it has been contended that the duty can be recovered only prospectively after the order modifying classification list and not retrospectively.

9. On merits it has been submitted that the product is an Ayurvedic preparation and the greater proportion of glucose is no ground to hold that it is a confectionery. It has also been stated that in many medical syrups, which are known and treated as medicines, the glucose base is over 90 per cent and still they are treated as medicines. The license was obtained by the petitioners from the Drug Controller, M.P. and the license has been issued after ascertaining that the product is an Ayurvedic product. It has also been stated that as the Assistant Collector approved the classification list, the review can be made only by him and not the Collector. It has also been stated that the show cause notice is barred by limitation as Annexure P-I to Annexure P-18 clearly show that there was full

disclosure of all the facts by the petitioners. It has also been submitted that the Collector has already made up his mind in respect of changing the classification of the product and, therefore, the notice, is biased.

10. The petition was resisted on the ground that the petitioners have used liquid glucose in the manufacture of their product SWAD from the very beginning but there is no mention of this in the ingredients either in their said drug licence or on the wrapper of the product. The second ground is that the weight of the tablet has been declared as 250 milligrams containing total 104 mg of Kala Namak, Sendha Namak, Nimbu Ka Sar, Kali Mirch, Iira, Ajwain, Sounth, Pipla Mul and Lendi Pipal, whereas in fact each tablet of SWAD weighs 3350 mg containing the same quantity i.e. 104 mg of the said 9 Ayurvedic ingredients. The Book mentioned in the Drug licence has not been followed. As such by mis-statement and suppression of fact the petitioners have managed to classify their product SWAD as an Ayurvedic Patent or Proprietary Medicine "with intent to evade Central Excise duty, but in fact it is not an Ayurvedic product for the following reason:

(i) Liquid glucose is an Allopathic ingredient and it has not been mentioned as ingredient in any Ayurvedic, Sidha or Unani Tibb system of medicine specified in the first Schedule of the Drugs and Cosmetics Act, 1940.

(ii) The weight of each tablet is 3.35 grams instead of 250 mgs., whereas the total weight of the Ayurvedic ingredients is only 104 mg. Thus, the overall percentage of the ingredients has come down from 42 per cent to only 33 per cent, and the percentage of sugar is 97 per cent instead of 58 per cent. As such by inclusion of such higher percentage of sugar the product has lost the characteristics of Ayurvedic medicine. As such the preparation is against the very book of Ayurvedic system which was followed by the notices. As such it has got no therapeutic or prophylactic uses. Further more no specific doses have also been mentioned.

As such the plea of the respondents is that the product SWAD has not been recognised as Ayurvedic medicine in a standard Ayurvedic work and has not been so proved by clinical trials and also has not been recognised so by the Authority like Director General of Health Services. It has also been stated that the Appellate Tribunal (CEGAT) in an identical case against M/s. Warner Hindustan Ltd., has held the product as a confectionery. The Deputy Chief Chemist of the Central Revenue has also, after visiting the factory of the petitioner and examining the goods and the process of manufacture, opined that the SWAD is a sugar confectionery. In any case the classification has to be resolved by the quasi judicial authorities themselves and, therefore, a writ under Article 226 of the Constitution does not lie. As the classification has been obtained by the petitioner by mis-statement and suppressing the material facts and the petitioner has also changed the proportion of the ingredients, therefore, the notice u/s 11A and Rule 173B is a valid notice. In any case this is not the stage wherein the Court should adjudicate on the validity of the notice because the petitioner has a chance to

show cause before the Authority.

11. M.P. No. 682 of 1991 has also been opposed on the aforesaid grounds and it has been stated by the respondents in that petition that they have filed detailed replies in M.P. No. 1297 of 1989 and those facts may be treated as reply in this petition also along with the annexures.

