(2005) 10 AHC CK 0180

In the Allahabad High Court

Case No : Trade Tax Revision No. 705 of 1998

The Commissioner, Trade Tax — APPELLANT

Vs

Singhal Brothers — RESPONDENT

Date of Decision : 28-10-2005

Acts Referred:

Uttar Pradesh General Clauses Act, 1904 — Section 21
Uttar Pradesh Sales Tax Act, 1948 — Section 3A, 3A(1)
Uttar Pradesh Trade Tax Act, 1948 — Section 11, 11(8)

Citation : (2009) 234 ELT 61

Hon'ble Judges : Rajes Kumar, J

Bench : Single Bench

Advocate : S.C, for the Appellant; Bharat Ji Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Rajes Kumar, J.—Present revision u/s 11 of the U.P. Trade Tax Act (hereinafter referred to as "the Act") is directed against the order of the Tribunal dated 22nd October, 1997 relating to the assessment year, 1988-89.

2. The short question involved in the present revision is that whether "Boroplus" is liable to tax as medicine as held by the Tribunal or liable to tax under the entry of "All kinds of cosmetics and toilet preparations...."

3. Heard learned Standing Counsel and Sri Bharatji Agrawal, learned Senior Advocate appearing on behalf of the dealer opposite party.

4. Learned Standing Counsel submitted that boroplus is Himani product. It is used as a cream to protect the face and skin from dryness etc. He submitted that it is never used to cure any disease or to prevent any disease. It is commonly available in a cosmetic shop and is commonly known as cosmetic item. He submitted that on the basis that it is used for protection of skin, Tribunal has illegally held it as medicine. He submitted that Himani boroplus has been held as Cosmetics by this Court in the case of Balaji Agency, Gorakhpur v. CST, reported

in 1994 UPTC 184 as cosmetics. Learned counsel for the dealer opposite party (hereinafter referred to as "the dealer") submitted that in the manufacturing of boroplus drug licence is required. He submitted that it is used to avoid dryness and fishers of skin and Tribunal has rightly held as medicines. In support of his contention he relied upon the various decisions namely Union of India and Ors. v. G.D. Pharmaceuticals Limited and Anr. reported in 118 STC 19, Commissisoner of Commercials Taxes, West Bengal and Anr. v. West Bengal Commercial Taxes Tribunal reported in 89 STC 355, G.D. Pharmaceuticals Ltd. v. State of West Bengal and Ors. reported in 1998 UPTC 1205, Commissioner of Commercial Taxes, Madhya Pradesh v. Dawar Brothers, Indore reported in 1998 UPTC 1211 and United Trading Agency v. Additional Commissioner of Commercial Taxes, Zone II, Bangalore reported in 104 STC 182.

5. It is useful to refer the relevant notifications, which reads as follows.

Notification No. ST-II-5785/X-10(1)-80-U.P. Act XV/48-Order-81, dated 7th September, 1981.

"Medicines and Pharmaceutical preparations including insecticides and pestisides". 6 per cent M or I

Notification No. ST-II-5784/X-10 (1)-80-U.P. Act 15/48-Order-891, dated 07.09.1981.

"In exercise of the powers under Clause (d) of Sub-section (1) of Section 3-A of the U.P. Sales Tax Act, 1948 (U.P.Act No. XV of 1948), read with Section 21 of the U.P. General Clauses Act, 1904 (U.P. Act No. 1 of 1904), and in supersession of all previous notifications issued from time to time under Sub-section (1) of Section 3-A of the Act as it stood before its amendment by the U.P. Sales Tax (Amendment and Validation) Ordinance, 1981 (U.P. Ordinance No. 12 of 1981), the Governor is pleased to declare that, with effect from September 7, 1981, the turnover in respect of the goods specified in column 2 of the Schedule to the notification shall be liable to tax at the point of sale specified in column 3 of the said Schedule at the rate specified against each in column 4 thereof:

SCHEDULE
-- SI. No. Description of Goods Point of tax Rate of tax
-- 1. ...
-- 2. ...
-- 3 ...
-- 4. ...
-- 5. All kinds of cosmetics and toilet M or I 12% preparations for beautification or care of the face, skin, hair, nails, eyes or brows, but not including soaps, safety razor blades, hair combs, tooth pastes, tooth powders,and other dentifrices, tooth brushes and kumkuni.
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6. The word "cosmetic and medicines" have not been defined in the statute. Therefore, it is necessary to look into the dictionary meaning of the aforesaid two words.

