A UNION OF INDIA AND ANR.

v.

VICCO LABORATORIES

NOVEMBER 26, 2007

B **[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]**

Central Excise Tariff Act, 1985—Tariff Entry 33.04 and 33.06—Assessee manufacturing products as 'ayurvedic medicines'—Revenue C *issuing Show Cause Notice seeking classification of the products as 'cosmetics'—On earlier occasions move of the Revenue to classify the product as 'Cosmetics' decided by High Court and Supreme Court in favour of the assessee—Show Cause Notice challenged in Writ Petition—Allowed by High Court—On appeal, held : Show Cause* D *Notice is liable to be quashed—It was merely a repetition of earlier show Causes Notices with slight variation—the matter stood concluded by previous judgments of High Court and Supreme Court.*

Jurisdiction—Jurisdiction of Writ Court—To interfere with Show E *Cause Notice—Scope of—Held: Interference with Show Cause Notice should not be in a routine manner—It should be only in rare cases where it is issued either without jurisdiction or in an abuse of process of Law—Where factual adjudication would be necessary, interference is ruled out.*

F **Respondent was a manufacturer of various products including 'Vicco Vajrudanti' and 'Vicco Termeric' which were stated to be 'ayurvedic medicines'. Authorities issued Show Cause Notice in 1976 seeking classification of the products as 'cosmetics' and not 'ayurvedic medicines'. The matter had been ultimately decided by Supreme Court** G **in favour of the respondent by order dated 19.4.93. The application for clarification of this order was dismissed as withdrawn. After introduction of Central Excise Tariff Act, 1985, authorities in 1987 issued Show Cause Notice in respect of the same products, seeking their**

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classification as 'cosmetics'. The appeal thereagainst was withdrawn. In 1996 again, Central Board of Excise by way of a Circular asked the authorities to reopen and finalize the classification of the products on the basis of a judgment of Supreme Court. However the Board clarified that the Circular would not have overriding effect over the judgments of High Court and Supreme Court in respect of the Vicco products. Pursuant to the Circular, three Show Cause Notices were issued and the products were classified as 'cosmetics'. The dispute against the same was finally decided in favour of the respondent by Supreme Court.

Thereafter again in 2005, authorities issued Show Cause Notice seeking clarification of the products as 'cosmetics.' Respondents filed Writ Petition against the Show Cause Notice on the ground that the Notice was seeking to re-open and re-litigate the issues which had been finally concluded by the decisions of High Court and Supreme Court; and that the Notice was without jurisdiction and was issued in arbitrary exercise of power and was an abuse of process of law. High Court decided in favour of the respondent. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. Normally, the writ court should not interfere at the stage of issuance of show cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the concerned authorities about the absence of case for proceeding against the person against who the show cause notices have been issued. However, the general rule of abstinence from interference in such cases, is not without exceptions. Where a Show Cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interefere even at the stage of issuance of show cause notice. The intereference at the show cause notice stage should be rare and not in a routine manner. Mere assertion by the writ petitioner that notice was without jurisdiction and/or abuse of process of law should not suffice. It should be *prima facie* established to be so. Where factual adjudication would be necessary, interference is ruled out. [Para 29] [550-E, F, G; 551-A]

A **2. The classification of the products in question having attained finality pursuant to the decision of this Court, the appellants have no jurisdiction to issue impugned show cause notice on the ground on which it has been issued and it virtually amounts to re-opening of the issue which stands concluded by the decision of this Court, and that therefore** B **it is an abuse of process of law. The High Court after referring to the history of litigation rightly concluded that the matter stood concluded by judgments of this Court and the High Court in respondents' case. The impugned show cause notice was nothing but a repetition of the earlier show cause notices with slight variations which in no way was** C **relatable to any different test. [Paras 30 and 32] [551-A, B, C, F]**

Meghdoot Gramodyog Sewa Sansthan, U.P. **v.** *Commissioner of Central Excise, Lucknow,* **[2005] 4 SCC 15;** *Naturalle Health Products (P) Ltd.* **v.** *Collector of Central Excuse, Hyderabad,* **[2004] 9 SCC 136; and** *Amrutanjan Ltd.* **v.** *CCE,* **[1996] 9 SCC 413, referred to.**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5401 of 2007.

From the Judgment and Order dated 7.10.2006 of the High Court of Judicature at Bombay, Nagpur Bench in W.P. No. 2913/2005.

