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THE STATE OF GOA AND ANR.

v.
M/S. COLFAX LABORATORIES LTD. AND ANR.

OCTOBER 29, 2003

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[S. RAJENDRA BABU AND G.P. MATHUR, JJ.]

Medicinal and toilet Preparations (Excise Duty) Act, 1955—Section 2(g) and (k)—After shave lotion—Manufactured under a licence for manufacture of cosmetic products—Classification—Whether it is 'toilet preparation' or 'medicinal preparation'—Held: Since the good is not for diagnosis, treatment, mitigation or prevention of any disease or disorder, it not being a drug and hence cannot come within purview of 'medicinal preparation'—Duty liable to be levied on it as a 'toilet preparation'—Drugs and Cosmetics Act, 1940—Section 3(aaa)—Drugs and Cosmetics Rules, 1945—Chapter VII.

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Medicinal and Toilet Preparations (Excise Duties) Rules, 1955—Rules 11 and 12—After Shave Lotion—Duty on—Paid by manufacturer till 1984 as toilet preparation—After the order from Excise Commissioner duty paid as medicinal preparation—Notice under Section 12 in 1991 demanding balance duty on the ground that duty should have been paid as toilet preparation—High Court held that the notices issued would be construed under Rule 11—On appeal, held: Order of Commissioner directing to pay the duty as medicinal preparation being a nullity having been passed without jurisdiction is liable to be ignored and Revenue entitled to recover the deficiency in duty w.e.f. the date duty was not paid—Since the duties had not been short levied through inadvertence, error, collusion or misconstruction on the part of Excise Officer or through misstatement on part of owner, Rule 11 is not applicable—There being no specific provision for such case, Section 12 will apply.

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Central Excise Act, 1944—Section 4(4)(d)—Excise duty—Rate of—Calculation—Held: Has to be calculated applying the formula laid down in Section 4(4)(d).

**Respondent-Company manufactured After Shave Lotion, under
H a Licence under Medicinal and Toilet Preparations (Excise Duties) Act,**

1955 for manufacture of cosmetic products. Till the year 1984 the excise duty on the product was on the basis of it being a toilet preparation. In 1985 company moved an application before commissioner of Excise for reclassification of the product as a 'medicinal preparation' for the purpose of levy of excise duty. Excise commissioner issued show cause notice to the company and then by order dated 23.3.1985 classified the same as 'medicinal preparation'. Another company which manufactured After Shave Lotion under the loan licence with the company. The licence issued to it was for manufacture of cosmetic products. The company started paying duty on the product at the rate applicable to 'medicinal preparations.'

In 1991 Commissioner of Excise issued notices under Rule 12 of Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 to the Companies demanding balance of excise duty on the ground that the duty should have been paid as 'toilet preparation'. The Commissioner, after hearing the parties passed the order holding that After Shave Lotions were toilet preparations. Writ Petition against the order dismissed by High Court, holding that the products are toilet preparations and Revenue was entitled to recover short paid duty on account of erroneous classification of the product. However, it held that the notices issued would be construed in exercise of Rule 11 of the Rules and hence the Revenue was entitled to recover the duty within a period of 6 months immediately proceeding the date of issue of each of the notices, and that quantification of duty will have to be worked out by applying the formula as laid down in Section 4(4)(d) of Central Excise Act, 1944, and consequently excise duty will have to be deducted from the wholesale price and the figure arrived at would be the value of the excisable goods. Hence the present appeals.

The issues before this Court are :

1. Whether the products in question are 'medicinal preparation' or 'toilet preparation'?

2. Whether the notices issued by Excise Commissioner should be treated to be one under Rule 11 or Rule 12 of Medicinal and Toilet Preparations (Excise Duties) Rules, 1956?

A 3. What would be the formula for quantification of the duties?

Dismissing the appeal of the Company and allowing that of the State, the Court

B HELD : 1.1. 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. If the intended use of the article is not for any one of the aforesaid purposes, it cannot be described as a 'medicinal preparation'. [1060-D-E]

C 1.2. 'Disease' means an impairment of the normal state of 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. On a plain interpretation of the statutory provisions, an after shave lotion (ASL) cannot come within the ambit of a "medicinal preparation" as defined in Section 2(g) of Medicinal and Toilet Preparations (Excise Duty) Act, 1955. The definition of the terms 'cosmetic' and 'drug' in Drugs and Cosmetics Act will also show that until the intended use of the article is for diagnosis, treatment, mitigation or prevention of any disease or disorder, it cannot be a drug. [1060-F-H, 1061-B, 1061-F]

F 1.3. No authoritative scientific text has been placed before the Court to show that only on account of a marginal increase of alcohol content to 62% an ASL will acquire any such property so as to make it a medicinal preparation within the meaning of Section 2(g) of the Act. The scientific literature relied upon by the company-manufacturer regarding the properties of the alcohol cannot be a safe guide to determine the characteristic of the products in question. [1061-H, 1062-A]

G 1.4. In view of its advertisement stating therein that the Company was engaged in manufacture of cosmetics (such as also the product in