"Cosmetic" has been defined as follows:

Collins Advanced "Cosmetic are substances such as lipstick Learners Dictionary or powder, which people put on their face to make themselves look more attractive.

The concise Oxford "Intended to beautify hair, skin or Dictionary complexion etc; imitating or restoring normal appearance; intended to improve appearances"

The Encyclopedia "Cosmetics, are primarily manufactured Americana preparations for beautifying the wearer, International they are articles intended to be rubbed, Edition poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance.''"

The World Book "Cosmetics are substances applied to a Encyclopedia person''s body to cleanse, promote Volume 4 attractiveness, or alter the appearance. Cosmetics include underarm deodorants, face powder, lipstick, nail polish, perfume, skin creams, most shampoos and some toothpastes.

The New Shorter "The art of adorning or beautifying the Oxford English body. A preparation for use in beautifying Dictionary the face, skin or hair. Intended merely to improve appearances; superficial."

The Law Lexicon "Cosmetic. A preparation to be applied to Dictionary human body for the purpose of beautifying, preserving or cleansing."

The New "Cosmetic, any of several preparation Encyclopaedia (excluding soap) that are applied to the Britannica human body for beautifying, preserving, or altering the appearance or for cleansing, colouring, conditioning, or protecting the skin, hair, nails, lips eyes, or teeth. Some of these products are of great antiquity, others areofrecent development."

Words and Phrases "Cosmetic is any external application Permanent Edition intended to beautify or improve the complexion, skin, or hair, including hair oils, dyes and dressings, tooth pastes, washes and dentifrices and toilet soaps."

A New English Cosmetic. A preparation intended to Dictionary on beautify the hair, skin, or complexion." Historical Principles

Medicine has been defined as follows: Random House "Medicine"-1. Any substance or Dictionary substances used in treating disease or illness; medicament; remedy. 2. The art or science of restoring or preserving health or due physical condition, as by means of drugs, surgical operations or appliances, manipulations, etc. often divided into medicine proper, surgery and obstetrics. 3. The art or science of treating disease with drugs or curative substances, as Distinguished from surgery and obstetrics. 4. The medical profession..."___________

Corpus Juris "Medicine", A technical and generic term, Secundum, Volume- derived from ''mederi''. It has frequently 57 at page 1042 been defined by eminent lexicographers of medical words and terms, and is susceptible of two distinct meanings."

Pocket Medical "Science or art of healing, specially as Dictionary by Nancy distinguished from surgery and oblitries. Roper A therapeutic."

Websters Third "A substance or preparation used in International treating disease American Indian give Dictionary, Vol II control over natural, or magical forces to Act as protective or healing charm"._______

Chamber Dictionary "Medicine N. any substance used (esp. internally) for the treatment or prevention of Disease; a drug. Medicinal used in medicine Curative, relating to Medicine." Oxford Dictionary "Medicine, substance esp one taken internally, used in medicine in theart of restoring and preserving health esp. by means of remedial substances and regulation diet etc. as opposed to surgery and obsterics."

7. Now let us examine various decisions of the Apex Court and the various High Courts in which the principle of classification of goods have been laid down and the word "Cosmetic and toilet preparation and Medicine" have been considered with reference to the product.