12. Before considering the respective contentions of the parties it is also necessary to briefly state the various rejoinders and the documents filed in M.P. No. 1297 of 1989. In the rejoinder of the petitioner dated 25-10-1989 it is stated that on the basis of the circular of Collector, Ex. P-20, it is manifest that the respondent No. 3 is biased against the petitioner. Ex. P-20 shows that the respondent No. 3 has already made up his mind before hearing the petitioner. Therefore, the objection of the respondents about the tenability of the petition cannot be looked into for this reason also. In reply to the rejoinder the respondents submitted that the show cause notice is legal because the Collector is the proper officer to modify the classification list and it could be so modified in view of the fresh facts being brought on record. Although the modification in classification has to be prospective, the differential duty for past period arising out of the wrong classification can be demanded u/s 11A.

13. Thereafter the petitioners, vide rejoinder dated 13-3-1990, submitted that on complaint of Collector Customs and Central Excise, the Drug Controller had issued a show cause to the petitioner firm u/s 18(a)(1) of the Drugs and Cosmetics Act, 1940 (hereinafter called the Cosmetics Act) read with the Rules framed thereunder asking the petitioner as to why permission to manufacture the drug be not withdrawn and why all the manufacturing licenses be not suspended or cancelled. The copy of these notices are Annexure P-20A and Annexure P-21.

14. The petitioner No. 1 obtained the report of two Experts appointed by the State Government under Rule 154(2) of the Cosmetics Rules, who were appointed by gazette notification dated 12-7-1985. The Experts have opined that the quantity of base material sugar and the preservative and binding agent liquid glucose does not affect the therapeutic value of the tablet SWAD. The Drug Controller and the Licensing Authority, after enquiry passed an order discharging the show cause notice and held that the Drug is an Ayurvedic drug and the quantity of the sugar as against the quantity of the active ingredients does not change the nature of the Ayurvedic medicine. Annexures P-25 and P-26 are also filed which are the supplementary show cause notices dated 1-11-1989 and 31-1-1990.

15. A reply to the rejoinder was filed by the respondents wherein the order of the Drug Controller dated 19-3-1990 was challenged by the Central Excise Authority being faulty, erroneous, biased and void abinitio. It is also contended that because SWAD tablet is manufactured under the licence issued by the Drug Controller, does not prove that it deserves to be classified under Clause 30 of

CET. Actually for the classification, Excise Tariff has to be considered and not the Cosmetics Act. In common parlance also the product is not known to have a curative power. The earlier averments were also reiterated along with a submission that since liquid glucose is an ingredient even if it is said to be preservative, SWAD cannot be treated as Ayurvedic medicine as defined in Section 3(h)(1) of the Cosmetics Act.

16. The petitioner gave further clarification on 9-4-1990, wherein it has been stated that Dr. G.P. Sharma is an Expert under the Rules framed under the Cosmetics Act and the respondents have no jurisdiction to criticise the order of the Drug Controller. The place of the sale of the medicine has also been clarified whereupon the respondent again stated that the Experts appointed under Rule 154(2) of the Rules framed under the Cosmetics Act and are only for the purposes of giving consultation before grant of licence and not thereafter. The opinion is in general terms and the liquid glucose is one of the ingredients. The petitioner again reiterated their earlier stand and said that an expert can give an opinion either before issue of licence or thereafter. The opinion has been given after the test analysis report has been received. According to expert opinion liquid glucose is not an active ingredient and therefore need not be mentioned in the label. Even in respect of Allopathic drugs under Rule 96 only the contents of active ingredients are to be mentioned on the label. The Director of Allopathic Services, under the Act or the Rules can not be held to be an Expert of Ayurvedic medicines. The provisions of the various authorities stated by the petitioners and the respondents were also stated in the reply.

17. During the course of the arguments both the learned counsel for the parties have argued in accordance with their pleadings as above, because the pleadings in view of the rejoinders and replies to the rejoinders actually had become argumentative. Therefore, nothing specific was added during the oral arguments, except the synopsis filed before us. In view of the aforesaid contention of both the parties the first and crucial point which arises for determination is whether the tablet SWAD can be classified as an Ayurvedic medicine or a confectionery. For answering this question various other aspects and the provisions of the Act and the authorities cited by the parties have to be taken into consideration. However, before considering the respective arguments of the parties on this crucial issue, on merits, let us first examine whether the petitioner could approach this Court on the show cause notice itself.