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issue) till as late as December, 1990 the Company itself was giving out that it is engaged in manufacture of cosmetics and not of any medicinal preparation. [1062-E-F] A

BPL Pharmaceuticals Ltd. v. Collector of Central Excise, [1995] Supp. 3 SCC 1, distinguished. B

2.1. The licences for manufacture of both the ASLs were as a cosmetic product and they were throughout renewed for manufacture of cosmetic product. Section 18(c) of the Drugs and Cosmetics Act clearly lays down that no person shall manufacture any drug except under and in accordance with the licence issued for such purpose. manufacture of drugs without a licence is an offence under Section 27 of the Drugs and Cosmetics Act. If as asserted by the company, it was manufacturing a drug or medicinal preparation it was clearly committing an offence and was liable for punishment as it had no licence for the said purpose. There being no provision for a prior classification of product under the Act and the Rules made thereunder the entire proceedings commenced on the basis of the application given by the Company and culminating with the order of the Commissioner of Excise are wholly without jurisdiction. The order passed by the Commissioner of Excise on 23.3.1985 being without jurisdiction is a nullity in the eyes of law and is liable to be ignored. [1067-F-H] C D E

2.2. Rule 11 of the Rules will apply when duties or charges have been short levied through inadvertance, error, collusion or misconstruction on the part of an excise officer or through misstatement as to the quantity or description of such goods on the part of the owner. After the order dated 23.3.1985 had been passed by the Commissioner of Excise, the concerned Excise Officer who made the relevant entries in Form A.R.-2 submitted by the Company could not have taken a different view and had to proceed on the footing that ASL, was a medicinal preparation. Being a subordinate officer he was fully bound by the order of the highest excise authority of the State. Thereafter, till 1991 when notices were issued and the matter was finally decided by the Excise Commissioner, he had to proceed treating the ASL as medicinal preparation. In the fact situation, the concerned Excise Officer who made entries in Form AR-12 will be the Excise Officer for F G H

A the purposes of Rule 11 and 12 as the matter was not dealt with by any other authority. In such circumstances it cannot be held that the duties or charges had been short levied through inadvertence, error, collusion or misconstruction on the part of the concerned Excise Officer or through misstatement as to the quantity or description of such goods on the part of the owner. Hence, Rule 11 of the Rules can have no application to the facts of the case. [1068-D-H, 1069-A]

2.3. Rule 12 confers residuary powers for recovery of sums due to Government. There being no specific provision for a case like the present one for collection of duty which has been short levied, the provisions of Rule 12 of the Rules will be applicable. There is no period of limitation prescribed under Rule 12. In view of the fact that the order dated 23.3.1985 of the Commissioner of Excise was an order passed wholly without jurisdiction and consequently was a nullity, the Government is entitled to recover the deficiency in duty w.e.f. the date the duty was not paid. [1069-B-D]

3. As regarding qualification of duties the view of the High Court that the phrase 'ad valorem' appearing in the column 'rate of duty' in the Schedule appended to the Act refers to the value of the excisable goods and; therefore, it will have to be worked out by applying the formula as laid down in Section 4(4)(d) of Central Excise Act, is perfectly correct and calls for no interference. [1069-G-H, 1070A-B]

F CIVIL APPELLATE JURISDICTION : Civil Appeal No. 414 of 2000.

From the Judgment and Order dated 1.4.99 of the Bombay High Court at Goa, Panaji in W.P. No. 337 of 1998.

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C.A. No. 415 of 2000.

H Mukul Rohtagi, Additional Solicitor General, M.S. Usgaoncor, Dhruv Mehta, Ms. Shalini Gupta, Mohit Chaudhary and S.K. Gupta for the Appellants.

Ashok H. Desai, Vikram Nankani, Ms. Ruby Singh Ahuja, R.N. A
Karanjawala, Mrs. Manik Karanjawala and Ms. Pragya for the Respondents.

The Judgment of the Court was delivered by

G.P. MATHUR, J. : 1. M/s Colfax Laboratories (India) Ltd. and B
State of Goa have preferred these appeals by special leave against the
judgment and order dated 1.4.1999 of High Court of Bombay (Goa Bench),
by which the writ petition preferred by M/s Colfax Laboratories (India)
Ltd. was partly allowed.

2. M/s Colfax Laboratories (India) Ltd. (for short 'Colfax') was C
granted a licence to manufacture various types of cosmetics including after
shave lotion under the trade mark 'Old Spice' on 15.4.1968 under the
Drugs and Cosmetics Act. A licence under the Medicinal and Toilet
Preparations (Excise Duties) Act, 1955 (for short 'the Act') in form L- D
1 for manufacture of 'Old Spice' after shave lotion and cologne for men
as toilet preparations was granted on 1.4.1969. Till the end of the year 1984
excise duty on 'Old Spice' after shave lotion (hereinafter called as 'ASL')
was paid on the basis that it was a toilet preparation. On 14.1.1985 Colfax
moved an application before the Commissioner of Excise, Government of
Goa for reclassification of Old Spice ASL as a 'medicinal preparation' E
falling under Tariff Item No.1(i)(b) of the Schedule to the Act for the
purpose of levy of excise duty. The Excise Commissioner vide his order
dated 23.3.1985 classified the same as 'medicinal preparation'. Subsequently,
by the order dated 12.6.1985 Old Spice ASL was classified as falling within
the ambit of Item No.1(i)(b) of the Schedule. Colfax thereafter made F
application for refund of excess amount of the excise duty paid after
23.3.1985 which was allowed by the Commissioner of Excise and orders
for refund of the excess amount of the excise duty were passed.