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A. Subba Rao and B. Krishna Prasad for the Appellants.

F.S. Nariman, Gopal Jain, Raj Nagrani, R.N. Jaranjawala, Nandini Gore, Pragya Singh Baghel, Simran Brara, Manik Karanjawala and Subhash Sharma for the Respondents.

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The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by a Division Bench G of the Bombay High Court allowing the writ petition filed by the respondent. Challenge in the writ petition was to the show cause notice dated 29th April, 2005 issued by the Commissioner of Customs and Central Excise, Nagpur (hereinafter referred to as the 'Commissioner') on the ground that the Commissioner was seeking to re-open and re-

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litigate the issues which have been finally concluded by the decision of the High Court and this Court in favour of the writ petitioner and, therefore, the said show cause notice was without jurisdiction and had been issued in arbitrary exercise of power and that it is an abuse of process of law.

3. The petition was resisted on the ground that at the stage of show cause notice there should not be any inference. In fact the notice was issued pursuant to the liberty given by this Court in C.A.Nos. 7896-97/2003 disposed of by a three-Judge Bench by order dated December 7, 2004. The High Court accepted the position that normally the High Court should not interfere at the show cause notice stage. But in view of the factual *scenario* the Court entertained the writ petition and decided in favour of the respondent.

4. Background facts in a nutshell are as follows:

The respondent is a manufacturer of various products including Vicco Vajradanti and Vicco Turmeric which are stated to be ayurvedic medicines. A show cause notice dated 8th November, 1976 was issued requiring the respondent to satisfy as to why the said products should not be classified as "cosmetics" and not "ayurvedic medicines". This show cause notice is hereinafter referred to as the "Ist SCN". After hearing the respondent, the Commissioner under order, dated 4th June, 1977 classified the said products as "cosmetics". The same was challenged by the respondent by way of Civil Suit No.143 of 1978 in the Court of Civil Judge, Senior Division, Thane, which came to be decreed in favour of the respondent holding that the said products were "ayurvedic medicines", and therefore, cannot be classified as "cosmetics". The appellants carried the matter in an appeal by filing First Appeal No.613 of 1982 before the High Court without any success as the same was dismissed on 27th April, 1988 holding that the products were "Ayurvedic medicines". The Special Leave Petition preferred by the appellants being SLP No.1918 of 1989 was dismissed on 6th September, 1990. Simultaneously, the respondent had also filed the Special Leave Petition No.14082 of 1988 which came to be disposed of by an order dated 19th April, 1993, while affirming the judgment of this Court with a rider that the claim for refund of the amounts already paid, would be subject to ascertaining whether the

A amounts were passed on to the purchasers or not, and that the consequential relief shall be subject to the provisions of section 11B of the Central Excise and Salt Act, 1944 (in short the 'Act') as amended by Act 40/1991.

B 5. On 28th February, 1986, Central Excise Tariff Act, 1985 (in short 'Tariff Act') was introduced, to be effective from Ist March, 1986. Under the Old Tariff Act, the ayurvedic medicines fell under the Notification No.234 of 1982, the products being listed at Sl. No.21. In term of the Tariff Act, the product was sought to be classified by the respondent under C Chapter 30 sub-heading 3003.30 and the same was approved by Assistant Commissioner, Nagpur, by his order dated 6th October, 1986. Pursuant to the direction by the Commissioner, a show cause notice dated 3rd July, 1987 was issued requiring the respondent to show cause as to why the products should not be classified as cosmetics falling under D Chapter 33. This was the second Show Cause Notice in relation to the same products, and hereinafter is referred to as the "2nd SCN". After the reply being filed to the 2nd SCN, the same was recalled under the order dated 21st June, 1989. The matter was, however, carried in appeal before the Commissioner of Central Excise (Appeals) but the same was withdrawn on 26th December, 1989.