18. According to the learned counsel for the Central Excise this petition is not tenable because an alternative efficacious remedy by way of appeal is available to the present petitioners after decision on the show cause notice. In support of his argument the petitioners have cited the judgment of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, wherein the Supreme Court has held that when an efficacious alternative remedy is available the writ petition does not lie. Same is the view taken in the case of Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others,

19. On the other hand the learned counsel for the petitioners Shri A.M. Mathur has placed reliance on number of authorities, including the judgment of Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others,

20. We may refer to the latest Supreme Court authority wherein it has been held that although an alternative remedy may be available for challenging the impugned order by referring the question under the statutory provision to the appropriate authority, but it is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. According to the petitioners the authorities cited by the Revenue in Dunlop's case (supra) and Titaghur Paper Mills's case (supra) do not oust the jurisdiction of the High Court in case of availability of an alternative remedy. The first case was the case of State of U.P. v. Mohammad Nook AIR 1958 SC 86, wherein it has been held that it is a well established principle that if there are existence of requisite grounds certiorari will lie although a right of appeal has been conferred by the Statute. This rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law. In the same case it is also held that if an inferior Court or Tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts proceedings before it in a manner contrary to rules of natural justice and accepted rules of procedure and which offends superior Court's sense of fair play, the Superior Court may exercise its powers to issue prerogative writ of certiorari to correct the error of the Court or Tribunal of first instance, even if an appeal to another inferior Court or Tribunal was available. This authority was referred to in Titaghur Paper Mills case (supra) and the Titaghur Paper Mill's case has been followed In Dunlop's case (supra) and the same principle has been reiterated in Dr. Smt. Kunterh Gupta's case (supra). Now, according to the petitioners the Central Excise Authorities have issued the notices challenged in the two petitions without any jurisdiction and without any basis, therefore, they can approach this Court directly.

21. Another point pertaining to the limitation has also been raised and the jurisdiction of the Collector, Central Excise, u/s 11A of the Central Excise Act has been challenged on the ground that it was not a case of suppression, mis-statement of facts, fraud, collusion or contravention of the provisions of the Excise Act. As such the extended period of five years is inapplicable. For deciding both the aforesaid points pertaining to the jurisdiction of the show cause notice and availability of the limitation granted u/s 11A of the Central Excise Act, the fact of the case have to be examined and it has to be ascertained whether the petitioners by suppression of fact obtained the classification of their product and whether the product has been rightly classified by the authorities. The crucial point which falls for consideration is whether the product SWAD is an Ayurvedic

preparation or a confectionery in view of the facts and circumstances of the case.

22. The basis of the challenge of the classification by the Central Excise Authorities is that the product is not in accordance with the standard Ayurvedic work nor is supported by any clinical trials. The liquid glucose, which is added in the tablet is nowhere provided as an ingredient in the preparation of the Ayurvedic medicines. By adding the liquid glucose the product falls out of the ambit of the definition of Ayurvedic medicine stipulated in Section 3(h)(i) of the Cosmetics Act, 1940. Thirdly it has been stated that it does not prescribe the specific doses. The proportion of the Ayurvedic ingredients in the medicine is only 3 per cent, whereas the contents of sugar are 97 per cent. As such the curative effect, if any, of the medicine is lost and actually branding it as an Ayurvedic medicine is for the sole purpose of evading excise duty. Strong reliance has been placed on the judgment of the Full Bench of CEGAT in the case of 1990 (29) ECC 172 wherein in the similar facts the Bench of the CECi AT has held that the Halls Icemint tablets are confectionery and not an Ayurvedic Medicine. It has also been argued that the fact that the petitioner has obtained a license to manufacture the Ayurvedic medicine and the approval of the formula by the Drug Controller is of no avail. The classification has to be done according to the Central Excise Tariff and not on the basis of the license issued by the Drug Controller.

