
(2007) 07 RAJ CK 0005
In the Rajasthan High Court

State of Rajasthan and Another	Vs	APPELLANT
Deys Medical Stores Ltd. and Another		RESPONDENT

Date of Decision : 27-07-2007

Acts Referred:

Rajasthan Sales Tax Act, 1954 — Section 5

Citation : (2008) 1 RLW 432

Hon'ble Judges : R.S. Chauhan, J; R.M. Lodha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—This group of four writ petitions is between the same parties and involves the identical controversy and, therefore, it is disposed of by common judgment.

2. The principal question that arises for consideration by us in this group of writ petitions relates to the classification of two products namely "Keo Karpin Hair Vitalizer" and "Keo Karpin Baby Oil" for the purposes of Sales Tax under the Rajasthan Sales Tax Act. According to the respondent No. 1, the aforesaid products fall in Entry 60 in the notification issued on 8.3.1988 in exercise of power conferred by Section 5 of the Rajasthan Sales Tax Act, 1954 (for short the R.S.T. Act) while according to the department (petitioners herein) the aforesaid products are covered by Entry 69 of the said notification.

3. Entry 60 reads thus:

60 Medicines, Drugs and all kinds of pharmaceutical preparations excluding chroquine.

4. Entry 69 reads thus:

Perfumery (excluding "Agarbatties" "Dhoop" and "Loban") cosmetics, including tooth paste "Manjan", Comb, brushes, perfumed hair oil, razor and other shaving articles but excluding razor blades.

5. The question as to whether a particular product is a drug or medicine or medicinal preparation or pharmaceutical preparation or a cosmetic has come up before the courts from time to time. Such cases have arisen under the different Acts and Taxing Statutes.

6. In the case of B.P.L. Pharmaceuticals Limited v. Collector of Central Excise Vadodara 104 STC 164 the issue before the Supreme Court was about the classification of the product marketed under the brand name "Selsun" under the Central Excise Tariff Act, 1985. According to the manufacturer B.P.L. Pharmaceutical Limited, the product "Selsun" was a medicine having anti-fungal and anti-seborrhoeic properties and was used as a detergent medium for the treatment of dandruff on the scalp, while according to the revenue, the said product was a cosmetic. The Supreme Court having regard to the preparation label, literature, character, common and commercial parlance understanding and the earlier decisions of the Central Board of Excise and Customs held that the product was a "medicine."

7. In the matter of classification of a product named "Boroline", the Division Bench of the Calcutta High Court held that since the product "Boroline" was an antiseptic boric ointment containing boric acid and zinc oxide, the product cannot possibly be termed to be a cosmetic item. The SLP therefrom was dismissed by the Supreme Court. The brief order of the Supreme Court incorporating the detailed judgment of the Calcutta High Court is reported in (2000) 118 STC 19).

8. In the case of Commissioner of Central Excise, Calcutta Vs. Sharma Chemical Works, , the question before the Supreme Court was whether "Banphool Hair Oil" was perfumed hair oil or an Ayurvedic medicament under the Central Excise Tariff Act, 1985. Relying upon its previous judgment in the case of B.P.L. Pharmaceuticals and few other judgments, the Supreme Court observed thus:

We have heard the parties and considered the submissions made by them. We have also read the opinion of the majority Bench and the minority opinion of the Technical Member. It is a settled law that the onus or burden to show that a product fall within a particular Tariff Item is always on the revenue. Mere fact that a product is sold across the counters and not under a Doctors prescription, does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr. Lakshmikumaran that merely because the percentage of medicament in a products less, does also ipso facto mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It could not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda text books. Of course the formula may not be as per the text books but a medicament can also be under a patented or proprietary formula. The main criteria for determining classification is normally the use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as an hair oil was on

the revenue. This burden is not discharged as no such proof is adduced. On the contrary we find that the oil can be used for treatment of headache, eye problem, night blindness, reeling, head weak memory, hysteria, amnesia, blood pressure, insomnia etc. The dosages required are also set out on the label. The product is registered with Drug Controller and is being manufactured under a drug licence.

9. Similarly, dealing with the question as to whether the product "Himtaj Oil" is classifiable as Ayurvedic medicament or perfumed hair oil under the Central Excise Tariff Act, 1985, the Supreme Court referred to the case of Bhanphool Oil (cited supra) and held thus:

5. At this stage it must be mentioned that in this Civil Appeal the question of classification relates to "Himtaj Oil". On board along with this Appeal were a number of other Appeals which related to classification of "Bhanphool Oil". The arguments of learned Additional Solicitor General, Mr. Raju Ramachandran, in this Appeal were based upon the submissions made in respect of "Bhanphool oil". It was submitted that if the submissions regarding "Bhanphool oil" are accepted by this Court then on the same reasoning it would have to be held that "Himtaj oil" was not an Ayurvedic medicament. Reliance was also placed upon the authority of this Court in the case of Shree Baidyanath Ayurved Bhavan Ltd. Vs. Collector of Central Excise, Nagpur, In this case it is held that resort to scientific and technical meanings should not be had but that the expression must be understood in its popular meaning. It was held that ordinarily a medicine would be prescribed by medical practitioner and would be used for a limited time and not every-day unless it was so prescribed to deal with a specific disease like diabetes. On this basis it was held that the product in question namely "Dant Manjan Lal" (tooth powder) was not a medicine.

