(2012) 09 GAU CK 0053

In the Gauhati High Court

Case No : Writ Petition (C) No''s. 1377, 1378, 1379 and 1380 of 2010

Reckitt Benckiser India Pvt. Ltd. APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Assam Value Added Tax Act, 2003 — Section 34, 90
Constitution of India, 1950 — Article 136
Drugs and Cosmetics Act, 1940 — Section 2(k), 3(aaa), 3(b)
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 2(g)

Citation : (2012) 56 VST 452

Hon'ble Judges : Adarsh Kumar Goel, C.J;N. Kotiswar Singh, J

Bench : Division Bench

Advocate : D. Senapati, for the Appellant; R. Dubey, for the Respondent

Final Decision : Allowed

Judgement

N. Kotiswar Singh, J.—By this batch of writ petitions, W.P. (C) No. 1377 of 2010, W.P. (C) No. 1378 of 2010, W.P. (C) No. 1379 of 2010 and W.P. (C) No. 1377 of 2010, the petitioner-company, registered under the Companies Act and engaged in manufacturing, sale and marketing of various household products including insecticides such as Mortein mosquito coils, mats, vaporizers and disinfectants like "Harpic" and "Lizol" dispirit and Dettol antiseptic liquid, cherry blossom shoe polish, etc., has challenged the assessment of the respondents authorities of the products of Harpic, Lizol and Dettol at the higher rate of these products at 12.5 per cent VAT charges classifying under the residual items under entry No. 1 of the Fifth Schedule of the Assam Value Added Tax Act, 2003 (hereinafter referred to as, "the Assam VAT Act"), contrary to the claim of the petitioner that the petitioner-company would be liable to pay only at rate of four per cent as these items are covered by specific entries provided under Schedule to the said Act at the said rate. As all these writ petitions challenge similar orders and under similar fact-situations, these writ petitions are heard together and disposed of by this common judgment.

2. According to the petitioner, the petitioner had been paying taxes at the rate of four per cent in respect of the aforesaid products as these (Harpic and Lizol) are covered under entry No. 19 of Part A of the Second Schedule to the Assam Value Added Tax Act chargeable at four per cent and Dettol is covered under entry No. 21 of the Fourth Schedule to the Assam Value Added Tax Act also chargeable at the same rate of four per cent.

3. Entry No. 19 of Part A of the Second Schedule to the Assam Value Added Tax Act reads as follows:

Chemical fertilizers, pesticides, weedicides and insecticides excluding mosquito repellents including electric or electronic mosquito repellents gadgets and insect repellents, devices and parts and accessories thereof.

4. The petitioner claims that the products Harpic and Lizol fall under the aforesaid entry No. 19 as these are disinfectants and covered by the expression "pesticides".

5. Entry 21 of the Fourth Schedule to the Assam Value Added Tax Act, as existed prior to August 7, 2005 which read as, "drugs and medicines (on maximum retail price basis)" was modified by the subsequent notification dated August 8, 2005, which now reads as follows:

Drugs and medicines including vaccines, disposable hypodermic syringes, hypodermic needles, catguts, sutures, surgical dressing (on maximum retail price basis).

Explanation.--The expression ''drugs and medicines'' shall not include products capable of being used as cosmetics and toilet preparations including tooth paste, tooth powder, cosmetics, toilet articles and soaps.

(emphasis here italicised added)

6. According to the petitioner, Dettol falls under the category of drugs and medicine and not a toilet article and does not come under the exclusion Explanation, and as such taxable at the rate of four per cent.

7. According to the Revenue, the said products not being specifically covered either under entry 19 or 21 as stated above, would be covered by the residuary entry, viz., entry No. 1 in Fifth Schedule to the Assam Value Added Tax Act which reads as follows:

All other goods not covered by First, Second, Third and Fourth Schedule.

8. The petitioner states that petitioner had filed its returns under the assessment category as provided under the Rules in respect of the assessment year 2005-06 and had been collecting tax at four per cent on the aforesaid products from its dealer/distributors and it duly deposited the same to the authorities.

9. However, after more than four years of filing of final return by the petitioner for the assessment year 2005-06, on July 4, 2009, respondent No. 3 issued a

notice to the petitioner directing the petitioner to pay VAT at 12.5 per cent on the aforesaid products, Harpic, Lizol and Dettol.

10. Similar notices were issued in respect of the assessment years 2006-07, 2007-08 and 2008-09.

11. The petitioner on receipt of the said notices dated July 4, 2009, submitted the replies on July 15, 2009, wherein the petitioner had stated that Harpic and Lizol being disinfectant, are to be treated as pesticide or insecticide and accordingly, would be covered under entry No. 19 of Part A of the Second Schedule to the Assam Value Added Tax Act and would be chargeable for VAT at four per cent only. As regards, Dettol, the petitioner submitted that since it possesses therapeutic and prophylactic properties, it is a drug or a medicine which falls under entry 21 of the Fourth Schedule and accordingly, chargeable for VAT only at four per cent on the maximum retail price.