M/s PJM Pharmaceuticals Pvt. Ltd. moved an application before the
Drugs Controller, Government of Goa on 14.1.1989 for manufacture of G
some cosmetic products including 'Blue Stratos' ASL under the loan
licence with M/s Colfax Laboratories (India) Ltd. which was approved and
a licence was issued on 13.2.1989. The Excise Commissioner vide order
dated 12.10.1989 approved the price inclusive of duty, the duty component
thereon as well as the maximum price for the products. M/s PJM H

A Pharmaceuticals Pvt. Ltd. started paying duty on Blue Stratos ASL at the rate applicable to medicinal preparations.

B 3. On 15.5.1991, the Commissioner of Excise, Goa issued a notice under Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 to Colfax to pay balance of excise duty amounting to Rs.17,77,16,361.20 (Rupees seventeen crore, seventy-seven lakh, sixteen thousand, three hundred sixty one and paise twenty only) within 30 days from the date of receipt of notice on the ground that w.e.f. 1.4.1985 the company had paid excise duty on Old Spice range of ASLs as medicinal preparation though it should have paid duty as toilet preparation. On C 13.3.1991, a notice was issued to M/s PJM Pharmaceuticals Pvt. Ltd. to pay balance of excise duty amounting to Rs.92,43,684.08 (Rupees ninety two lakh, forty three thousand, six hundred eighty four and paise eight only) within 30 days from the date of receipt of notice on the ground that it had paid excise duty on Blue Stratos ASL as a medicinal preparation D though it should have paid duty as toilet preparation.

4. Colfax then filed Writ Petition Nos.109 of 1991 and 351 of 1991 challenging the aforesaid notices before the Bombay High Court (Goa Bench) which were disposed of with a direction to the Excise Commissioner E to treat the demand notices as show cause notices and thereafter to pass a final order after giving the Company an opportunity of hearing. It was left open for the Excise Commissioner to supplement the said notice by additional grounds or materials, if he so desired. Thereafter, supplementary memorandum were issued by the Excise Commissioner on 6.9.1991 and F 30.9.1991 to which Colfax gave a reply. The Excise Commissioner after hearing the parties gave his decision on 7.11.1991 which was challenged in appeal by the State Government and Colfax preferred Writ Petition No.84 of 1992 before the High Court. The High Court by its order dated 21.12.1994 directed the Excise Commissioner to decide all the issues afresh after giving an opportunity of hearing to the company. The Excise G Commissioner, after hearing the parties passed a detailed order on 12.8.1998 holding that after shave lotions were toilet preparations and the company was liable to pay excise duty as mentioned in the demand notices dated 13.3.1991 and 15.5.1991, which was challenged by Colfax by filing Writ H 1.4.1999 has held that after shave lotions are toilet preparations and the

Revenue was entitled to recover short paid duty on account of erroneous A
classification of the aforesaid goods. The notices issued will have to be
construed in exercise of power under Rule 11 of the Rules. Thus, the
Revenue would be entitled to recover short paid duty on the goods cleared
for which the duty was short paid within a period of six months
immediately preceding the date of issue of each of the notices. It has been B
further held that the phrase 'ad valorem' appearing in the column 'rate of
duty' in the Schedule appended to the Act refers to the value of excisable
goods and, therefore, it will have to be worked out by applying the formula
as laid down in Section 4(4)(d) of the Central Excise Act, 1944
and consequently, the excise duty will have to be deducted from the C
wholesale price and the figure arrived at would be the value of the excisable
goods.

5. M/s Colfax has preferred Civil Appeal No.415 of 2000 challenging
the finding of the High Court that 'Old Spice' and 'Blue Stratos' ASLs are D
toilet preparations and not medicinal preparations. The State of Goa has
preferred Civil Appeal No.414 of 2000 challenging the remaining part of
the order of the High Court, wherein the notices have been directed to be
treated to be under Rule 11 of the Rules and their right to recover the short
paid duty has been restricted to a period of six months immediately
preceding the date of issue of notices and also the direction regarding E
manner of calculation of excise duty out of the wholesale price at which
the goods in question were sold.