23. On the other hand it has been argued by the petitioner that the product SWAD was considered an Ayurvedic medicine on the basis of the Drug License No. 25D/24/83. The formula was approved by the Drug Controller on 18-7-1986. The classification list was thereafter filed by the petitioner on 25-8-1986. It was provisionally approved on 15-10-1985 and final approval was given on 9-1-1988. As per formula a mixture of sugar is prepared in manufacturing process. Therefore, the respondent No. 4 gave a notice on 26-11-1987 to the petitioner stating that sugar syrup prepared during the course of manufacture is classifiable under sub-heading 1702.30. A reply was given by the petitioner to this notice on 11-2-1987 that Sugar Syrup is not excisable. Thereafter the respondent, vide letter dated 11-1-1988 asked for the details of production and value of sugar Syrup, vide Annexure P-12. The petitioners, vide Annexure P-13 gave the quantity of the sugar consumed from August 1986 to November, 1987 and the Inspector Central Excise, Range 5, took samples of sugar syrup and SWAD tablet for test on 26-12-1988 and 6-2-1989. The purchase invoices of raw material was also furnished, vide Ex. P-I 8. As such the petitioners have never refused to disclose any fact from the Authorities and acting upon approved classification list did not collect additional price from the customers on account of the excise duty now demanded.

24. It is also the case of the petitioners that the Collector Customs & Central Excise had sent complaint to the Drug Controller about the suppression of facts by the petitioner and obtaining the license fraudulently, whereupon the Drug Controller had issued a show cause notice to the petitioner firm u/s 18(a)(i) of the Cosmetics Act on the ground that the drug is misbranded and show cause

notice was issued under the Rules framed, why permission to manufacture the drug be not withdrawn and why the manufacturing license be not suspended or cancelled. Along with the notice, a copy of the Drug Analysts report was also enclosed. The petitioner No. 1 obtained the report of two experts appointed by the State Government under Rule 154(2) of the Cosmetics Act and they have opined that the quantity of base material sugar is the preservative and binding agent liquid glucose does not affect the therapeutic value of the tablet SWAD. A report was filed along with the opinion of the Experts Annexure P-22 before the Drug Controller. The Drug Controller, after holding the enquiry, vide Annexure P-24 passed an order in favour of the petitioner discharging the notice wherein it held that the medicine is an Ayurvedic preparation despite the presence of liquid glucose and the variation in the weight and the ratio of the glucose and the active ingredient would not change the nature of the medicine. The Central Excise Officers had no authority to challenge or criticise the order of the Drug Controller, which is a Statutory Authority and an Expert competent to give a finding on the nature of a drug for which a license for manufacture has been issued.

25. In the light of the above arguments, let us first see the relevant judgments relied on the points raised before us. In the case of *Collector of Central Excise v. Warner Hindustan Ltd.* (supra) the Full Bench of CEGAT, New Delhi, has held that for any formulation to be considered as Ayurvedic medicine, the same should be either recognised so in a standard Ayurvedic work or should be so proved by clinical trials or should be recognised so by an authority like DGHS. The appellant's case for considering the goods described as Halls Icemint tablets, as medicine is only based on one fact that active ingredients, namely Pudina and Eucalyptus oil are Ayurvedic in nature and these have medicinal properties. The certificate given by Dr. Rao is not based on first hand information and besides, being a Professor of Surgery of E.N.T., he cannot be considered as a specialist in the field of medicine. The certificate, which could be taken note of is the one issued by the competent authority, which, in the instant case could only be the DGHS. Therefore, the case of the appellant that the product is a medicine is not established and, therefore, the Tribunal held the product as confectionery. In the aforesaid judgment the certificate of the so-called Expert Dr. Rao was considered and it was found that the information was based on the opinion of Dr. M.A. Virinchi, but it was not clear before the Tribunal as to who this Dr. Virinchi is and what information is supplied to Dr. Rao. As such the certificate is not based on the first hand information. It is also not shown whether the certificate is based on the clinical trials. The manufacturer also was not in a position to give any further details. Therefore, after considering all the facts and circumstances of the case and the contents of the product the Tribunal was of the view that the above said product could not be treated as an Ayurvedic medicine but can be classified as a sugar confectionery as it has a cooling and soothing effect on the throat as described in the literature.