6. We have today, by a separate judgment, negated the submissions of the Revenue in respect of "Bhanphool oil". Thus for reasons set out in that separate judgment the arguments of the Revenue even in respect of "Himtaj oil" cannot be accepted. The authority relied upon is also of no assistance. In that case there was no evidence to show that the common man considered that product as a medicine. In this case the report of the Range Officer shows that dealers, wholesalers, retailers, customers, chemists and druggist all consider "Himtaj oil" to be an Ayurvedic medicament. Apart from that the other material relied upon by the Assistant Collector (which has been set out hereinabove) also clearly shows that "Himtaj oil" is an Ayurvedic medicament. In this view of the matter we see no infirmity in the impugned judgment.

10. In yet another case of Meghdoot Gramodyog Sewa Sansthan v. Commissioner of Central Excise, Lucknow 2004 (174) ELT 14 (SC), the Supreme Court was concerned with the question as to the products namely, "Bhringraj Tail", "Trifla Brahmi" and "Neem Herbal Sat", were perfumed hair oil or medicaments. This is how the Supreme Court dealt with the matter:

4. In coming to the conclusion that all the six products were classifiable under preparation for use on the hair, the Tribunal held that except for certain letters from doctors, the appellants had not produced any evidence to show that the products were prescribed by Medical Practitioners as medicines for various diseases. The second basis of the Tribunal's conclusion was that there was nothing to show that patients were kept under observations, or that the results said to be have been achieved by the use of the products were obtained by keeping the patients in hospitals over a period of time. Thirdly, it was held that the Commissioner had found that the packing of the products would indicate that the products were cosmetics and not medicines or drugs since it depicted "a lady with black flowing hair" and other similar images.

5. The decision of the Tribunal is unsustainable on the reasoning given. A product may be medicinal without having been prescribed by a Medical Practitioner. It was also not necessary for a person manufacturing medical products to claim classification under Tariff Heading 3303.03 without establishing that the products had in fact been tested on patients in controlled situations or that the outcome had not been tested for effectiveness. This would be particularly true in the cases where the products are claimed to be based on traditional ayurvedic formulae.

6. The appellant has drawn our attention to the composition of the six products and the uses in respect of each of these six products. This has not been doubted by the Tribunal nor indeed by the Departmental authority. The composition and the curative properties being admitted, it was not open either to the Department or the Tribunal to hold that the items were cosmetics merely by reason of the outward packing.

7. This Court has in similar matters come to the conclusion that items which may be sold under names being a "cosmetic" connotation would nevertheless remain medicines based on the composition of the items in *B.P.L. Pharmaceuticals Ltd. Vs. Collector of Central Excise, Vadodara*, .

8. As far as the first three items listed earlier are concerned, this Court has in *Commissioner of Central Excise, Calcutta-IV Vs. Pandit D.P. Sharma, and The Commissioner of Central Excise, Allahabad Vs. Himtaj Ayurvedic Udyog Kendra*, , in connection with Banphool oil and Himtaj oil held that the ayurvedic hair oils, were medicines and should be properly classified under the Tariff Heading 3033.03, rather than under Tariff Heading 3305.10 or 3305.50. Indeed the learned Counsel appearing on behalf of the respondent has not seriously contended otherwise in respect of the first three items.

9. As far as items 4, 5 and 6 are concerned, for the reasons stated earlier, we are of the view that they are also properly classifiable under Medicaments under Tariff Heading 3303.30.

11. Before we deal with the matter further, we deem it proper to deal with some of the judgments cited by Mr. R.B. Mathur, the counsel for the petitioner-department.

12. The first decision cited by him was the decision of the West Bengal Taxation Tribunal in the case of Alembic Chemical Works Co. Limited and Anr. v. Commercial Tax Officer, Assessment Wing and Ors. (1994) 95 STC 44. The question before the Taxation Tribunal was whether the product called "Protinules" manufactured and sold by Alembic Chemical Works Company Limited was taxable under the West Bengal Sales Tax Act, 1954 as a drug or patent and proprietary medicine or as powdered milk or as powder for food drinks. After dealing with the concerned notifications, the Tribunal held that "Protinules" was powdered milk and not the medicine.