6. We will first consider the appeal preferred by Colfax, wherein
challenge has been made to the finding of the High Court that ASLs are F
not medicinal preparations but are toilet preparations. Shri Ashok Desai,
learned senior counsel for Colfax has submitted that the term 'medicinal
preparation' has been defined in Section 2(g) of the Act and it includes
all drugs which are a remedy or prescription intended to be used for or in
the treatment, mitigation or prevention of disease in human beings or
animals. 'Toilet preparation' has been defined in Section 2(k) of the Act G
and it means any preparation which is intended to be used in the toilet of
the human body or any substance intended to cleanse, improve or alter the
complexion, skin, hair or teeth and includes deodorants and perfumes.
Learned counsel has submitted that the basic difference between the
medicinal preparation and toilet preparation is the intent and purpose for H

- A which it is used. If the article is used for the treatment, mitigation or prevention of disease, it is a medicinal preparation but if it is used to cleanse, improve or alter the complexion, skin, hair or teeth, etc. then it is a toilet preparation. According to Colfax its ASL contains alcohol - 62%, Propylene glycol - 5%, Benzyl alcohol - 0.5% and the remaining is water.
- B Learned counsel has further urged that the concentration of alcohol in various ASLs manufactured by other companies is less than 60% whilst that manufactured by Colfax it is 62% and in fact actual test results show that it is 63%. Where the alcohol is less than 60% in any ASL, it cannot have any medicinal properties and it will be treated as a toilet preparation, but where the concentration is more than 60%, it will have medicinal
- C properties. In this connection Shri Desai has referred to British Pharmacopoeia Codex and Remington Pharmaceutical Science to show that if strength of alcohol increases beyond 60% to 90% and beyond 90%, it has no microbiolisation. Reference has also been made to Martindale Pharmacopoeia to show that benzyl alcohol has also bactericidal properties.
- D Propylene glycol is a humectant and it promotes retention of moisture. It has been urged that after shaving skin may get fungus and, therefore, propylene glycol is used as moisturizer. Ethyle alcohol in a concentration of 62% to 65% has bactericidal effects. It is astringent to prevent penetration of bacteria and, therefore, it has antiseptic properties. Propylene
- E glycol is a humectant as well as inhibitant to fungus. Benzyl alcohol is a mild anaesthetic and has antiseptic properties. Therefore, composition of these products in the above mentioned proportion, it is contended, makes Old Spice and Blue Stratos ASLs made by the company as medicinal products.
- F 7. Shri M. Usgaonkar, learned Senior Advocate for the State of Goa, has submitted that Colfax had a licence to manufacture cosmetics and even the licence applied in the year 1989 for manufacture of Blue Stratos ASL for PJM was also for a cosmetic product. Colfax also admits that such after shave lotions which have a concentration of alcohol below 60% are toilet
- G preparations. Merely because the alcohol content is slightly increased and it goes up to 62% or 63%, it would not mean that the same will become a medicinal preparation. Learned counsel has submitted that ASL is basically an aqueous alcohol solution containing a perfume. The popular brands of ASLs in UK contain 50% to 70% of ethyl alcohol by weight and
- H in United States the volume of alcohol recommended for ASLs is 40% to

60%. Propylene glycol is preferred because it has low viscosity and high volatility. Learned counsel has also laid stress upon the fact that after shave lotions contain perfume as a key component and normally perfume is not used in a medicinal preparation. It has thus been urged that the products Old Spice and Blue Stratos manufactured by Colfax are pure and simple toilet preparations and cannot be said to be medicinal preparations by any stretch of imagination.

8. In order to appreciate the contention raised by learned counsel for the parties, it is necessary to have in mind the relevant provisions of the Statute under which the licence to manufacture the product is granted and the excise duties are levied. Section 2(a), 2(c), 2(g) and 2(k) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 read as under :

Section 2 (a) 'alcohol' means ethyl alcohol of any strength and purity having chemical composition C^2H^5OH ;

(c) 'dutiabale goods' means the medicinal and toilet preparations specified in the schedule as being subject to the duties of excise levied under this Act;

(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;

(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.

Sub-section (1) of Section 3 of the Act is the charging section and it lays down that there shall be levied duties of excise at the rates specified in the Schedule on all dutiable goods manufactured in India. Sub-section (3) of Section 3 lays down that subject to other provisions contained in the Act, the duties aforesaid shall be collected in such manner as may be

- A prescribed. Item 1(i)(b) of the Schedule provides that the rate of duty on 'allopathic medicinal preparations' (other than patent or proprietary medicines) would be Rs.10 per litre of pure alcohol content. Item No.4 of the Schedule deals with toilet preparations and at the relevant time rate of duty for toilet preparations containing alcohol was 100% ad valorem.
- B Section 6 of the Act lays down that no person shall engage in the production or manufacture of any dutiable goods or of any specified components, parts or ingredients of such goods except under the authority and in accordance with the terms and conditions of a licence granted under the Act. Section 18(c) of the Drugs and Cosmetics Act, 1940 lays down that no person shall himself or by any other person on his behalf
- C manufacture for sale or for distribution or sale or stock or exhibit or offer for sale or distribute any drug or cosmetic except under and in accordance with the conditions of the licence issued for such purpose. The definition of the term 'medicinal preparation' in Section 2(g) of the Act shows that it will include all such drugs which are a remedy or prescription prepared
- D for internal or external use of human beings or animals and all substance intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals. 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
- E used for the purpose of either curing or mitigating the disease after its symptoms have appeared or in prevention of any 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
- F 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 of the normal state of 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
- G 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. Many people
- H have been shaving regularly every day for 40-50 years but no one has ever