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6. On 31st October, 1996, the Central Board of Excise issued a circular withdrawing its earlier clarification dated 12th May, 1989 in respect of Vicco Products and asked the authorities to reopen and finalise the classification of Vicco products on the basis of the judgment in *Shree* F *Baidyanath Bhavan* v. *CCE Nagpur,* reported in (1996) 83 ELT 492 : [1996] 9 SCC 402. Consequently, fresh show cause notices dated 2nd May, 1997, 18th September, 1997 and 27th October, 1997 came to be issued requiring the respondent to satisfy as to why the products should not be classified as "cosmetic" falling under Chapter 33. These three show G cause notices are hereinafter referred to as the "3rd SCNs". Meanwhile, by Telex dated 8.9.1997, the Board further clarified that the circular dated 31.10.1996 is general in nature and the Vicco products having been subjected to the specific judgment and order of the High Court affirmed by this Court, the circular would not have overriding effect. The H department further sought opinion of the Law and Judiciary Department

on 13.11.1997. Thereafter, the Union of India moved an application being IA-1 of 1999 in this Court in Civil Appeal No.2123 of 1993 arising out of the SLP No.14082 of 1988 which was filed by the respondent for clarification of the order dated 19th April, 1993 with reference, to *Shree Baidyanath's* judgment (supra). A

7. On 17.07.2000 the said application was withdrawn stating that the authorities will act in accordance with the provisions of law, which statement was recorded by this Court while disposing of the said application. B

8. On 14.5.2001 with reference to the 3rd SCNs, the Deputy Commissioner passed orders classifying the respondent's products as "cosmetics" falling under Chapter 33. The respondent preferred appeal before the Commissioner of Central Excise (Appeals) which came to be allowed by an order dated 10.01.2002. The appellant carried the matter in appeal before CEGAT, which came to be dismissed by an order dated 03.02.2003. The appellant filed special leave petition before this Court. The same were converted into the Civil Appeals No.7896-97 of 2003 and the appeals were dismissed by this Court on 07.12.2004. C D

9. Again, on 29.04.2005 a fresh show cause notice came to be issued requiring the respondent to satisfy as to why the products should not be held as products under Chapter 33. The same was questioned before the High Court and by the impugned judgment the same was quashed. E

10. The stand of the appellants in support of the appeal is that the liberty granted by this Court in the earlier case was on the footing that there was need for factual adjudication on applying correct position. In the earlier round of litigation the foundation of the revenue's case was the decision in *Shree Baidyanath Ayurved Bhawan's* case (supra). This Court categorically held in the said case as follows: F G

> 2. In this connection your kind attention is also invited to the Board's Circular No. 11/91-CX-1 dated 19.4.03 (copy enclosed) whereby the Board had circulated order No. 22/91-C, dated 8.1.91 of CEGAT in the case of CCE, *Indore* v. *M/s. Shree* H

A *Baidynath Ayurved Bhavan Ltd.* to the fluid formations. The Hon'ble Tribunal relying on its earlier orders No. 438-439/85-C, dated 7.6.1985 (1985) (11) ELT 175 (tribunal) and No. 714-715/ 90-C, dated 10.7.90 (1991 (51) ELT 502 (tribunal), all in the cases of M/s. Shree Baidyanath Ayurved Bhavan is not an B Ayurvedic drug or medicine and it is appropriately classificable under heading No. 33.06 of the. CETA, 1985. Aggrieved by the judgments of the CEGAT the assessee had gone in appeal to Supreme Court. The appeals of M/s. Dabur India Ltd. on the same issue were also tagged with the appeal of Shree Baidyanath C Ayurved Bhavan Ltd.

3. Now the Hon'ble Supreme Court vide its judgment dated 30.3.1995 (1996 (83) ELT 392 (SC) (copy enclosed), has dismissed the appeal of M/s. Shree Baidyanath Ayurved Bhavan D Ltd. and M/s. Dabur India Ltd. and upheld the judgments of CEGAT wherein it had been held that the product "Dant Manjan Lal" is a toilet preparation and not a medicinal preparation (Ayurvedic) and therefore not classifiable as a medicine (Ayurvedic) and accordingly not eligible for the benefit of exemption notification. E The judgment of Supreme Court is being circulated to all the field formations of CBCE for necessary action in the matter.

4. Therefore, keeping in view the aforesaid judgment of Supreme Court the Board has decided to withdraw its aforesaid instructions contained in letter No.F.No.1031/14/88-CS.3 dated 12 5.1989. F You may therefore decide classification of the goods in question in the light of Hon'ble Supreme Court's said judgment under intimation to the Board.