13. Mr. R.B. Mathur then cited the decision of the Gujarat High Court in the case of Dandwala v. State of Gujarat (1993) 88 STC 459 wherein the product "Dandwala Keshkalpa" was in issue. The Division Bench of the Gujarat High Court held that even though the product was manufactured and prepared with the help of certain ayurvedic herbs, as it intended to have beneficial effect on the hair growth, it was a hair oil and not medicine.

14. The Division Bench of the Karnataka High Court in the case of L.M. Rajappachetty and Bros. Vs. Commissioner of Commercial Taxes in Karnataka, was seized with the question whether Herbs/roots/barks of trees could be regarded as medicinal and pharmaceutical preparations falling under Entry 41 of the Second Schedule to the Karnataka Sales Tax Act, 1976. The Division Bench of the Karnataka High Court held that an interpretation of any entry in a sales tax law should be given the same meaning which it has at common parlance and herbs/roots/barks at common parlance are drugs/medicine, but not medicinal preparations and, therefore, not covered by Entry 41 of the Schedule of the Karnataka Sales Tax Act.

15. The question as to whether "Roshan Shital Tail" was a medicine or hair oil for the purposes of Uttar Pradesh Sales Tax Act, 1948 fell for consideration before the Single Judge of Allahabad High Court in the case of Commissioner of Sales Tax v. Raj and Co. (1986) 62 STC 76. The Single Judge held that at Entry 26(a) of notification referred to hair tonic as well. The preparation of the hair tonic may have several medicinal properties, yet the "hair tonic" has been described by the notification as an item of "cosmetics" and simply because the oil was manufactured by the assessee out of several herbs having the medicinal properties, it cannot be said that oil was in the nature of medicine.

16. In the case of Alpine Industries Vs. Collector of Central Excise, New Delhi, , the issue before the Supreme Court was the classification of the product "Lip Salve" under the Central Excise Tariff Act, 1985. The Supreme Court applied "Commercial parlance theory" and held that the product was essentially for care of skin and not for cure of skin and, hence, classifiable as skin care cream and - not a medicament. This is what the Supreme Court observed in Paragraph 7 of the report:

7. We have gone through the pharmaceutical and medical literature produced

before us in the course of hearing and which has been duly dealt with by the Tribunal in its minority and majority opinion. The certificate issued by the Army Authorities and the chemical ingredients of the product are not decisive on the question of classification of the product for levy of excise duty. It is firmly established that on the question of classification of a product under the Central Excise Tariff Act, "commercial parlance theory" has to be applied. It is true that the entire supply by the appellant of its product "Lip Salve" has been to the Defence Department for use of military personnel but that would also not be determinative of the nature of the product for classifying it. It is not disputed that the product "Lip Salve" is used for the care of the lips. It is a product essentially for "care of skin" and not for "cure of skin". It is, therefore, classifiable as a skin-care cream and not a medicament. From the nature of the product and the use to which it is put, we do not find that the claim of the appellant is acceptable that it is primarily for therapeutic use. What we find from the material produced before the Tribunal is that essentially the product is a protective/preventive preparation for chapping of lips. It is not a curative product, maybe, that incidentally on cracked and chapped lips, it has come curative effect. It is also not denied that the product "Lip Salve" is not suitable for use only for soldiers operative in high altitude areas but it is of use for everyone as protection from dry, cold weather or sunrays. The product, therefore, essentially is protective of skin of lips. It is a lip-care product and not a "medicament". It is neither prescribed by any doctor nor obtainable from the chemist or pharmaceutical shops in the market.

17. In the case of Dabar India Limited v. Assistant Commissioner and Ors. (2007) 5 BST 190, the West Bengal Taxation Tribunal held that "hajmola candy" was a confectionery as is understood in common parlance and not a medicine.

18. Having surveyed the aforesaid decisions, in our considered view, while deciding the question as to whether the product is a drug or medicine or medicament or pharmaceutical preparation or a cosmetic or a perfumery oil, the Court has to have regard to the nature of the article, the ingredients thereof, the uses to which they are " put with specific reference to the extra information, as to how the goods are treated in the market as such, the literature and whether the manufacturer of the goods applied for a license under the Drugs and Cosmetics Act, 1940 as a drug or medicine and the same having been obtained, and then the goods are marketed as such. Surely, the preparation label, literature, character, common and commercial parlance understanding with the goods and the manufacture of the product after procuring necessary license or approval of the Drugs Controller may be indicative as to whether such product is a "cosmetic" or a medicine"/drug.

19. It is not necessary as a matter of law to look into the dictionary meaning of the words "medicine" or "drug" or "cosmetic" since in the construction of entry in a taxing statute providing for classification, the dictionary meaning of the word is not of much assistance.