suffered any kind of a disease. If the process of shaving would have resulted in some kind of a disease, the best preventive measure to be adopted was not to shave. The number of persons who shave every day and have been shaving for years would run into crores even in our own country and except for a very insignificant percentage thereof, who belong to affluent class, no one uses any after shave lotion. But they have not suffered any disease. Therefore, on a plain interpretation of the statutory provisions an after shave lotion cannot come within the ambit of a "medicinal preparation" as defined in Section 2(g) of the Act. A B

9. Section 3(aaa) of the Drugs and Cosmetics Act defines a 'cosmetic' and it 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. Section 3(b) of the same Act gives a very exhaustive definition of 'drug'. Sub-clause (i) thereof lays down that drug may include 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. Sub-clause (ii) thereof lays down that drug will include such substances (other than food) intended to affect the structure or any function of human body or intended to be used for the purpose of 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. The definition of the terms 'cosmetic' and 'drug' in this Act will also show that until the intended use of the article is for diagnosis, treatment, mitigation or prevention of any disease or disorder, it cannot be a drug. C D E F

10. The technical material produced by Colfax shows that various kinds of after shave lotions (Aqua Velva, Park Avenue, Monarch, Emami,, etc.) generally contain concentration of alcohol below 60%. The only distinguishing feature pointed out by Colfax is that the alcohol content of the ASLs manufactured by it, viz., Old Spice and Blue Stratos is 62%. No authoritative scientific text has been placed before us to show that only on account of a marginal increase of alcohol content to 62% an ASL will G H

A acquire any such property so as to make it a medicinal preparation within the meaning of Section 2(g) of the Act. It may be noted that according to Colfax the ASLs manufactured by it contain alcohol - 62%, Propylene Glycol - 5%, Benzyl alcohol - 0.5% and the remaining 32.5% is water. They also contain some perfume. According to Harry's Cosmeticology,

B after shave lotion is basically an aqueous alcohol solution containing a perfume. The desired balance of 'mild astringency' and 'coolness' is achieved by controlling ratio of ethyl alcohol to water. Popular brands of after shave lotions in UK contain 50% to 75% of ethyl alcohol by weight. In the United States also volume of alcohol in after shave lotions range

C from 40% to 60%. It is necessary to emphasise that we are not concerned here with the properties of alcohol simplicitor but a solution which contains 62% alcohol and 33% water. The said solution on account of presence of water cannot yield the same result as that of alcohol simplicitor. Even a small percentage of presence of one ingredient may completely alter the chemical properties of another ingredient. Therefore, the scientific literature

D relied upon by the learned counsel for Colfax in support of his submission regarding the properties of the alcohol cannot be a safe guide to determine the characteristic of the products Old Spice and Blue Stratos.

11. There is another aspect of the matter which also deserves to be

E noticed. The Company (Colfax) issued an advertisement in December, 1990 inviting deposits from public for fixed period and offering 14% interest. In the details and particulars submitted as per the Companies (Acceptance of Deposits) Rule, 1975, it was stated that the Company is engaged in the manufacture of cosmetics such as Old Spice ASL, Cologne, etc. Therefore, till as late as December, 1990, the Company itself was

F giving out that it is engaged in manufacture of cosmetics and not of any medicinal preparation.

12. Shri Ashok Desai has placed great reliance in support of his submission on *BPL Pharmaceuticals Ltd. v. Collector of Central Excise*, [1995] Supp. 3 SCC 1, wherein the decision of CEGAT holding 'Selsun' Shampoo as a cosmetic product was reversed by this Court and it was held to be a drug or medicine. The judgment shows that the Court went into the chemical components of the article, the nature of use and the contents of the label on the bottle. The main factors which weighed with the Court

H were : (i) the article was used for treatment of a disease known as dandruff;

(ii) it was manufactured under a drug licence; (iii) the Food and Drugs Administration had certified it as a 'drug'; (iv) it was sold only on a doctor's prescription and was used as a medicine; (v) it was marketed as a patent or proprietary medicine through registered pharmacists who hold valid drug licence and not by any dealer like other shampoos; (vi) it was included as a drug in the US Pharmacopoeia and other standard books and treatises; and (vii) the label on the bottle specifically mentioned that it was a poison, should be used twice weekly and was for external use only and should be kept out of the eyes and away from the children. None of these factors are present in the case in hand and, therefore, the decision cited can be of no assistance at all to the company.

13. The Excise Commissioner, Goa, after a detailed consideration of scientific and technical material, has recorded a finding that ASLs manufactured by Colfax are 'toilet preparations' within the meaning of Section 2(k) of the Act. The High Court has also examined the matter threadbare and has arrived at the same finding. We find absolutely no reason to disagree with the view taken by the Excise Commissioner, who is an expert in the field. Therefore, the contention raised by learned counsel for Colfax that Old Spice and Blue Stratos ASLs are medicinal preparations and not toilet preparations, has no substance and has to be rejected.