8. The Hon''ble Supreme Court in the case of Ram Avtar Budhai Prasad v. Assistant Sales Tax Officer, 12 STC 286 held that the word ''vegetable'' in Schedule of C.P. and Berar Sales Tax Act must be construed not in any technical sense nor from botanical point of view but as understood in common parlance. In the case of Collector of Customs, Bombay Vs. Swastic Woollens (P) Ltd. and Others, . Hon''ble Apex Court held in para 4 "We are of the opinion that when no statutory definition is provided in respect of an item in this Customs Act or the Central Excise Act, this trade understanding, meaning thereby the understanding in the opinion of those who deal with the goods in question is the safest guide."

9. In the case of Commissioner of Sales Tax v. Sarin Chemical Laboratory reported in 24 STC 406, the question was whether the tooth paste and tooth powder was medicine or toilet requisite or medicine. The Division Bench of this Court held that it is a matter of common knowledge that toothpaste or tooth powder is an essential item of toiletry in the modern life. The Division Bench held as follows:

"It is a matter of common knowledge that tooth paste and tooth power is an essential item of toiletry in modern life. The manufacturers of dentifrices like tooth paste, tooth powder invariably claim medicinal property for their products and some of them do possess prophylactic and remedial properties but whether they do or do not possess medicinal properties claimed by their manufacturers, the fact remains that they are used for dental cleanliness which is an essential Act of toilet. In fact, medicinal properties are claimed even in respect of large number of items of cosmetics such as lotions, creams, snows and powders but that does not mean that such article ceased to belong to the range of cosmetics and became medicines. The word ''medicine'' means also is a word of every day use and we all know what medicine means. Act of brushing one''s teeth with tooth paste or tooth powder is certainly is not the same thing as taking or using medicines."

10. The aforesaid decision has been approved by the Apex Court in the case of Sarin Chemicals Laboratories v. Commissioner of Sales Tax, reported in 26 STC 339. The Apex Court has upheld the test of common parlance in the classification of goods.

11. In the case of State of Gujarat v. Prakash Trading Co. reported in 30 STC 348, the Apex Court reiterated its earlier view taken in the case of Sarin Chemical Laboratory v. CST (supra) and held tooth paste as toilet requisite.

12. In the case of The State of Goa and Another Vs. Colfax Laboratories Ltd. and Another, the case of the assessee was that after shave lotion comes within the ambit of medicinal preparation and is not toilet preparation. The distinction between medicinal preparation and toilet preparation was pointed out by the Court, taking into consideration the scheme of the Medicinal and Toilet Preparation (Excise Duty) Act, 1955 and the nature of product involved, the Court came to the conclusion that after shave lotions are toilet preparations and not "Medicinal preparations". The relevant part of the judgment is quoted below:

"Therefore, in order to come within the ambit of "Medicinal preparations" the intended use of the article must be for treatment, mitigation or prevention of disease. The article must be used for the purpose of either curing or mitigating the disease. If the intended use of the article is not for any one of the aforesaid purposes, it cannot be described as a "Medicinal preparation". Therefore, the main question to be examined is whether ''shaving'' results in some kind of a disease which requires treatment by a medicine so that it may be cured or its effect is mitigated or at least an effort has to be made to prevent the happening of such disease by taking a preventive medicine. ''Disease'' means an impairment or the normal state or the living animal that interrupts or modifies the performance of the vital functions being a response to environmental factors (as malnutrition, industrial hazards, or climate) or to specific infective agents (as worms, bacteria, or viruses) or to inherent defects of the organism (as various genetic anomalies) or to combinations of these factors. The process of shaving does not cause any kind of impairment of the normal state of a person, it does not in any manner interrupt or modify the performance of any vital functions of the human body."

13. In the case of 1991 (33) ECR 217 the Apex Court held that Lal Dant Manjan which is being used for cleaning teeth only, is not a drug or ayurvedic medicine.