20. That the respondent No. 1 sought for permission to manufacture for sale of the item "Keo Karpin Hair Vitalizer" with Directorate of Drugs Control, Government of West Bengal is not in dispute nor it is questioned. It appears that vide communication dated 31.10.1983 the Directorate of Drugs Control, Government of West Bengal gave no objection to the respondent No. 1 to manufacture for sale of the product "Keo Karpin Hair Vitalizer" with the following composition:

Item No. Name of the product Composition Packing (5) of Keo Karpin Hair Each 100 ml. Contains Sch C1 Vitalizer Keratin Hydrolysate (5%) 5 ml 100 ml d-Panthenol 50 mg Biotin 5 mg Nicotinic Acid I.P. 200 mg Resorcinol I.P. 50 mg Hialkyl HBU 150 500 mg (undecylenic derivative) Providone I.P. 1 gm Absolute Alcohol 25% v/v Glycerin I.P. 10 ml Purified Water I.P. To 100 ml

21. Similarly the Directorate of Drugs Control, Government of West Bengal in the year 1986 permitted the respondent No. 1 to manufacture for sale the product "Keo Karpin Baby Oil" under license No. 123 MB (L) with the following composition:

Item No. Name of the product Composition Packing (5) of Keo Karpin Baby Oil Each 10 ml. Contains Sch C1 Vitamin A.I. P.: 20,000 I.U. Bot. of Vitamin D3 I.P.: 4,000 I.U. 60 ml. Vitamin E N.F. : 3 mg. 180 ml Olive oil B.P. : 0.05 ml And Lanolin I.P. : 0.05 gm 450 ml. Arachis Oil I.P. : 5.0 ml 100 ml. Light Liquid paraffin I.P. ad.: 10.0 ml. Sandalwood Oil : q.s. Absolute Alcohol I.P. : 1% v/v. Isopropyl Myristate BPO : 0.05 ml. Neem Oil I.P. : 0.05 ml. Appropriate overages of vitamins added.

22. That both the aforesaid products namely, "Keo Karpin Hair Vitalizer" and "Keo Karpin Baby Oil" are manufactured as per the composition approved by the Directorate of Drugs Control has not been questioned.

23. In other words, the products "Keo Karpin Hair Vitalizer" as well as "Keo Karpin Baby Oil" are being manufactured by the respondent No. 1 after obtaining requisite permission and license under the Drugs and Cosmetics Act, 1940 as a medicinal preparation and these goods are marketed by them as such. A look at the aforesaid composition would show that in "Keo Karpin Hair Vitalizer", there is no element of hair oil and what it contains is the various medicines like keratin Hydrolysate, D-Panthenol IP, Biotin, resorcinol IP. 66 etc. Similarly, "Keo Karpin Baby oil" has ingredients of medicines like isopropyl myristate etc. According to the respondent No. 1, "Keo Karpin Hair Vitalizer" prevents untimely fall of hair and helps in removal of dandruff. Even an expert opinion was placed before the authorities who opined that vitalizer was a formulated product for use in excessive fall of hair and dandruff.

24. Every pack of vitalizer mentions that it provides deep down treatment for premature and excessive hair loss. It cures common acute bacterial and fungal scalp infections caused by pollution, nutritional deficiencies and from excessive strain of modern life.

25. In so far as "Keo Karpin Baby oil" is concerned, the manufacturer claims that the product protects the children from rickets, checks Vitamin A & E deficiency and its regular massage provides goods health to the children round the year.

26. Applying the tests laid down by the Supreme Court in the case of B.P.L. Pharmaceuticals Limited and followed in the matters of "Banphool Hair Oil", "Himtaj Oil" and Maha Bhringraj oil", it cannot be said that the finding of the Taxation Tribunal that the products viz., "Keo Karpin Hair Vitalizer and "Keo Karpin Baby oil" fall in entry 60 and not the entry 69 of the afore-referred notification suffers from any error of law.

27. Before we close, we may notice that the counsel for the department submitted that both these products are sold across the counter and these are not required to be sold on the doctor's prescription and, therefore, these products do not fall in entry 60. The submission is without any substance. As a matter of fact, this very argument has been rejected by the Supreme Court in the case of Banphool Hair oil. The Supreme Court held that mere fact that a product is sold across the counters and not under a Doctor's prescription, does not by itself lead to the conclusion that it is not a medicament.

28. Moreover it was admitted by Mr. R.B. Mathur that no material or evidence was placed by the department that these two products namely "Keo Karpin Hair Vitalizer" and "Keo Karpin Baby oil" were cosmetics. That the burden of proving that a particular products falls in a particular entry is on the revenue. The department has miserably failed to discharge its burden. We thus find no merit in these writ petitions and all the four writ petitions are dismissed with no order as to costs.