14. The second question which requires consideration is whether the notices issued by the Excise Commissioner on 13.3.1991 and 15.5.1991 requiring Colfax to deposit the balance of excise duty should be treated to be one under Rule 11 or Rule 12 of the Rules. In the notices it is specifically mentioned that the same are being issued in exercise of power under Rule 12 of the Rules. The Excise Commissioner in his order dated 12.8.1998 held that the balance amount of excise duty has to be paid w.e.f. 23.3.1985, when the product was classified as medicinal preparation. The High Court has held that the notices should be treated to have been issued under Rule 11 of the Rules and the balance amount of excise duty can be recovered only for a period of six months immediately preceding the date of issue of each of the notices.

15. Shri Mukul Rohtagi, Addl. Solicitor General and Shri M. Usgaonkar, learned Senior Advocate for the State of Goa, have strenuously urged that the case in hand is squarely covered by Rule 12 of the Rules

A and the Excise Commissioner was fully justified in directing recovery of balance amount of duty w.e.f. 23.3.1985, when the order was passed holding the product ASL as a medicinal preparation and the company started paying excise duty on its basis and the view to the contrary taken by the High Court is not correct. Shri Ashok Desai, learned senior counsel for the company has, on the other hand, submitted that the case is covered by Rule 11 of the Rules and Rule 12, which is a residuary provision, can have no application and, therefore, the order passed by the High Court in that regard is perfectly correct and calls for no interference.

C 16. Before examining the rival contentions, it will be useful to take note of the scheme of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1955 (for short 'Rules'). Sub-rule (1) of Rule 9 provides that no dutiable goods shall be removed from any place where they are manufactured or any premises appurtenant thereto which may be specified by the Excise Commissioner in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Excise Commissioner may require. Rule 81 lays down that when the licensee desires to remove goods on payment of duty, he shall make an application in Form A.R.-2, in triplicate, to the officer-in-charge or the proper officer, as the case may be, at least twelve hours before he intends to remove the goods. The officer shall, thereupon, assess the amount of duty leviable on the goods and on production of evidence that the sum has been paid into a treasury or the sum has been debited to the account-current, as the case may be, shall allow the goods to be cleared. Sub-rule (2) of Rule 9 provides that if any dutiable goods are in contravention of Sub-rule (1) deposited in, or removed from, any place specified therein, the manufacturer thereof shall pay the duty leviable on such goods and shall also be liable to a penalty to be determined by the Excise Commissioner which may extend to two thousand rupees and such goods shall also to be liable to confiscation. Sub-rule (1) of Rule 40 and Rule 81 read as under :

H *Rule 40. Issue from a bonded manufactory* (1) Issues of alcoholic preparations and preparations containing opium, Indian hemp or other narcotic drugs and narcotics shall be made from a bonded manufactory on payment of duty. The licensee shall present

before the officer-in-charge an application in Form A.R.-2 signed by him or by his authorised representative. The officer-in-charge shall, after checking the entries and realizing the duty payable, allow the required quantities to be removed after issuing a permit :

Provided that issues to another bonded warehouse shall be made without payment of duty under proper security governed by the rules in Chapters VII and VIII.

Rule 81. Clearance on payment of duty. When the licensee desires to remove goods on payment of duty, he shall make an application in Form A.R.-2, in triplicate, to the officer-in-charge or the proper officer, as the case may be, at least twelve hours before he is intended to remove the goods. The officer shall, thereupon, assess the amount of duty leviable on the goods and on production of evidence that the sum has been paid into a treasury or the sum has been debited to the account-current, as the case may be, shall allow the goods to be cleared.

Form A.R.-2 is the prescribed proforma of application for clearance on payment of duty from bonded manufactory/warehouse and it is in three parts. The first part deals with the description of goods, their contents and the amount of excise duty. This portion has to be filled in by the owner of the bonded manufactory or his authorised agent. The second part is Assessment Memorandum, wherein the total number of containers, quantity of goods, rate of duty and total duty payable has to be mentioned and has to be signed by the officer-in-charge of the bonded manufactory/warehouse. The third part relates to the receipt of amount of excise duty in the treasury which has to be signed by the concerned officer of the treasury/bank. The combined effect of Rules, 9, 40 and 81 is that every time when a manufacturer or licensee desires to remove goods, he has to make an application in form A.R.-2 in triplicate to the officer-in-charge. The officer has to then assess the amount of duty leviable on the goods which has to be deposited in the treasury. The goods can be cleared only after payment or deposit of the assessed duty. If a manufacturer or licensee is aggrieved by an order of the Excise Officer, he has got a right of appeal to the Excise Commissioner or to the State Government, as the case may be, under Rule

