A M/S. DABUR (INDIA) LTD.

v.

COMMISSIONER OF CENTRAL EXCISE, JAMSHEDPUR

APRIL 1, 2005

B [S.N. VARIAVA, DR. AR. LAKSHMANAN AND S.H. KAPADIA, JJ.]

Central Excise Tariff Act, 1985—Chapter 30, Note 1(d) and Chapter 33:

C *Classification—'Janam Ghunti'—Assessee claiming that their product 'Janam Ghunti" is neither a distillate nor a solution but is an extraction—Held: The matter requires enquiry into the manufacturing process and composition of the product—Hence, Tribunal was right in remitting back the matter for fresh decision.*

D *Classification—'Lal Tail'—Assessee having the Drug Controller's licence for the product 'Lal Tail'—Ayurvedic Doctors prescribing Lal Tail for treatment of rickets also put on record—Thus Tribunal was right in holding that the product is a medicament and classifiable under chapter 30.*

Classification of goods—Basis of determination—Guiding factor—Held:
E *The product to be classified according to the popular meaning attached to it by its user—Resort not to be made to the scientific and technical meaning.*

Questions which arose for consideration in these appeals are whether the Tribunal was justified in remitting back the matter for fresh decision in respect of classification of the product 'Janam Ghunti' and whether
F **the Tribunal has rightly classified the product 'Lal Tail' under chapter Heading 33.04 of Central Excise Tariff Act, 1985.**

Partly allowing the appeals, the Court

HELD : 1. There is no infirmity in the Order of the Tribunal in
G **remitting back the matter to the original authority for fresh decision on classification of the product 'Janam Ghunti'. Chapter Note 1. (c) of Chapter 30 of Central Excise Tariff Act, 1985 states that Chapter 30 does not apply to aqueous distillates or aqueous solutions of essential oils even though they are suitable for medicinal uses. Further, under Chapter Note**

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1.(d) of Chapter 30 preparations of Chapter 33 would not fall under Chapter 30 even if they have therapeutic or prophylactic properties. The Tribunal has, therefore, correctly held that if 'Janam Ghunti' is an aqueous distillates or aqueous solutions of essential oils it would fall under Chapter 33 even though it may have therapeutic or prophylactic properties. The Appellants have claimed that their product 'Janam Ghunti' is neither a distillate nor a solution but is an extraction. However, this is a matter which requires inquiry into. Therefore, the finding of the Tribunal that this would require looking into the process of manufacture, the composition of the product and that classification of this product cannot be decided upon without chemical test of the product, is upheld. [146-C-F]

2. In classifying a product the scientific and technical meaning is not to be resorted to. The product must be classified according to the popular meaning attached to it by those using the product. The Appellants have shown that all the ingredients in the product 'Lal Tail' are those which are mentioned in Ayurvedic Text Books. This by itself may not be sufficient but the Appellants have shown that they have a Drug Controller's Licence for the product and they have also produced evidence by way of prescriptions of Ayurvedic Doctors, who have prescribed these for treatment of rickets. The Revenue has not made any effort and not produced any evidence that in common parlance the product is not understood as a medicament. Hence, the product would be a medicament and classifiable as such under Chapter 30. [150-C-F]

Shree Baidyanath Ayurved Bhavan Ltd. **v.** *Collector of Central Excise, Nagpur,* **(1996) 83 ELT 492 S.C.;** *Commissioner of Central Excise, Calcutta-IV* **v.** *Pandit D.P. Sharma,* **(2003) 154 ELT 324 SC;** *Commissioner of Central Excise, Calcutta* **v.** *Sharma Chemical Works,* **(2003) 154 ELT 328 SC and** *Commissioner of Central Excise, Nagpur,* **v.** *Vicco Laboratories,* **(2005) 179 ELT 17 SC, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7907 of 2002.

From the Judgment and Order dated 26.6.2002 of the Central Excise, Customs and Gold (Control) Appellate Tribunal Eastern Bench at Kolkata in F.O. No. A-692/2002/KOL/ in A. No. E/386 of 2001.

WITH

C.A. Nos. 6755, 6867/2003 and 1591 of 2005.

A V. Lakshmikumaran, Alok Yadav and Rajesh Kumar for the Appellant.

Rajiv Dutta, Sr. Adv., Tufail A.Khan, S. Beno Bencigar, P. Parmeswaran and B. Krishna Prasad with him for the Respondent.

The Judgment of the Court was delivered by

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All these Appeals can be disposed of by this common Judgment as the point involved is the same. The dispute is regarding classification of two items manufactured by the Appellants, namely, (1) Lal Tail; and (2) Janam Ghunti. The Tribunal has held that the product Lal Tail is classifiable under Chapter heading 33.04. As regards 'Janam Ghunti', the matter has been C remitted back to the original authority for a fresh decision.