The relevant portion is quoted below:

"Cleaning teeth being an Act of daily toilet, dentifrices produced in the form of tooth powder used for cleaning teeth would be an article of Toilet as held by the Bombay High Court in the case of Commissioner of Sales Tax v. Vicco Laboratories 22 STC 169. Madras High Court in the case of V.P. Somasundra Mudaliar v. State of Madras (1963) 14 STC 943(MAD) also took the view that the tooth powder is a ''toilet'' requisite. Hon''ble Supreme Court in the case of Sarin Chemical Laboratory v. Commissioner of Sales Tax, V.P. AIR 1972 SC 65 also held that tooth powder in common parlance is considered as a toilet article. In this judgment, Supreme Court referred to the decisions of Allahabad, Bombay and Madras High Courts mentioned above and confirmed the view taken y those High Courts that the tooth powder is a ''toilet requisite''."

14. In the case of Commissioner of Sales Tax v. Shri Sadhana Aushdhalaya reported in 14 STC 813, the Division Bench of Madhya Pradesh High Court held Mahabhringraj hair oil as toilet article and also as cosmetic. It has been observed as follows:

"A hair oil is clearly not a pure and simple perfume and the question whether it has a sweet fragrance of a disagreeable odors is in no way determinative of its character as a Hair Oil. Every Hair Oil, whether it is manufactured scientifically with ingredients containing some medicinal prosperities of credely, is intended as a hari tonic for the prevention of dandruff, falling hair and baldness and for beautifying ultimately the hair and the appearance of the person using it. Hair oil may cool the brain or improve the system and induce sound sleep, but none the less it does not because of these qualities become a medicinal preparation. Now, the word "cosmetic" has been defined in Webster''s International Dictionary as meaning "any external application intended to beautify and improve the complexion, skin or hair". Other dictionaries also give the same meaning. The meaning of the word "toilet", as given in Webster''s International Dictionary, is "Act or process of dressing, especially, formerly of dressing hair, now usually cleansing and grooming of one''s person". A "toilet preparation" in any preparation which is intended to affect and conceivably to improve the bodily appearance. The words "cosmetics" and "toilet", being words of everyday use, must be construed not in any technical or scientific sense but as understood in common parlance and in commercial language. A hair oil intended to be applied to the hair and supposed to Act as a hair tonic and no prevent dandruff, falling hair and baldness and to cool the brains does not cease to be a hair oil merely because it is manufactured and sold by a person dealing in medicines and according to a process more complex than used in the manufacture of ordinary hair oil. The object of all hair oils is to tidy the hair, to promote luxuriant growth of hair and to prevent dandruff and falling hair and it cannot be denied that if a hair oil produce the effects proclaimed and claimed in regard to it, then the appearance of the person using it is undoubtedly improved. We have no doubt that the hair oil manufactured by the assessee is a "toilet article" and falls also within the meaning of the term "cosmetics".

15. In the case of Commissioner of Sales Tax v. Raj and Co., reported in 1985 UPTC 503 the Single Judge of this Court has held that merely because hair oil was manufactured out for several herbs having medicine properties it cannot be said the oil was in the nature of medicine. Learned Single Judge has relied upon the judgment of Madhya Pradesh High Court in the case of Commissioner of Sales Tax v. Shri Sadhna Aushdhalaya, reported in 14 STC 813 (supra) and in D.K. Sandu Bros. v. The State of M.P., reported in 4 STC 397 (supra).This court has observed as follows:

"whether the oil manufactured by the assessee is or is not an item of cosmetic or toilet of does not depend on the formula, according to which, it is manufactured. The oil manufactured by the assessee is made on several ingredients including herbs, which may be useful for removing dandruff, preventing hair falling and which may be conducive to cooling the mind. The question is how the product of the assessee is understood in public, whereby, the product is ultimately used? From the description given on the carton by the assessee as reproduced by the Assistant Commissioner (judicial) in his order, it is manifest that the oil manufactured by the assessee is to be applied mainly to human hair, and therefore, it is immaterial whether the assessee has named it is a hair oil or an oil simplicitor".

16. In the case of United Trading Agency v. Additional Commissioner of Commercial Taxes, Zone II, Bangalore reported in 104 STC 182, Karnataka High Court held that Vicco Vajradanti is not taxable as tooth paste being an ayurvedic medicine. In that case, on the basis of the material placed by the assessee, it has been held that goods were manufactured as drugs and marketed as drugs.