A 127 of the Rules and there is a further right of revision under Rule 128. The scheme of the Medicinal and Toilet Preparations (Excise Duties) Rules is entirely different from Chapter VII-A of the Central Excise Rules, 1944, which deal with removal of excisable goods on determination of duty by producers, manufacturers or private warehouse. This chapter contains the provisions for the self removal of excisable goods. The rules in Chapter B VII-A permits an assessee to remove excisable goods without any physical supervision. The assessee has to himself determine the duty payable and clear the goods under a gate pass. He is required to file monthly returns of the goods cleared to the concerned Excise Officer. In essence, the provisions of these Rules enable the removal of notified excisable goods C by a manufacturer thereof on payment of a sum determined as duty on the basis of broad decisions given to him by approved officers of the department. The assessee has to file the declaration of the goods proposed to be manufactured by him giving the description thereof, the item number of the schedule to the Central Excise Tariff Act under which such goods D fall, the rate of duty leviable on each of such goods and such other particulars as may be prescribed by the Commissioner vide Rule 173-B of the Central Excise Rules, 1944. In fact, Rule 173-B specifically provides that the proper officer shall after such inquiry, as he deems fit, approve the list with such modifications as are considered necessary and return one E copy of the approved list to the assessee who shall, unless otherwise directed by the proper officer, determine the duty payable on goods intended to be removed in accordance with such list. Rule 173-B also provides that when the dispute about the rate of duty has been finalised and a modification of the rate or rates of duty is necessitated for any reason, the proper officer shall make such modification and inform the assessee F accordingly. Under the Medicinal and Toilet Preparations (Excise Duties) Rules, 1955, the Excise Commissioner has no independent power of classification. The Excise Officer has to assess the duty every time when the manufacturer or licensee applies in Form A.R.-2 for removal of goods. If the manufacturer or licensee is aggrieved by the assessment so G made, he can prefer an appeal under Rule 127 and has also a right of revision.

17. As mentioned earlier, Colfax moved an application on 14.2.1968 for grant of a cosmetic licence for Old Spice ASL. The Assistant Drugs

H Controller granted a cosmetics licence for manufacture of Old Spice ASL

on 15.4.1968. The licence was renewed from time to time as a toilet preparation. Colfax continued to pay excise duty on ASL as a toilet preparation till the end of 1984. It was for the first time on 14.1.1985 that Colfax moved an application before the Commissioner of State Excise, Government of Goa stating that their product ASL is essentially a medicinal preparation and should be classified under Tariff Item No.1(i)(b) of the Schedule appended to the Act and a prayer was made to reclassify the product. The Commissioner of Excise after noticing the contention of Colfax sent a reply on 24.1.1985 requiring Colfax to show cause as to why its request should not be rejected in toto. Colfax gave a reply and thereafter the Commissioner of Excise passed an order on 23.3.1985 holding that After Shave Lotion is to be classified as a 'Medicinal' preparation and not as a 'Toilet Preparation' under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 and the order shall be effective from the date of issue of the same.

M/s PJM Pharmaceuticals Pvt. Ltd. had moved an application before the Drugs Controller, Government of Goa on 14.1.1989 for manufacture of Blue Stratos ASL under a loan licence with M/s Colfax Laboratories (India) Ltd. and in this application they clearly mentioned that they want to manufacture cosmetic products. Colfax sent a letter to M/s PJM Pharmaceuticals Pvt. Ltd. on 2.2.1989 and in the last paragraph of the letter it was stated "We undertake further to keep record of alcohol consumed for the manufacture of your product and pay excise duty as specified by the State Excise Department at the time of dispatch on your behalf." In the licence issued by the Drugs Controller, Blue Stratos ASL was described as a cosmetic product. The licences for manufacture of both the ASLs namely Old Spice and Blue Stratos were as a cosmetic product and they were throughout renewed for manufacture of cosmetic product. At no stage Colfax had any licence to manufacture any medicinal preparation or drug. Section 18(c) of the Drugs and Cosmetics Act clearly lays down that no person shall manufacture any drug except under and in accordance with the licence issued for such purpose. A detailed procedure for grant of licence for manufacture of drugs is given in Chapter VII of Drugs and Cosmetics Rules, 1945. Manufacture of drugs without a licence is an offence under Section 27 of the Drugs and Cosmetics Act and the person so manufacturing is liable for punishment with imprisonment for a term which shall not be less than one year but may extend to two years with

A fine. If as asserted by Colfax it was manufacturing a drug or medicinal preparation it was clearly committing an offence and was liable for punishment as it had no licence for the said purpose. In spite of these facts a very strange procedure was adopted by the Commissioner of Excise, Goa in entertaining an application from Colfax for reclassifying its products, issuing a notice to it to show cause why its request should not be rejected and thereafter passing an order on 23.3.1985 classifying the ASL as a medicinal preparation and not as a toilet preparation under the Act. There was no requirement in law to issue a show cause notice before rejecting such an application. There being no provision for a prior classification of product under the Medicinal and Toilet Preparations (Excise Duties) Act and the Rules made thereunder the entire proceedings commenced on the basis of the application given by Colfax and culminating with the order of the Commissioner of Excise are wholly without jurisdiction. The order passed by the Commissioner of Excise on 23.3.1985 being without jurisdiction is a nullity in the eyes of law and is liable to be ignored.