12. However, respondent No. 3 by ignoring the aforesaid explanation submitted by the petitioner rejected the same by holding that Harpic is merely a toilet cleaner and Lizol is a floor cleaner and Dettol is only a toilet preparation, and not covered by any of the entries No. 19 or 21 as claimed by the petitioner, and respondent No. 3, vide notice dated September 8, 2009, directed the petitioner to file correct and amended returns for the years 2005-06, 2006-07, 2007-08 and 2008-09 by holding the petitioner is liable to pay at the higher rate of 12.5 per cent.

13. On receipt of the said notices, the petitioner submitted a detailed replies on October 5, 2009. However, respondent No. 3 without issue of provisional assessment order as amended u/s 34 of the VAT Act, issued notices for demand for tax/interest on October 15, 2009, copies of which were made available to the petitioner on October 29, 2009. Respondent No. 3, thereafter, has stopped certification/issue of forms thereby bringing the activities of the petitioner in relation to the sale of their goods to a grinding halt. Respondent No. 3, thereafter, issued show-cause notices dated February 5, 2010, for imposition of penalty u/s 90 of the Assam VAT Act. The petitioner being aggrieved by the aforesaid order dated October 15, 2009 and the subsequent actions have approached this court challenging the same and praying other consequential reliefs. The petitioner has also alleged other procedural irregularities in the assessment made by the authorities in respect of the assessment years 2005-06 to 2008-09 by filing these four writ petitions.

14. The main crux of the issue raised in these petitions is whether the assessing authorities are correct in their assessment by rejecting the claim of the petitioner that the aforesaid items fall under entries No. 19 and 12, respectively, as stated above.

15. As we proceed to deal with the issues raised herein, we have kept in mind what the honourable Supreme Court had observed in Ponds India Ltd. (Merged with H.L. Ltd.) Vs. Commissioner of Trade Tax, Lucknow, , while dealing with a

similar issue, that such a question has been considered from various perspectives. The honourable Supreme Court held in the said case that (pages 269 and 270 in 15 VST):

35.... While interpreting an entry in a taxing statute, the court''s role would be to consider the effect thereof, upon considering the same from different angles. Different tests are laid down for interpretation of an entry in a taxing statute, namely, dictionary meaning, technical meaning, user''s point of view, popular meaning, etc.

...

38. Whether a product would be a drug or a cosmetic sometimes poses a difficult question and, thus, answer thereto may not be easy. For the said purpose, the court may not only be required to consider the contents thereof, but also the history of the entry, the purpose for which the product is used, the manner in which it has been dealt with under the relevant statute as also the interpretation thereof by the implementing authorities.

16. Respondent No. 3, the Superintendent of Taxes, in his impugned assessment orders dated October 15, 2009, for rejecting the claim of the petitioner that the items Harpic and Lizol are covered under entry 19 of Part A of the Second Schedule, based it on common parlance test and the package describing the product, it was held that in common parlance of the consumers as well as traders, the items Harpic and Lizol are not understood as pesticides but FMCG products of daily use. Referring to the Chamber''s 21st Century Dictionary, it was held that "pest" means a living organism such as insect, fungus or weed, that has a damaging effect on animal livestock, crop plant or stored produce and "pesticide" means any of the various chemical compounds, insecticides, herbicides and fungicides that are used to kill "pests". The products, "Harpic" and "Lizol" are meant to be used as toilet cleaner by the manufacturers as well as the consumers, and cannot be regarded in common parlance as "pesticide", which term covers chemical compounds exclusively used to kill living organisms such as insects, fungus or weed affecting livestock, crop, plant or stored produce. It was also held that even if it is accepted that the products "Harpic" and "Lizol" possess some additional attributes of killing microorganisms mainly bacteria or viruses (the main use being of toilet cleaner or surface cleaner), the latter are definitely not "pests" and the products are also not to be regarded as pesticides.

17. Referring to the package, it was also held that the brochure of the product clearly points to the use for removal of tough stains, killing germs and fighting odours. It was also observed that the brochure also contains an assurance that "Harpic" is suitable for all types of toilet bowls and does not affect the septic tank. Accordingly, the Revenue held that all these clearly prove that the usage of the product is sought to be presented or advertised primarily as a toilet cleaner and the killing of germs is only an incidental or added attribute of the product. Therefore, it was held that the products "Harpic" and "Lizol" cannot be set to be

covered by entry 19 of the Second Schedule--Part A.