11. It was submitted that fresh materials had been considered and it G has been found that the products are to be classified under Entry 33.04 and 33.06 and not by Entry 3003.31. Reference is also made to the Notes in Chapter 30 and Chapter 33. So far as Chapter 30's notes are concerned reference is made to notes 1 and 2 and notes of Chapter 33 which read as follows:

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"*Chapter 30* 1. This Chapter does not cover: A

(a) Food or beverages (such as, dietetic, diabetic or fortified food, food supplements, tonic beverages and mineral waters) (Section IV);

(b) Plasters specially calcined or finely ground for use in dentistry (Chapter 25); B

(c) Aqueous distillates or aqueous solutions of essential oils, suitable for medicinal uses (Chapter 33);

(d) Preparations of Chapter 33 even if they have therapeutic or prophylactic properties; C

(e) Soap or other products of Chapter 34 containing added medicaments;

(f) Preparations with a basis of plaster for use in dentistry (Chapter 34); D

(g) Blood albumin not prepared for therapeutic or for prophylactic uses (Chapter 35).

2. For the purposes of heading No.30.03: E

(i) 'Medicaments' means goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within heading No.30.02 or 30.04 which are either:-

(a) Products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic uses; or F

(b) unmixed products suitable for such uses put up in measured doses or in packings for retail sale or for use in hospitals.

(ii) 'Patent or proprietary medicaments' means any drug or medicinal preparation, in whatever form, for use in the internal or external treatment of, or for the prevention of ailments in human beings or animals, which bears either on itself or on its container or both, a name which is not specified in a monograph, in a Pharmacopoeia, Formulary or other G H

publications, namely:-

(a) The Indian Pharmacopoeia;

(b) The International Pharmacopoeia;

(c) The National Formulary of India;

(d) The British Pharmacopoeia;

(e) The British Pharmaceutical Codex;

(f) The British Veterinary Codex;

(g) The United States Pharmacopoeia;

(h) The National Formulary of the U.S.A.;

(i) The Dental Formulary of the U.S.A. and

(j) The State Pharmacopoeia of the U.S.S.R'

or which is a brand name, that is, a name or a registered trade mark under the Trade and Merchandise Marks Act, 1958 (43 of 1958), or any other mark such as a symbol, monogram, label, signature or invented words or any writing which is used in relation to that medicine for the purpose of indicating or so as to indicate a connection in the course of trade between the medicine and some person, having the right either as proprietor or otherwise to use the name or mark with or without any indicating of the identity of that person.

Chapter 33

2. Heading Nos. 33.03 to 33.07 apply, *inter alia*, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings with labels, literature or other indications that they are for use as cosmetics or toilet preparations or put up in a form clearly specialised to such use and includes products whether or not they contain subsidiary pharmaceutical or antiseptic constituents or are held out as having subsidiary curative or prophylactic value.

4. In relation to products of heading Nos. 33.03, 33.04 and 33.05, conversion of powder into tablets, labelling or relabelling of containers intended for consumers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the products marketable to the consumer, shall be construed as 'manufacture'. A B

6. Heading No. 33.05 applies, *inter alia*, to the following products; brilliantines, perfumed hair oils, hair lotions, pomades and creams, hair dyes (in whatever form), shampoos, whether or not containing soap or organic surface active agents". C

12. It was submitted that the products are sold across the counter and without prescription. The outward packings also described as cosmetics.

13. The primary stand also is that the High Court should not have interfered at the show cause notice stage. D

14. In response, learned counsel for the respondent with reference to history of the long drawn litigation submitted that the High Court has rightly taken note of various factual aspects and quashed the show cause notice. E

15. In *Dabur India Ltd.* v. *Commissioner of Central Excise, Jamshedpur*, [2005] 4 SCC 9, this Court reiterating its earlier decision in *Commissioner of Central Excise, Calcutta* v. *Sharma Chemical Works*, [2003] 5 SCC 60, held that merely because a product is sold F 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 does not *ipso facto* mean that the product is not a medicament. It was held that generally the percentage or dosage of the medicament G 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.

16. In *Meghdoot Gramodyog Sewa Sansthan, U.P.* v. H

A *Commissioner of Central Excise, Lucknow,* [2005] 4 SCC 15 this Court had held that the products cannot be classified as cosmetics solely on the basis of outward packing of the products. It was specifically held that the composition and the curative properties of the product being admitted, it was not open to the department to hold the product to be B cosmetics merely by reason of the outward packing.