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18. Rule 11 of the Rules will apply when duties or charge have been short levied through inadvertence, error, collusion or misconstruction on the part of an excise officer or through misstatement as to the quantity or description of such goods on the part of the owner. After the order dated 23.3.1985 had been passed by the Commissioner of Excise, Goa, the concerned Excise Officer who made the relevant entries in Form A.R.-2 submitted by Colfax could not have taken a different view and had to proceed on the footing that ASL was a medicinal preparation. Being a subordinate officer he was fully bound by the order of the highest excise authority of the State. Thereafter, till 1991 when notices were issued and the matter was finally decided by the Excise Commissioner, he had to proceed treating the ASL as medicinal preparation. In the fact situation, the concerned Excise Officer who made entries in Form AR-12 will be the Excise Officer for the purposes of Rule 11 and 12 as the matter was not dealt with by any other authority. In such circumstances it cannot be held that the duties or charge had been short levied through inadvertence, error, collusion or misconstruction on the part of the concerned Excise Officer or through misstatement as to the quantity or description of such goods on the part of the owner. Collusion means a secret agreement for a fraudulent purpose or a secret or dishonest arrangement in fraud of the rights of another. It is a deceitful agreement between two or more persons for some

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evil purpose, such as to defraud a third person of his rights. The concerned A
Excise officer who made the relevant entries in Form A.R.-2 and cleared
the goods at the spot being a subordinate officer had absolutely no option
but to act in accordance with the order dated 23.3.1985 of the Commissioner
of Excise. In these circumstances Rule 11 of the Rules can have no
application to the facts of the case. Rule 12 confers residuary powers for B
recovery of sums due to Government. It provides that where the Rules do
not make any specific provision for the collection of any duty or of any
deficiency in duty, if the duty has, for any reason, been short levied or
of any other sum of any kind payable to the collecting Government under C
the Act or the Rules, such duty, deficiency in duty or sum shall, on written
demand made by the appropriate officer be paid to such person and at such
time and place as the proper officer may specify. There being no specific
provision for a case like the present one for collection of duty which has
been short levied, the provisions of Rule 12 of the Rules will be applicable.
There is no period of limitation prescribed under Rule 12. In view of the D
fact that the order dated 23.3.1985 of the Commissioner of Excise was an
order passed wholly without jurisdiction and consequently was a nullity,
the Government is entitled to recover the deficiency in duty w.e.f. the said
date. The ratio of *Collector of Central Excise v. Cotspun Ltd.*, [1997] 7
SCC 633, reliance on which was placed by Shri Desai, can have no
application here as the said case turned on the interpretation of Rules 10, E
173-B and 173-C of Central Excise Rules, 1944, whereunder the whole
scheme is different as discussed earlier. The view taken by the Excise
Commissioner on this point in his order dated 12.8.1998 is, therefore,
perfectly correct. The High Court clearly erred in setting aside the order
of the Excise Commissioner and in directing that the notices be treated to F
have been issued under Rule 11 of the Rules. The order passed by the High
Court in this regard is, therefore, liable to be set aside.

19. The third point relates to the quantification of duties done by the
Excise Commissioner. The learned senior counsel for Colfax has submitted
that in case of a product which has a cum-duty price, the assessment is G
required to be done on the basis of wholesale price less excise duty payable,
as provided under Section 4(4)(d)(ii) of the Central Excise Act, 1944.
Learned Additional Solicitor and learned Senior Advocate for the State of
Goa have urged that the chart annexed to the show cause notices takes into
account the prices indicated by the manufacturer after excluding the duty H

A and its on this price that the excise duty has to be worked out. The High Court has placed reliance upon a decision of this Court in *Govt. of India v. Madras Rubber Factory*, (1975) 77 ELT 433 for computation of assessable value in a cum-duty price. It has held that the phrase 'ad valorem' appearing in the column 'rate of duty' in the Schedule appended to the Act refers to the value of the excisable goods and, therefore, it will have to be worked out by applying the formula as laid down in Section 4(4)(d) of Central Excise Act. We are of the opinion that the view taken by the High Court is perfectly correct and calls for no interference.

20. In the result, Civil Appeal No.415 of 2000 filed by M/s Colfax Laboratories (India) Ltd. is dismissed with costs. Civil Appeal No.414 of 2000 filed by State of Goa is partly allowed. The judgment and order of the High Court in so far as it holds that notices dated 13.3.1991 and 15.5.1991, though purported to have been issued under Rule 12, would have to be construed as having been issued in the exercise of powers under Rule 11 of the said Rules and that the Government is entitled to recover the short paid duty on the goods cleared only for a period of six months immediately preceding the date of each notice is set aside. The Government will be entitled to recover the entire amount of duty which has been short levied in accordance with the order of Excise Commissioner dated 12.8.1998.

K.K.F.

C.A. No. 414/2000 partly allowed.

C.A. No. 415/2000 dismissed.