We have heard the parties. In our view, there is no infirmity in the Order of the Tribunal insofar as it remits the matter back to the original authority for a fresh decision on classification of the product 'Janam Ghunti'. Chapter Note 1.(c) of Chapter 30 states that Chapter 30 does not apply to D aqueous distillates or aqueous solutions of essential oils even though they are suitable for medicinal uses. Further, under Chapter Note 1.(d) of Chapter 30 preparations of Chapter 33 would not fall under Chapter 30 even if they have therapeutic or prophylactic properties.. The Tribunal has, therefore, correctly held that if 'Janam Ghunti' is an aqueous distillates or aqueous solutions of E essential oils it would fall under Chapter 33 even though it may have therapeutic or prophylactic properties. The Appellants have claimed that their product 'Janam Ghunti' is neither a distillate nor a solution but is an extraction. However, this is a matter which requires inquiry into. We approve the finding of the Tribunal that this would require looking into the process of manufacture, the composition of the product and that classification of this product cannot F be decided upon without chemical test of the product. We, therefore, see no infirmity in the Order of the Tribunal to this extent and the same is upheld.

As regards 'Lal Tail', Mr. Lakshmikumaran has pointed out that this product has all the ingredients mentioned in Ayurvedic Text Books. The G product also has a Drug Controller's Licence. The Appellants have also filed evidence by way of prescriptions of Ayurvedic Doctors to show that their product has therapeutic or prophylactic properties and is used as a drug. As against this the Respondents have admittedly led no evidence or produced any material to show that in the market this product is not considered to be a drug.

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The Tribunal has held against the Appellants mainly on the basis of the decision of this Court in *Shree Baidyanath Ayurved Bhavan Ltd.* v. *Collr. of C. Ex., Nagpur,* reported in (1996) 83 ELT 492 S.C.. In this case the question was whether 'Dunt Manjan Lal' (Tooth powder) could be considered to be a medicament and as such eligible for exemption under Notification No. 62/78-C.E. This Court held that a medicine is ordinarily prescribed by a medical practitioner and is used for a limited time and not for every day use unless it is so prescribed to deal with a specific disease like diabetes. This Court has held that in interpreting taxing statute the scientific and technical meaning of the terms and expressions used in the tax laws is not to be resorted to and that goods are to be classifiable according to the popular meaning attached to them by those using the product. The Tribunal has held that from the Appellants literature it can be seen that 'Lal Tail' is used for nourishing the babies skin and that the product is not used under any prescription by a medical practitioner and is not used for a limited period. The Tribunal has held that this product is used regularly but not in connection with a special ailment. On this basis, it is held that this product fails the test for a medicament.

Whether a product can be considered to be a medicament or not has also been considered by this Court in a number of other decisions, some of which may usefully be referred to herein.

In the case of *Commissioner of C. Ex., Calcutta-IV* v. *Pandit D.P. Sharma,* reported in (2003) 154 ELT 324 SC, the question was whether 'Himtaj Oil' is a Ayurvedic medicament or not classifiable under sub-heading 3003.30 or a 'perfumed hair oil' classifiable under sub-heading 3305.10. Even though reliance had been placed upon the authority of this Court in *Shree Baidyanath Ayurved Bhavan'* case (supra), this Court negatived an argument that the product would not be considered to be a drug because it was not prescribed by a medical practitioner and was one which could be used for a long period of time. It was held that the test was to see what persons using the product understand it to be. On the basis of evidence produced by the manufacturer that the common man understood the product as a medicine it was held that the product was a medicament.

In the case of *Commissioner of C. Ex., Calcutta* v. *Sharma Chemical Works,* reported in (2003) 154 ELT 328 SC the question was whether 'Banphool oil' was a Ayurvedic medicament or a perfumed hair oil. This Court, after considering *Shree Baidyanath Ayurved Bhavan*' case (supra),

A held that the onus or burden to show that a product falls within a particular Tariff Item is always on the Revenue. It has been held that merely because 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. It was also held that in the product the percentage of medicament may be small but that by itself did not *ipso facto* mean that the product is not a medicament. B It was held that generally the percentage or dosage of the medicament will be such as can be absorbed by the human body and that the medicament would necessarily be covered by fillers/vehicles in order to make the product usable. It was noted that all the ingredients used in Banphool Oil were those which were set out in the Ayurveda Text Books. It was held that the Revenue C had not discharged the burden to show as to how the customers who used this product understood it and on the contrary there was evidence to show that the product was being used for treatment of headache, eye problem, night blindness, reeling, head weak memory, hysteria, ammenesia, blood pressure, insomnia etc. the product was a medicament.