18. As regards the item "Dettol", it was held that the brochure indicates the uses for first aid, bathing, nappy wash, shaving, and other uses in personal hygiene, surgical, medicinal, midwifery and the like. Referring to the Explanation given to entry 21 of the Fourth Schedule, which provided that the drugs and medicines shall not include products capable of being used as cosmetics and toilet preparations including tooth paste, tooth powder, cosmetics, toilet articles and soaps and also holding that the product "Dettol" according to the own admission of the dealer was meant for diverse uses like bathing, shaving, nappy wash, first aid, personal hygiene, surgical, medical, midwifery, and the like, cannot fall within the item drug and medicines.

19. The Revenue also relied upon the decision rendered by the Kerala High Court in Reckitt Benckiser (India) Ltd. Vs. Commissioner, Commercial Taxes and Others, involving the same dealer where the Kerala High Court had held that the products "Harpic" and "Lizol" do not fall under the description of pesticides or germicides. It was also held that the dominant use of these products is of stain removing and deodorising and surface cleaning. It was also held that "Dettol" cannot be understood as an item of medicament.

20. Assailing the aforesaid findings, the petitioner has contended that under the Central excise, Harpic and Lizol are treated as insecticides and/or disinfectants as covered under Chapter 3808.40 of the Central excise classification. It has also been submitted that under Note 2 to the Second Schedule to the Assam VAT Act, the Rules for the interpretation of the Central Excise Tariff Act, 1985, read with the Explanatory notes as updated from time to time published by the Customs Co-operation Council Brussels, shall apply for interpretation of that part and submitted that since Harpic and Lizol are covered under Chapter 3808.40 of the Central excise classification in accordance with HSN entry 3808.40 issued by the Custom Co-operation Council, Brussels, the same would be also applied to entry No. 19 of Part A of the Second Schedule to the Assam VAT Act.

21. The petitioner has contended that the products "Harpic" and "Lizol" are disinfectants and since disinfectants are also covered by the expression "pesticides", these products would be covered by entry 19 of Part A of the Second Schedule.

22. The petitioner states that the active ingredient of Harpic is hydrochloric acid, which is a well known disinfectant and in addition, it has other ingredients like Bis/2 hydroxyethyl oleylamine, alkyl trimethyl ammonium chloride, butylated hydroxy toluene, methyl salicylte and other chemicals, used for disinfecting the surface on which it is applied and is effective in killing various micro-organisms (germs/bacteria) like S. Aurus, E. Coli, S. Flexnari, S. Feacalis, K. Pneumoniae, and C. Albicans, which are generally found in toilet bowls that cause skin, soft tissue and mucous membrane infections, gastroenteritis, inflammation of colon, bacillary dysentery, diarrhoea, etc. Before respondent No. 3, the petitioner had

also furnished supporting documents/certification from experts, viz., SGS India Private Limited which is an affiliate of Societe Generale de Survellience S. A V Geneva, the world''s independent international testing, verification and certification organisation, which hold accreditation from National Accreditation Board for Testing and Calibration Laboratories, Ministry of Science and Technology, New Delhi and is approved, among others, by the Bureau of Indian Standards, New Delhi and the Ministry of Environment and Forests, Government of India (under Environment Protection Act, 1986), New Delhi, to substantiate the contention that Harpic is a disinfectant.

23. The aforesaid contention of the petitioner that Harpic is a disinfectant was not doubted or contradicted by the Revenue. Similarly, the primarily disinfectant quality of "Lizol", supported by expert opinion also remained unrebutted.

24. The petitioner also contended that similarly, "Lizol" has the active ingredient benzalkonium chloride solution I.P. and other ingredients fragrance-BBA P 2062 M, propylene glyeel LP, sodium bicarbonate I.P, tartazine yellow, fatty alcohol ethoxylate, lsoprpyl alcohol I.P. and other chemicals, used for disinfecting floor, cooking platform, sink and similar hard surfaces. It is effective in killing micro-organisms like S. Aurus E. Coli (MTCC 1687) Pseudomonas Aeruginosa (MTCC-741) which are generally found on hard surfaces like floors that cause urinary tract infections, respiratory system infections, dermatitis, soft tissue infections, bone and joint infections, infections to patients with severe burns, cancer and AIDS, etc.

25. Accordingly, it was submitted that the petitioner, through the product labels, had been publicly and commercially representing "Harpic" and "Lizol" as disinfectants and the consumers purchase the products for their disinfectant properties apart from the cleansing utility. The consumers purchase and use the same for mainly disinfectant purpose while keeping their toilets/homes clean. Thus, the primary purpose of the products is disinfectant and is not the secondary as held by the Revenue.