26. Now, in respect of classification of goods it has been the consistent view that

the general principle of interpretation of tariff entries occurring in a Taxing Statute is a commercial nomenclature and understanding between persons in the trade. But it is also a settled legal position that the said doctrine of commercial nomenclature and trade understanding should be departed from in a case where the statutory content in which the tariff entry appears, requires such a departure. As such in cases where the application of commercial meaning or trade nomenclature runs counter to the statutory context in which the said word was used then the said principle of interpretation should not be applied. Trade meaning or commercial nomenclature would be applicable if a particular product description occurs by itself in a tariff entry and there is no conflict between the tariff entry and any other entry requiring to reconcile and harmonise that tariff entry with any other entry. The Supreme Court has reiterated the aforesaid view in a recent case of Akbar Badrudin Jiwani of Bombay Vs. Collector of Customs, Bombay, In the same judgment the Supreme Court has held that although it is the settled position of law that the words used in Taxing Statute have to be understood in the common parlance or commercial parlance but such a trade understanding or commercial nomenclature can be given only in cases where the word in the Tariff Entry has not been used in a scientific or technical sense and where there is no conflict between the words used in the Tariff Entry and any other entry in the Tariff Schedule. In the aforesaid case the Supreme Court took into consideration the various entry items and held that the calcareous stone as mentioned in ITC Schedule has to be taken in scientific and technical sense as therein the said stone has been described as of an apparent specific gravity of 2.5 or more. Therefore, the word "marble" has to be interpreted in the scientific or technical sense and not in the sense commercially understood or as meant in the trade parlance.

27. A Division Bench of the M.P. High Court in Ramesh Chemical Industries Vs. Union of India (UOI) and Others, has sought the aid of Section 3(b) of the Drugs and Cosmetics Act to consider the classification under the Central Excise Tariff. To ascertain whether a particular product is a medical preparation or not on the basis of the definition of "drug" in Section 3(b) of the Cosmetics Act it was held that the glucose repacked by the petitioner could not be taxed under Item No. 14E of the Tariff.

28. The Bombay High Court in the case of Leukoplast (India) Ltd. v. State of Goa 1988 (36) E.L.T. 369A, has held that although it is well settled that generally, while interpreting the fiscal statutes, the scientific meaning of a product is not relevant but one has to consider its popular understanding or its understanding in the commerce or in the trade. But it is obvious that this trade understanding should be the understanding of those who are actually dealing with that particular product or goods. The Drugs and Cosmetics Act is a comprehensive piece of legislation which deals with drugs and provides not only for the standards of quality, misbranded and adulterated drugs but also for the safeguards for the manufacture, sale and distribution of drugs as well as cosmetics. The Act makes it abundantly clear that only those drugs which are

manufactured under a valid licence issued under the Act and in compliance with its provisions can be lawfully sold, exhibited for sale or distributed. After considering the various aspects of the Act the Court was of the view that the definition of "drug" given in the said Act is most relevant for determining its meaning in the trade. Therefore, the true and real meaning which a drug has in the trade or in commerce is the meaning given to it in the Drugs and Cosmetics Act. In this case the Bombay High Court has also taken the view that the order of the Assessment Officer has to stand or fall on its own grounds and cannot be supplemented by affidavits.

29. Now, in the light of the aforesaid authorities it has to be seen as to how the medicine in question i.e. SWAD is known in the common parlance or in commercial use. There is not an iota of evidence to show that this product is sold as a confectionery and is commonly used as a confectionery by the consumers. In Tariff Entry 3003.30 the medicaments including those in Ayurvedic, Unani, Sidh and Homoeopathy system have been mentioned as the goods falling within that entry. Therefore, for ascertaining whether a product is an Ayurvedic product or not the facts on the record have to be perused and in the light of the decisions of the Supreme Court in Akbar Badruddin Jiwani's case (supra), the Leukoplast (India) Ltd.'s case (supra) and the case of Ramesh Chemical Industries (supra), this Court has to look to the scientific and technical aspect of the product with the aid of the Cosmetics Act, 1940.