17. In the case of BPL Pharmaceuticals Ltd. v. Collector of Central Excise reported in 104 STC 164, the Supreme Court was concerned with "selsun" anti-dandruff preparation containing 2.5 percent of selenium sulphide, which is the full therapeutic limit permissible under the pharmacopoeia. The said product was manufactured under the drug licence as a medicine, put up as a medicine, used under doctor''s advice and sold through chemist''s shops on a doctor''s prescription. It was held medicine as it was understood in common parlance as medicine.

18. In the case of B. Shah & Co. v. State of Gujarat, reported in 28 STC 5, Gujarat High Court held nycil-dedicated powder as a medicine. Hon''ble Gujarat High Court on a consideration of definition of word "medicines" held as follows:

"It is thus clear that the word "medicine" is susceptible of two distinct meanings and that in its ordinary sense as applied to human ailments, it means something which is administered either internally or externally in the treatment of disease or the relief of sickness. It is now well settled that the names of articles, sales as well as purchases of which are liable to be taxed, given in a statute, unless defined in the statute must be construed not in a technical sense but as understood in common parlance, vide Ramavatar Budhai Prasad v. Assistant Sales Tax Officer. The word "medicine" appearing in Entry-13, Schedule-C, will therefore, have to interpreted not in a technical sense but as understood in common parlance. In its popular sense, "medicine" is a remedial agent, a substance which may be sold in various forms such as liquid, tablets, capsules or powder, which is administered in the treatment of disease and which has the property of curing or remedying disease. This meaning also accords with the dictionary meaning to which we have just referred above. If this is the true meaning of "medicine" in popular parlance, many articles which may not be medicine technically or strictly so called would be covered by the wide ambit of the word "medicine" and we see no reason why Nycil powder, with its special qualities and attributes, its character and composition and its recommended or intended use as advertised by the manufacturers would not be covered within the meaning of the word "medicine" as understood in popular parlance".

19. In the case of Commissioner of Sales Tax v. S/S Balsara Hygiene Products Ltd., reported in 1986 UPTC 367, Odomos has been held as a medicine. This Court held:

"There cannot be dispute about the fact that Odomos is used only as mosquitoes repellent. The purpose is to save the human skin from mosquitoes which results in several infectious disease; and mostly Malarial Fever etc. It is true that it is not used as a medicine to cure some disease or to heal up some wound but it is certainly a preventive medicine which prevents the body from being infected by the bite of the mosquitoes. One redeeming feature which has also been mentioned by the Tribunal in its order is that manufacturing of this commodity is controlled by the authorities under the Drug and Cosmetics Act, 1940, which also lends support to the contention of the respondent-assessee that it is used like a medicine".

"It has been contended by the department that Odomos is available even in general stores merchandise shops and is not sold at the Chemist shop exclusively. In my opinion the mere fact that Odomos is available even in general merchandise shops will not detract the substance from being used as a preventive medicine. It is well settled that common parlance meaning has to be applied while interpreting entries under the fiscal statute and the Courts have said time and again that it is not safe to be always guided by the dictionary or technical meanings. It is, therefore, not necessary to deal with various authorities cited by the learned Counsel for the assessee on the point. Since in common parlance Odomos is used as a medicine and is known as a medicine, in my opinion, the Tribunal was fully justified in holding that Odomos was covered under the notification dated 7th September, 1981".

20. SLP against the aforesaid judgment has been dismissed by Hon''ble Supreme Court which is reported in 65 STC 5 (FRCS).