26. As regards the aforesaid contention, it is noticed that the product labels of both the products clearly indicate that the petitioner has made representation of their disinfectant property as the primary purpose. In the impugned order, though the label has been referred to, the representation about the disinfectant property has been glossed over, not highlighted and has held the disinfectant property to be only the secondary one. The products labels of both the products indicate that the said products are in the nature of disinfectant which prominently display the potential of the products to kill germs. In the product label of Lizol, it is clearly stated thereon that the product is a "disinfectant surface cleaner". Moreover, it is prominently stated on the face of the product that it "Kills 99.9 per cent germs". Even on the reverse of the product label the name of the product is shown as "Lizol disinfectant". There is also a logo of a house with a commonly used medical sign of "+" whereunder it is written "Kills 99.9 per cent germs". The same logo is prominently embossed on both the front

and back of the bottle to indicate that the said product kills germs, thereby emphasizing that it is a disinfectant.

27. From the above, what emerges is that there are sufficient materials to show that Harpic and Lizol are disinfectants. The Revenue also do not seem to be refuting this disinfectant quality of the products, but takes the view that these are only additional attributes and held that even if these products have the attribute to kill bacteria or viruses, since these cannot be said to be "pests", these products cannot be regarded as pesticides.

28. Respondent No. 3 in its order stated that the dominant use of these products is of stain removing and deodorizing and surface cleaning.

29. What is to be noted is that these products are used for cleaning toilets/ floors, etc., because of the disinfectant properties. Without the disinfectant qualities, these products would be reduced to mere cleaning agents and not different from any other cleaning solutions. It may be also noted that stain caused on the toilet or floor is because of dirts which carry germs and bacteria. Therefore, removing the stain and cleaning of floor or toilet is also for the purpose of sanitising the same which is most effective with the disinfectant component of these liquids. Therefore, in any event, whether used for removing stains or cleaning, the sanitising aspect cannot be ignored. Thus, what stands out in respect of these products is the disinfectant quality these products possess. Therefore, the most distinguishable attribute of these products is the disinfectant quality.

30. The compositions of the products show that these are meant to be disinfectants, to kill germs and bacteria, which has not been seriously contested. The expert opinions by way of certificates from various individuals, organisation, relied upon by the petitioner have not been refuted or contradicted by the respondents.

31. In Ponds India Ltd. (Merged with H.L. Ltd.) Vs. Commissioner of Trade Tax, Lucknow, , the honourable Supreme Court held that while deciding the issue whether any particular item would be covered under any relevant entry or classification, the opinion of the expert in the field can be taken into consideration.

32. The petitioner has also relied on several orders passed by the Revenue authorities in other States and by various High Courts to drive home the point that these products, Harpic and Lizol are disinfectants.

33. Therefore, in view of the materials which have been placed on record, which are not denied by the Revenue, it can be held that Harpic and Lizol are disinfectants.

34. It may be mentioned that even though a writ court would not normally enter into areas of disputed questions of fact and appreciate evidence in the proceedings, in the present case the aforesaid materials had also been relied

upon by the petitioner before respondent No. 3, the Superintendent of Taxes, Guwahati, which were not controverted by the authorities in this proceeding also, and accordingly, we have no hesitation to rely on the aforesaid materials and draw reasonable conclusions based on the same.

35. However, determination of the issue that "Harpic" and "Lizol" are disinfectants do not ipso facto lead to the conclusion that these are to be treated as pesticides for the purpose of the assessment in issue.

36. Therefore, what is required to be further decided is whether, "Harpic" and "Lizol" if these are treated as disinfectants, can be considered as "pesticides" for the purpose of entry 19 of the Second Schedule to the Assam VAT Act.

37. In this regard, the petitioner has pressed into service the decision of the honourable Supreme Court in Bombay Chemical Pvt. Ltd. Vs. Collector of Central Excise, Bombay I, Bombay, , to clinch the issue in his favour.

38. In the said case, the honourable Supreme Court was considering whether the appellant therein, which was manufacturing disinfectant fluids was entitled to exemptions in respect of item No. 18 added to list of exempted items under the Central Excises and Salt Act, 1944. The said item No. 18 of the notification which listed the items eligible for certain exemptions under the Central excise, reads as follows:

18. Pesticides, weedicides and fungicides

39. The honourable Supreme Court therein considered the meaning of "disinfectant" and "pesticides" (pages 341 and 342 in 99 STC):