30. Now it is not indispute that the petitioners in both the petitions are manufacturing SWAD tablets and the ingredients have been taken from the Ayurvedic text books with certain modifications evolving a formula of their own. The petitioners have considered the commentaries of the scholars Dr. Krishnachandra Chunekar and Dr. Ganga Sahai Pandya. The Hindi translation of the original books is Bhavprakash Nighantu and another commentary is by Shri Vishvanath Dwivedi Shastri of Ayurvedic Medical College, Lucknow. The formula so prepared with the aid of the aforesaid text books was patented and an application to the Drug Controller for obtaining the license for manufacture of this drug was made, which was granted to them. The classification list was filed before the Central Excise Authorities which was provisionally approved and later on finally approved. Now, the objection of the Central Excise Authorities is that firstly the liquid glucose, which is used in the medicine, is not an Ayurvedic ingredient and nowhere mentioned in the Ayurvedic book of medicines and the contents of the so-called curative medicines is only 3 per cent whereas the percentage of glucose 97 per cent. It has further been stated that there is deviation in the weight proportion of the active ingredients of the product and the liquid glucose has taken the product out of the purview of medicine. There is absence of dosage in the wrapper. However, it is manifest that the classification submitted by the petitioner was approved by the Competent Authority on the strength of the license issued by the Drug Controller of M.P. who has given the license after his due satisfaction that the product is an Ayurvedic product.

31. In the instant case a further development has taken place wherein the Central Excise Authorities had made a complaint to the Drug Controller that the license has been wrongly issued on the grounds which have been enumerated in the show cause notice. Therefore, a show cause notice was issued u/s 18(a)(o) of the Cosmetics Act and the Rules by the Drug Controller to the petitioner and a copy of the test laboratory report was also sent with the show cause notice. In the reply the petitioners submitted that the product SWAD is for digestion it contains ingredients commonly used for creating appetite and help in digestion. To make it tasty and eatable like other medicine, the manufacturers used the sugar base. The liquid glucose is used as preservative and binding agent like other medicines just to preserve the properties of the drug and in general practise there is no need to mention about the preservatives and binding agents. In the labels of other products of the same brand which are treated as drugs, the binding agent and preservative is not mentioned. The opinion of two experts was obtained and was also submitted along with the reply. The first opinion is by the Divisional Officer, Ayurved, Indore Division, who is declared as an Expert and according to him the medicine used in the product is Ayurvedic medicines. According to the opinion the addition of and proportion of sugar and liquid glucose would not change the quality of the active agents in the product.

32. The Divisional Director, Bharatiya Chikitsa Padhati, has been declared as an Expert by the State Government, vide Gazette Notification dated 20th April, 1985 in exercise of the powers under Rule 154(2) of the Drug and Cosmetic Rules, 1945 and the other expert Dr. Sharma has also been so declared as an Expert. According to Dr. Sharma also liquid glucose is used in Ayurvedic medicines as preservative material and binding agent and the increase or decrease in the quantity of the binding agent or preservative does not change the nature of the medicine. In both the Expert opinions it has been said that the product is a medicine containing the Ayurvedic properties.

33. The Controller Food and Drugs Administration, M.P. vide Annexure P-24 has dropped the notice and in a detailed order has considered the grievance of the Collector of Customs and Excise, Indore whereupon a sample of the drug was drawn by the Drug Inspector, Indore and analysed by the Government Analyst Bhopal. This report dated 13-6-1989 has not given any opinion that the Drug is of a standard quality or not, but the drug contains liquid glucose without label declaration. However, the Drug Controller agreed with the contention of the petitioner that the liquid glucose is a preservative in Ayurvedic as well in Allopathic drugs. A letter of the Director Indigenous System of Medicines Dr. Sharma, dated 23-12-1989 was also produced, which says that liquid glucose is commonly used as preservative and binding agent and its presence has no effect on the active ingredient and the further opinion of the Expert that despite the presence of liquid glucose the character of the drug shall remain Ayurvedic, has also been considered by the Drug Controller. Finding the aforesaid opinion and the argument sound and comparing the various ingredients in Hall's and Vicks tablets and their preparation as compared to SWAD which are licenced as

Ayurvedic medicines by the State of Maharashtra and Andhra Pradesh, the Controller of Foods and Drugs Administration, Bhopal discharged the notice against the petitioner and held that the product is an Ayurvedic product. As such the fact that the Drug Controller, agreeing with the opinion of the two Experts, has reiterated its earlier finding while issuing the licence of manufacture that the product SWAD is an Ayurvedic product, supports the case of the petitioner and the aforesaid fact cannot be brushed aside simply because the assessment has to be made independently in accordance with the Central Tariff.