D In the case of *Commissioner of Central Excise, Nagpur* v. *Vicco Laboratories,* reported in (2005) 179 ELT 17 (SC), this Court whilst considering whether turmeric skin cream and vajradanti toothpaste and tooth powder were to be classifiable under Chapter 30 or Chapter 33, noted Shree Baidyanath Ayurved Bhavan's case and held as follows:-

E "2..... The basis of the show cause notices was the decision of this Court in *Shree Baidyanath Ayurved Bhavan Ltd.* v. *Collector of Central Excise, Indore,* reported in [1996] 9 SCC 402 and the tests allegedly laid down in that decision for determining whether a product should be classified under Chapter 33 or Chapter 30.

F 3. The two tests according to the show cause notice for determining whether a product was classifiable as a pharmaceutical product under Chapter 30 of the Central Excise Tariff were (1) Whether the products are being used daily and are sold without prescription by a medical practitioner; and (2) whether the products are available in General G Store Department/Grocery shops. The department's case in the show cause notice is that as these two tests were not fulfilled the product failed to come within the prescription of pharmaceutical products in Chapter 30.

4. The mere decision of a court of law without more cannot be H justification enough for changing the classification without a change

in the nature of a product or a change in the use of the product, or a fresh interpretation of the tariff heading by such decision. It is not the appellant's case that any of these circumstances were present in this case, besides the decision in *Shree Baidyanath's* case (supra) does not lay down, the test of classification as concluded by the Department at all. In that case the Tribunal had considered the evidence produced before it with regard to the sale and purchase of the product in question. It was found as a matter of fact that in common parlance the product was not described as a medicinal preparation but was described as a toilet preparation. This Court affirmed the tests laid down by the Tribunal, namely, that since the primary object of the Excise Act was to raise revenue, resort should not be had, for the purppose of classification, to the scientific and technical meaning of the terms and expressions used therein but to their popular meaning, that is to say, the meaning attached to that by those using the product.

5. The Court also noted that the Tribunal had rejected the assessee's claim in that case holding that "ordinarily" a medicine is prescribed by a medical practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with a specific disease like diabetes." It may be noted that the court affirmed this line of reasoning of the Tribunal on the ground that it was "in general agreement with it". The court did not itself affirmatively hold that what was laid down by the Tribunal as a test to be "ordinarily" followed was invariably to be the sole test for determining whether a product is to be proved as a medicine or as a cosmetic. Indeed this Court in *BPL Pharmaceuticals Ltd.* v. *CCE,* reported in [1995] Suppl. 3 SCC 1 has upheld the classification of 'Selsun' medicated shampoo as a medicine and not as a cosmetic and held that in order to attract Note 2 to Chapter 33 the product was first proved to be a cosmetic and

> "that the product should be suitable for use as goods under Heading Nos. 33.03 to 33.08 and they must be put in packing as labels, literature and other indications showing that they are for use as cosmetic or toilet preparation."

6. These observations however were not made in connection with Chapter Note 1(d) of Chapter 30 the impact and purport of which may have to be considered in an appropriate case.

7. This Court in *Commissioner of Central Excise, Calcutta* v. *Sharma*

A *Chemical Works,* reported in [2003] 5 SCC 60 has also disapproved the approach of the Department in holding that the product was a cosmetic only because it was not sold by chemists or under doctors prescription. This, according to the decision, does not by itself lead to the conclusion that it is not a medicament. The Court reaffirmed the test as categorically laid down in Shree Baidyanath, namely, that
B the burden of proof that a product is classifiable under a particular tariff head is on the revenue and must be discharged by proving that it is so understood by consumers of the product or in common parlance. [See also *Meghdoot* v. *Commisisoner of Central Excise*, (2004) 174 ELT 14 S.C.]."

C From the above mentioned authorities, it is clear that in classifying a product the scientific and technical meaning is not to be resorted to. The product must be classifiable according to the popular meaning attached to it by those using the product. As stated above, in this case the Appellants have shown that all the ingredients in the product are those which are mentioned
D in Ayurvedic Text Books. This by itself may not be sufficient but the Appellants have shown that they have a Drug Controller's Licence for the product and they have also produced evidence by way of prescriptions of Ayurvedic Doctors, who have prescribed these for treatment of rickets. As against this, the Revenue has not made any effort and not produced any
E evidence that in common parlance the product is not understood as a medicament.

In view of the above, the decision of the Tribunal on this aspect cannot be sustained and is accordingly set aside. It is held that the product would be a medicament and classifiable as such under Chapter 30.

F Therefore, the Appeals partly succeed and stand disposed of as such. There will be no order as to costs.

D.G. Appeals partly allowed.