As regards ''disinfectant'' the Supreme Court observed that,--

5. ''Disinfectant'' is defined in Webster Comprehensive Dictionary ''as a substance used to disinfect or to destroy the germs of infectious and contagious diseases''. In the Concise Oxford Dictionary of Current English, ''disinfectant'' is defined as ''a commercially produced chemical liquid that destroys germs''. In Encyclopaedia Britannica, Volume 4, it is explained to mean, ''any substance, such as creosote or alcohol, applied to inanimate objects to kill micro-organisms. Disinfectants and antiseptics are alike in that both are germicidal, but antiseptics are applied primarily to living tissue. The ideal disinfectant would rapidly destroy bacteria, fungi, viruses and protozoans, would not be corrosive to surgical instruments, and would not destroy or discolour materials on which it is used''. It thus cannot be disputed that a disinfectant is also a killing agent. Even the Tribunal found that the goods produced by the appellant which contained high boiling tar acid kill the bacteria in the gutters and the bathrooms. In the report of the Deputy Chief Chemist it was mentioned that all above products numbering 14 were formulations containing high boiling tar acid as the principal active ingredient. It then noticed the definition of pesticide and disinfectant and observed that, ''it appears from the above definition that disinfectants are used for killing or inactivating micro-organisms, in some literature for oils (containing high boiling

tar acid) are mentioned in pesticide manual''. But he opined that it was not clear whether the formulations containing tar acids, as in the case of the goods, produced by the appellant which were used as disinfectants, will be covered broadly by the term ''pesticides''.

As regards, ''pesticide'', the honourable Supreme Court observed that,

6. ''Pesticide'' has been defined in Butterworths Medical Dictionary, Second Edition, as ''a comprehensive word to include substances that will kill any form of pests, e.g., insects, rodents and bacteria''. The term ''pesticide'' includes a large variety of compounds of diverse chemical nature and biological activity grouped together usually on the basis of what kind of pests they are used to destroy or eliminate. Under the US Federal Environment Pesticide Control Act, the term ''pesticide'' has been defined to include ''(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, insect, rodent, nematode, fungus, weed, other forms of terrestrial or aquatic plants or other forms of animal life, e.g., viruses, bacteria, or other micro-organisms, which the administrator declares to be a pest and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant'' (Pesticides in the Indian Environment, by P.K. Gupta, page 2).

40. Having settled the issue as regards the meaning of "disinfectant" and "pesticide", the honourable Supreme Court went on to consider whether "disinfectant" can also be considered a "pesticide".

41. In para 8 of Bombay Chemical Pvt. Ltd. Vs. Collector of Central Excise, Bombay I, Bombay, , the honourable Supreme Court held that (pages 342 in 99 STC):

8. A disinfectant which, therefore, is used for killing may broadly be covered in the word ''pesticide''. Disinfectants, may be of two types; one to disinfect and other to destroy the germs. The former, i.e., those products which are used as disinfectant for instance lavender, etc., may not be covered in the expression ''pesticide''. But those products which are used for killing insects by use of substances such as high boiling tar acid have the same characteristic as ''pesticide''.

42. Accordingly, the honourable Supreme Court decided the issue before it by holding that (page 343 in 99 STC):

10.... the goods produced by the appellant from phenolic compounds and high boiling tar acid being disinfectant fluids which have the capability of killing bacteria which are nothing but pests, the appellant was entitled to exemption under item 18 of the notification issued in 1978...

43. What can be culled from the aforesaid decision is that disinfection fluids which have the capability to kill bacteria, which are also treated as pests; would be considered "pesticide".

44. From the above, what is also clearly evident is that the Supreme Court gave a broader meaning to "pests" to include bacteria and germs thus bringing disinfectant within the meaning of pesticide.

45. If the word "pests" is to be given a restrictive meaning by limiting to the dictionary meaning as had been done by the Revenue in the impugned order, disinfectants which primarily kills germs and bacteria cannot be considered "pesticides". However, by giving a broader meaning to the word "pest" as has been done by the honourable Supreme Court in the aforesaid case, by including bacteria and germs within the meaning of "pests", Harpic and Lizol which are disinfectants would be clearly covered by the item "pesticide", in which event, the petitioner would be liable to be assessed only at the rate of four per cent.

46. Accordingly, we also hold that "Harpic" and "Lizol" which are disinfectants being "pesticides", in terms of the decision of the honourable Supreme Court in Bombay Chemical Pvt. Ltd. Vs. Collector of Central Excise, Bombay I, Bombay, , would be covered by entry No. 19 of Part A of the Second Schedule to the Assam VAT Act and chargeable at four per cent.

47. As regards Dettol, respondent No. 3 in the impugned order observed that the product "Dettol" according to own admission of the petitioner, was meant for diverse uses in bathing, shaving, nappy wash, first aid, personal hygiene (removal of dandruff), surgical, medical, midwifery and the like, and further observed that the "Dettol" on the conspectus of attendant factual attributes of its usages, marketing and consumption, etc., was excluded from entry No. 21 of the Fourth Schedule. Respondent No. 3 also relied upon the judgment of the Kerala High Court in Reckitt Benckiser (India) Ltd. Vs. Commissioner, Commercial Taxes and Others, involving the present petitioner in the said State which had ruled that Dettol cannot be understood as an item of medicament. Accordingly, respondent No. 3 held that Dettol cannot be treated as drug or medicines under item No. 21 of the Fourth Schedule. Further, respondent No. 3 though not specifically holding that Dettol was capable of being used as cosmetic and toilet preparation so as to be included within the Explanation clause, is suggesting that it is a toilet preparation because of the attributes derived from the brochure as stated above.