34. It is true that the classification of the goods has to be made according to the Central Excise Tariff. But as discussed above the Central Excise Tariff does not specifically define the product, but speaks of the Ayurvedic preparation. As such as held by the Supreme Court, Bombay High Court and the M.P. High Court in the aforementioned cases the Court has to resort to the provisions of the Cosmetics Act for ascertaining the nature of the product and when the experts in the field is available. It cannot be brushed aside lightly only because there is an averment that it is a confectionery. The deviations in the preparation as pointed out by the Central Excise Authorities were dealt with and considered by the Controller of Foods and Drugs, Government of M.P. and there is no contrary opinion of any Ayurvedic Expert to hold that the product is simply a confectionery and not a Ayurvedic product. Even in the Warner Hindustan Ltd's case (supra) decided by the CEGAT, on which much reliance is placed by the learned counsel for the Central Excise, the Authority has considered the Expert opinion and thereafter gave a finding that the expert opinion is of no avail to the manufacture in that case because the opinion of Dr. Rao was a second hand information and the qualifications of Dr. Rao were also not known to ascertain whether he was an Expert or not, coupled with the fact that there was no clinical test of the product. In the instant case the clinical test was made of the aforesaid product and after considering the result of the clinical test and the opinion of the Experts the finding of the product being an Ayurvedic product has been given. It has already been held above that there is no evidence on record that in common parlance, the product is known as a confectionery. Therefore, the scientific and technical meaning of the product are most relevant for ascertaining whether a product is an Ayurvedic product or a confectionery.

35. The Central Excise Authorities, after filing of the report of the Director. Food and Drugs, in favour of the petitioner discharging the notice issued to them have filed a rejoinder wherein it has been stated that the opinion of the Director is erroneous and should not be acted upon. We fail to understand as to how the opinion of the Experts and that of the Drug Controller can be held to be erroneous in absence of any contrary opinion of Experts being on record. Much emphasis has been laid that according to the definition of Ayurvedic preparation there is a clear interdict on the use of any ingredient than the one shown in the text and that is why the word "only" has been used in the definition. It is manifest that the word "only" has been used in respect of the ingredients of the product and the preservative items in a particular product cannot be treated as

active ingredients. Consequently we hold that the product of the petitioner is an Ayurvedic preparation and has rightly been classified by the Assistant Collector under Item 3003.30 of the Central Excise Tariff.

36. As regards the tenability of the petition it has been strenuously argued that the petition is premature. But as discussed above the law on the point is practically settled that the Court should not interfere in a matter at the stage on show cause notice as a general rule. But can always interfere when the notice is without jurisdiction, arbitrary or illegal. About invoking of the provisions of Section 11A also, it is the settled principle that the provisions of Section 11A are available to the authorities provided the assessee has been guilty of misrepresentation, fraud or suppression of fact etc. In view of the aforesaid discussion we do not find it either a case of fraud, misrepresentation or suppression of fact. The classification was done on the basis of the license issued by the Controller of Drugs, Govt. of M.P. and he has found that the product is an Ayurvedic product even after holding an enquiry on a show cause notice. The Central Excise Authorities have also made enquiries as discussed above before the classification. Therefore, the extended period of five years of limitation u/s 11A is not available to the Collector, Customs and Central Excise. The notice Annexure P-19 in M.P. No. 1297 of 1989, is therefore, without jurisdiction and as such this Court could very well entertain a petition in a case where the notice is without jurisdiction. The notice Annexure P-19 is, therefore, quashed. The notices Ex. P-6, P-7 and P-8 issued by the authorities are as a sequel of the notice issued in M.P. No. 1297 of 1989 and in view of the finding given by us that the product is an Ayurvedic medicine, these notices also cannot be allowed to stand which were issued during the pendency of the first petition. Accordingly these notices also deserve to be quashed and are accordingly quashed.

37. In the result both the petitions M.P. No. 1297 of 1989 and M.P. No. 682 of 1991 are allowed. The notices issued in the aforesaid petitions are quashed. There shall be no order as to costs.