21. In the case of Balaji Agency, Gorakhpur v. Commissioner of Sales Tax

reported in 1994 UPTC 184, Himani Boroplus Antiseptic Cream came up for considering before this Court and the Learned Single Judge has treated it as cosmetic. This Court observed as follows:

"As regards Emami Naturally Fair Cream, Himani Cold Turmeric Cream and Himani Boroplus Antiseptic Cream, the learned Counsel could not show that the view of the Tribunal that they are merely cosmetics was wrong. He contended that several medicinal herbs etc. are used for preparing these items and they are, therefore, medicines. Every cosmetic usually has some medicinal properties for the care of the skin, teeth, hair etc. and simply because they have some medicinal properties, they can not be treated as medicines. Whether a thing is cosmetic or medicine has to depend on its general use and such creams are generally used for skin care and not for treatment of any disease of skin. I, therefore, do not find any force in the contention that the Tribunal, was in error in holding these items to be cosmetics."

22. Much reliance has been placed on the decision of the Apex Court in the case of Union of India and Ors. v. G.D. Pharmaceuticals Limited and Anr. reported in 118 STC 19 in which Boroline has been treated as medicine and not as cosmetic or a toilet preparation under the Central Excise Tariff Act, 1985. In the said case, the Apex Court observed, " the contextual facts reveal that the product in question contains Boric acid with Zinc oxide which cannot possibly be termed to be a cosmetic item. In any event, the Learned Trial Judge has gone into the matter very carefully and detailed out the reason for his conclusion that Boroline cannot but be termed to be a medicine and not a cosmetic product. In that case, the learned Trial Judge while dealing with the matter recorded the findings that "Boroline" is an antiseptic boric ointment and the chemical composition was Boric acid I.P. one percent, Zinc oxide I.P. three percent, While petroleum jelly I.P. and Lanolin anhydrous I.P. Q.S. Before the Apex Court, the entry of item No. 14 F of the Central Excise Tariff Act, 1985 was under consideration. Therefore, this judgment is based on the composition of the Boroline and is of no help to the assessee in the present case.

23. West Bengal Taxation Tribunal while dealing with the entry of cosmetic under the West Bengal Sales Tax Act held Boroline is a chemical and not drug or proprietory medicine. However, the aforesaid decision of the West Bengal Taxation Tribunal has not been upheld by the Apex Court in the case of G.D. Pharmaceuticals Ltd. v. State of West Bengal and Ors. reported in 1998 UPTC 1205 In view of the decision of the Apex Court dated 15th September, 1997 in SLP (C) No. ...(CC.5883/97), Union of India and Ors. v. G.D. Pharmaceutical Ltd. and Anr. (supra).

24. As stated earlier, the decision is of no help to the assessee in the present case because in the case of Union of India and Ors. v. G.D. Pharmaceutical Ltd. and Anr. (supra), the Apex Court held that Boroline is a medicine on the basis of its composition.

25. Reliance is also placed on the decision in the case of Commissioner of Commercial Taxes, Madhya Pradesh v. Dawar Brothers, Indore reported in 1998 UPTC 1211 in which the Madhya Pradesh High Court has held that Vicco Vajradanti paste and powder as drug and medicine following the decisions of the Karnataka and Bombay High Courts. In that case, it was found that Vicco Vajradanti paste and powder or face cream posses medicinal properties for the treatment of tooth decay, swollen and bleeding gums and periodical disorder of teeth.

26. In the case of Commissioner of Central Excise v. Sharma Chemical works reported in 2004 24 NTN 28 in which Banphool oil has been held as ayurvedic medicine under the Central Excise Tariff Act, 1985. The revenue has treated it as perfumed hair oil on the ground that it contains 98 percent Til oil and only 2 percent Ayurvedic ingredient. The Apex Court held as follows:

"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 falls within a particular tariff item is always on the Revenue. The 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. We are also in agreement with the submission of Mr. Lakshmikumaran that merely because the percentage of medicament in a product is less, does not 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, bight 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.

Another aspect to be kept in mind is that the Revenue is bound by the circulars issued by the Board. The Board circular dated December 5, 1991, clearly stipulates that in case of doubt the matter should be referred to the Drug Controller. The matter was referred to the Drug Controller who, as stated above, has opined that it is an Ayurvedic medicament. If the Department was still entertaining any doubts, they could have referred the matter to the Adviser, Ayurveda/Sub-Commissioner in the office of Drug Controller, Director General of

Health Services, New Delhi. This was not done."