48. The petitioners, however, have stated that Dettol is in the nature of an antiseptic liquid that is used for cleaning wounds, cuts, grazes, bites and stings and also for killing germs, bacteria, etc., as it possesses active ingredient such as Chloroxylenol IP, Teripineol BP, Alcohol Absolute IP (denatured), which have medicinal qualities.

49. It has also been stated that Dettol even in common parlance is bought and sold as a drug and it is well known fact that Dettol kills germs and prevents illness and it is squarely covered by definition of drug, as per section 3(b) of the Drugs and Cosmetics Act, 1940 and it cannot be treated as a cosmetic or toilet preparation for the purpose of bringing under the Explanation of entry 21 of the

Fourth Schedule. In fact, Dettol can be sold only under a licence under the Drugs and Cosmetics Act, 1940 and the petitioner had obtained a licence from the authority for dealing with Dettol under the Drugs and Cosmetics Act, 1940.

50. The petitioner also stated that Dettol is used as an antiseptic liquid in hospitals and homes and it is used prior to and after surgery, for its well known therapeutic and prophylactic properties.

51. Therefore, what is to be considered by us in respect of Dettol is, whether it is an item of medicament to be treated as a drug and medicine as contended by the petitioner or is to be treated as "cosmetic" or "toilet preparation" because of its general attributes and would stand excluded from entry No. 21 of the Fourth Schedule in terms of the Explanation to it as has been held by respondent No. 3.

52. In undertaking this exercise, we may first acquaint ourselves as to what is meant by drug and medicine and cosmetics and toilet preparations.

53. None of these words is defined under the Assam VAT Act. However, it is defined under the relevant Acts, namely, the Drugs and Cosmetics Act, 1940, Medicinal and Toilet Preparations (Excise Duty) Act, 1955. Though definitions given in these Acts may not be determinative of the issues at hand, yet in absence of definitions in the Assam VAT Act, these would provide the beacon on which basis we may properly understand the meaning of the words in issue to reach the correct conclusion.

54. Section 3(b) of the Drugs and Cosmetics Act, 1940 defines "drug" as follows:

3(b) ''drug'' includes,-

(i) all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;

(ii) such substances (other than food) intended to affect the structure or any function of the human body or intended to be used for the destruction of vermin or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;

(iii) all substances intended for use as components of a drug including empty gelatin capsules; and

(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board.

55. Section 2(g) of the Medicinal and Toilet Preparations (Excise Duty) Act, 1955

defines "medicinal preparation" as follows:

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;

56. Section 2(k) of the Drugs and Cosmetics Act, 1940 defines "toilet preparation" as follows:

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.

57. Section 3(aaa) of the Drugs and Cosmetics Act, 1940 defines "cosmetic" as follows:

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

58. From the above definitions of "drug" and "medicinal preparations" provided under the Drugs and Cosmetics Act, 1940 and the Medicinal and Toilet Preparations (Excise Duty) Act, 1955, one of the attributes of a substance to qualify to be considered as a drug is the use for human beings for the purpose of prevention of disease. The use of a drug is not only for cure of any disease or illness but for prevention also and both these curative and preventive aspects have been incorporated in the definition of "drug" in the aforesaid Acts. Therefore, if the purpose of a substance is to prevent disease, unless otherwise provided, it can be considered a drug.

59. In the instant case also, the Revenue does not seem to controvert or deny the use of Dettol for first aid, nappy wash, shaving, uses in personal hygiene, surgical, medical, midwifery and the like. It cannot be denied that use of Dettol for the purposes mentioned above primarily to prevent infections, which is also admitted by the respondents, is only because of its prophylactic properties. The main purpose for the use of Dettol is to prevent infections which may occur due to minor cuts, injuries, abrasions, grazes, insect bites, etc. Thus, by applying the "users test", it would squarely fall under the definition of "drug" as defined u/s 3(b) of the Drugs and Cosmetics Act, 1940 as well as under the definition of section of the Medicinal and Toilet Preparations (Excise Duty) Act, 1955.

60. It may be apposite herein to refer to the decision of the Supreme Court in Sujanil Chemo Industries v. CCE [2005] 4 SCC 189, in which the Supreme Court held that,

6.... Any medicine or substance which treats disease or is a palliative or curative is therapeutic. Licel cures the infection or infestation of lice in human hair. It is thus therapeutic. It is also prophylactic inasmuch as it prevents disease which will follow from infestation of lice. Thus, this is a product which is used for therapeutic and prophylactic purposes. It would thus be a medicament within the meaning of the term ''medicament'' in Note 2 of Chapter 30...

61. We will also examine, conversely, whether Dettol can be considered as a "cosmetic" or a "toilet preparation" so as be excluded from being considered as drug because of the Explanation to entry No. 21 of the Fourth Schedule.

62. From the above definition of "cosmetic" given under the Drugs and Cosmetics Act, 1940, it can be gathered that the main characteristics of a cosmetic is that it is applied externally on the human body for cleansing, beautifying, promoting attractiveness, or altering the appearance.

63. Dettol is definitely not used for beautifying, promoting attractiveness, or altering the appearance. It is not used for cleansing as a substitute for soap or detergent. Though it is used for cleansing, the purpose is to prevent infection and for sanitisation because of its therapeutic and prophylactic properties. Therefore, Dettol cannot be considered to be a cosmetic substance.

64. Further, from the users point of view, it cannot also be considered a toilet preparation in terms of the definition given in the Medicinal and Toilet Preparations (Excise Duty) Act, 1955. Though it may be kept in the toilet, it is not used on human body to improve or alter the complexion, skin, hair or teeth. It is also not used as deodorant or perfume. Of course, it is also used for cleansing purpose, but only because of its prophylactic qualities, i.e., to cleanse any wound, or minor injuries or cuts, etc.

65. In the definition of "cosmetic" and "toilet preparations" as discussed above, the element of any medicinal quality, either for treatment or prevention of disease is conspicuously absent.

66. Therefore, we are of the view that Dettol cannot be considered either as a cosmetic or a toilet preparation by applying the "common parlance test" and "users test" so as to bring it within the excluded items as per Explanation to entry No. 21 of the Fourth Schedule to the Assam VAT Act.

67. It has been also noted that Dettol is manufactured and sold by the petitioner under a licence issued under the Drugs and Cosmetics Act, 1940 and the Drug Price Control Order applies to Dettol also. These are facts which had been pleaded by the petitioner before respondent No. 3, but there is neither any reference to the same in the impugned order nor was it contested by the authorities. These facts are also clearly indicative of the fact that "Dettol" is a drug and not a cosmetic item.

68. Thus, in our view there are sufficient materials and consideration to hold that Dettol is a drug or medicine to be covered by entry 21 of the Fourth Schedule to

the Assam VAT Act and also not covered by Explanation to the said entry 21.

69. We briefly refer to the judgment of the Kerala High Court, which has been referred to by respondent No. 3 for coming to a finding to the effect that Harpic and Lizol are merely cleansing substances and the Dettol is not a medicament. As regards the products Harpic and Lizol, it was held that from the product description and the nature of use stated in the products, there can be no doubt that items are essentially used as stain remover and deodorants, though they actually kill germs as well. The said finding was arrived at on the basis of the product description and the nature of use stated in the products. No other parameters were adopted or examined in order to determine whether the said products are merely stain remover and deodorants, or disinfectants.

70. As we have already examined earlier, the findings of this Court is that the said products are disinfectants and hence, pesticides are based on various parameters as explained above.

71. Further, in the said case decided by the Kerala High Court, there was another competing entry, namely, entry No. 27(4) which provided for "floor and toilet cleaning". The Kerala High Court held that those products are covered by entry 24(7) as floor and toilet cleaning objects. However, in our present case, there is no such competing entry other than entry 19, as discussed above.

72. Further, as regards the issue of Dettol, it was not the case of the appellant therein that the above disinfectant, that is, Dettol is able to prevent or cure any disease. They had also accepted that it certainly kills germs and is used for various purposes referred to in the leaflet attached to it, which includes even washing and but, held that Dettol cannot be a medicament. With respect, we are not able to agree with the said conclusion that the Dettol cannot prevent any disease and it is merely a product to maintain hygiene. That its germicidal qualities cannot be disputed and the fact that it is used for surgical, medical and midwifery also cannot be disputed. Though the aforesaid qualities had been mentioned in the judgment, there is no reference to such while giving the finding that it is not a medicament. In view of use of Dettol for preventing disease or infections due to cuts, abrasions to body, etc., it cannot be said that it does not have any prophylactic qualities. Further, the Kerala High Court also had held that it is a product generally to maintain hygiene.

73. Dictionary meaning of "hygiene" given in Oxford Advanced Learner''s Dictionary, New Eighth Edition, is as:

the practice of keeping yourself and your living and working areas clean in order to prevent illness an disease.

74. Maintenance of hygiene is possible only when such substance is used to prevent illness or disease. Therefore, if Dettol is used for maintaining hygiene, it cannot be said that it does not have prophylactic qualities and its medicinal value cannot be ignored. Therefore, it is difficult to hold the view that Dettol is not a

medicament.