27. The aforesaid decision is also of no help to the assessee as in that case, the Drug Controller opined that it is an Ayurvedic medicament and it was found 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 was registered with Drug Controller and was being manufactured Under a drug licence. It was further found that 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, which could not be discharged.

28. In the case of Deys Medical Stores Limited. v. Commissioner, Trade Tax, U.P. reported in 2004 24 NTN 222, Keo Karpin hair vitaliser, Baby oil, massage oil and Antiseptic cream has been held covered under the category of "medicines and Pharmaceutical preparation" In that case, it was found that Baby oil and Massage oil are used for strengthening bones, which are not on the surface of the body, but are the internal parts of the body. So far as Antiseptic cream is concerned it was found that it was protective and smoothing emollient for chopped skin, crackednipples, cuts and dry skin diseases. With regard to Keo Karpin hair vitaliser, is concerned, it was found that it is used to prevent untimely fall of hair and to remove dandruff.

29. On the question of classification of product in the rival entries, Chapters 30 and 33 of the Central Excise Tariff Act, 1985, the Supreme Court in the case of Alpine Industries Vs. Collector of Central Excise, New Delhi, laid down the principles of classification after going through the Pharmaceutical and Medical Literature produced before it in respect of a product namely, ''Lip Salve''. They are- (a) The certificate issued by the user (In that case the Army authorities) and the chemical ingredients of the product are not decisives on the question of classification of the product for levy of excise duty, (b) Commercial parlance has to be applied. (c) The mere fact that the product has some curative effect is not enough to classify the product as a medicament. (d) Rules of interpretation and chapter notes are the guides to determine classification of a product, (e) Preparation of chapter 33 even if they have therapeutic values are excluded from chapter 30 (note l(d) to chapter 30). (f) Medicaments are defined in note 2(1) to mean ''goods which are either products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic; and (g) Preparations which have a subsidiary curative or prophylactic value clearly fall under entry 33.03 to 33.07 as per note No. 2 under chapter 33.

30. In my opinion, on the consideration of various decisions and Dictionary meanings referred hereinabove following aspect are relevant for the classification of product under the entry "cosmetic or toilet preparation" and'' medicine.

(i) How product is known in common parlance and in commercial sense.

(ii) Mere fact that the product has some curative or preventive effect is not enough to classify the product as a medicament,

(iii) Mere fact that the product is being manufactured under the Drug Licence is not enough to classify the product as medicine,

(iv) Language of the entry has to be given effect,

(v) How the product is known in scientific sense or technical sense is not much relevant.

(vi) Dictionary meaning is a good guide but not conclusive, (vii) For being a medicine a product must have a effect either to cure the disease or to prevent and intend use must be for treatment, mitigation or prevention of disease and in common parlance and commercial sense known as medicine

(viii) Cosmetic and toilet preparation are product which is used for beautification or care of face, skin, hair, nails, eyes or brow and are known as cosmetic and toilet preparation in common parlance and commercial sense.

(ix) Onus lies on the revenue to prove that product falls under particular entry.

31. Himani Boroplus is commonly and generally available in a cosmetic or general merchandise shop and not in a medicine shop. It is generally and commonly used during winter to protect skin and to make it smooth. It is commonly known as cosmetic and not as a medicine. It may have some antiseptic effect but that will not classify it as medicine. It is not intended to be used for treatment mitigation or prevention of disease. Entry of cosmetic is much wide to include all cosmetic not only used for beautification but also for care of skin. A product, which is used for care of skin must necessarily have some antiseptic effect but that will not take out the product from cosmetic and to bring under medicine.

32. For the reasons stated above, 1 have no manner of doubt that Himani Boroplus is classifiable as ''cosmetic'' and liable to tax accordingly. 1 fully agree with the view taken by this Court in the case of Balaji Agency v. CST (supra).

33. In the result, revision is allowed. The order of the Tribunal is set aside. Tribunal is directed to pass appropriate order u/s 11(8) of the Act.