75. Hence, we respectfully are not able to agree with the conclusions reached by the Kerala High Court in the aforesaid case.

76. In respect of the aforesaid products, as discussed above, the disinfectants qualities of the Harpic and Lizol and the prophylactic qualities of Dettol have not been denied by the Revenue authorities. The only stand taken by the Revenue authorities is that these were not dominant nature of the products. However, it cannot be denied that these disinfectant and the prophylactic qualities of the aforesaid products are not insignificant, rather because of the aforesaid disinfectant and prophylactic qualities, the aforesaid products are used.

77. It is now well-settled principle of law that when two views are possible, the one which favours assessee should be adopted. In Mauri Yeast India Pvt. Ltd. Vs. State of U.P. and Another, :

46. It is now a well-settled principle of law that when two views are possible, one which favours the assessee should be adopted. (See Bihar State Electricity Board and another Vs. M/s. Usha Martin Industries and another,).

78. Here, in the present case, there are two possible views: either to take the products Harpic and Lizol to be merely stain remover and cleansing agents or as disinfectants and in respect of Dettol, to treat it as a mere toilet preparation or a drug or medicine. Since there are sufficient materials to consider Harpic and Lizol as disinfectants and accordingly, as pesticides, and Dettol as medicament, following the aforesaid principle of law, it can be held that the said products are pesticides and drugs, respectively.

79. In view of the aforesaid possible views taken to consider Harpic and Lizol as pesticides and Dettol as a drug, based on materials as discussed above, it will not be appropriate to deny their qualification under the aforesaid entry Nos. 19 and 21 and consign them to the residual entry. In this connection, we may recollect the observations of the honourable Supreme Court in Dunlop India Ltd. and Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others, , where the honourable Supreme Court held as:

35. It is good fiscal policy not to put people in doubt and quandary about their liability to duty. When a particular product like V.P. Latex known to trade and commerce in this country and abroad is imported, it would have been better if the article is, eo nomine, put under a proper classification to avoid controversy over the residuary clause. As a matter of fact in the Red Book (Import Trade Control Policy of the Ministry of Commerce) under item 150, in section II, which relates to ''rubber, raw and gutta percha, raw'', synthetic latex including vinyl pyridine latex and copolymer of styrene butadiene latex are specifically included under the sub-head ''synthetic rubber''. We do not see any reason why the same policy could not have been followed in the ICT book being complementary to each other. When an article has, by all standards, a reasonable claim to be

classified under an enumerated item in the Tariff Schedule, it will be against the very principle of classification to deny it the parentage and consign it to an orphanage of the residuary clause. The question of competition between two rival classifications will, however, stand on a different footing.

36. It is not for the court to determine for itself under article 136 of the Constitution under which item a particular article falls. It is best left to the authorities entrusted with the subject. But where the very basis of the reason for including the article under a residuary head in order to charge higher duty is foreign to a proper determination of this kind, this court will be loath to say that it will not interfere.

80. It has been the plea of the petitioner that the petitioner had been consistently assessed treating the aforesaid products as disinfectants, pesticides and as a drug/medicines during the earlier assessment years 2005-06, 2006-07, 2007-08 and 2008-09 till the Revenue decided to review the said assessment only in the year 2009 by the impugned orders. The petitioner had been contending that there is no material change in the circumstances for the Revenue authorities to make reassessment except for the judgment rendered by the Kerala High Court as stated above. We find force in the aforesaid contention of the petitioner inasmuch as except for the judgment rendered by the Kerala High Court, there is no other material which has been brought on record to depart from their earlier assessment. In M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax, , the honourable Supreme Court held as (page 329 in 193 ITR):

16. We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

81. Similarly, in Ponds India Ltd. (Merged with H.L. Ltd.) Vs. Commissioner of Trade Tax, Lucknow, , the honourable Supreme Court held as below (page 281 in 15 VST):

76. If an entry had been interpreted consistently in a particular manner for several assessment years, ordinarily it would not be permissible for the Revenue to depart therefrom, unless there is any material change. (See Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others,).

82. In the light of the above discussions, we are of the view that these petitions should be allowed and the products Harpic and Lizol having been declared to be pesticides as discussed above, would be liable to tax under entry No. 19 of Part A of the Second Schedule to the Assam VAT Act and Dettol would be liable to be assessed as an item under entry 21 of the Fourth Schedule to the Assam VAT Act

and will not fall within the excluded category under the Explanation. Accordingly, this batch of writ petitions is allowed. The impugned assessment orders dated October 15, 2009 passed by respondent No. 3 in respect of the assessment years 2005-06 to 2008-09 are set aside and consequently, the respondents are directed to take necessary consequential actions in accordance with law.