17. In *Naturalle Health Products (P) Ltd.* v. *Collector of Central Excise, Hyderabad,* [2004] 9 SCC 136, it was held that the essential character of medicine and the primary function of the medicine is derived C from the active ingredients contained therein and it has certainly a bearing on the determination of classification under the Act. Further re-iterating its earlier decision in *Amrutanjan Ltd.* v. *CCE,* [1996] 9 SCC 413, this Court held that "the mere fact that the ingredients are purified or added with some preservatives does not really alter their character."

D 18. First round of show cause notice dated 8.11.1976 states as follows:

> "M/s Vicco Laboratories Ltd. furnished Photostat copies of the certificates bearing Nos. A/Cert/12/75 dated 6.1.1976 and A/Cert/ E 388/76 dated 6.1.70 issued by Food and Drug Administration, Maharashtra State, Bombay in support of their claim.
>
> M/s Vicco Laboratories, Dombivli are hereby required to show cause to the Asst. Collector, central Excise, Kalyan Division, Kalyan why "Vicco Vajradanti Paste" and Vicco Turmeric Vanishing F Cream should not continue to be classified as tooth paste. T.I. No.14FF and Cosmetic & Toilet preparation T.I. 14 FF respectively as these products are marketed and are known in the Trade parlance as tooth paste and vanishing cream and not as Ayurvedic medicies."

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Suit No.143/1998 was filed challenging the show cause notice.

14. Whether the two products Vicco Vajaradanti and Vicco Turmeric Skin Cream were Ayurvedic Medicines or Cosmetics (toothpaste, vanishing cream, cosmetic cream) was adjudicated in Thane Suit No.143 H

of 1978, where evidence was led by the plaintiff (Vicco Laboratories) and by the defendants (Revenue Department). Amongst the issues framed were issue Nos. 1 to 3 reading as follows:

> (i) Do Plaintiffs prove that their products Vicco Vajaradanti and Vicco Vanishing Cream are Ayurvedic medicinal preparations?
>
> (ii) Do Defendants prove that Vicco Vajaradanti falls under item 14 FF of first schedule of Central Excise and Salt Act, 1944? (Tooth paste including dental cream)?
>
> (iii) Do defendants prove that Vicco Turmeric Vanishing cream falls under item 14F (1) of the said schedule? (Cosmetic and toilet Preparation for the care of the skin).

20. Eleven witnesses were examined on behalf of the plaintiff and three witnesses on behalf of the Department. The finding of the trial Court on issue Nos. 1 to 3 is as follows:

> "In the result the plaintiff have proved their product Vicco Vajaradanti and Vicco Turmeric as Ayurvedic medicinal preparations whereas the defendants have failed that they fall under tariff items 14FF and 14F. Therefore, Vicco Vajaradanti is not merely a tooth paste but a medical formulation meant for treatment of tooth and gum trouble whereas Vicco Turmeric does not simply give a promise beauty but is meant for treatment of dermatitis. Accordingly, the issue No.1 is held in the affirmative and the issue Nos. 2 and 3 in the negative."

21. In appeal No.613/1982 filed by the Department in the Bombay High Court, the High Court by judgment dated 27.4.1988 held:

> "Whether the two products are medicine or merely tooth, paste and vanishing cream or rather a cosmetic cream has to be decided on this record. On the record as is available to us, it is more than amply proved by overwhelming evidence that the products would be excisable under Entry 14 E and at the rates prescribed from time to time in respect of the said entry. The consumers and doctors, and the later category will include the general practitioners

A dentists and Ayurvedic experts, consider that the two products are medicines and further that they are Ayurvedic medicines. In this respect even the first two witnesses who were examined on behalf of the defendants were ultimately forced, much against their inclination, to concede that these products were prescribed by B doctors and sold by them, under doctors' prescriptions. The third witness examined on behalf of the defendants has not carried the matter any further and her evidence is almost totally useless as far as these proceedings are concerned. In addition to this, we have the classifications made by various governmental authorities C including the Sales Tax Commissioner accepting the status of the two products as Ayurvedic medicines. Last but not the least, we have unshaken testimony of P.W. 11 Dr. Antarkar, admittedly an expert on Ayurvedic medicines.

D There is overwhelming evidence, therefore, on the record which is almost one sided-to establish that the two products under consideration must be regarded as Ayurvedic medicines although they may also be used as tooth paste and are used as cosmetic cream.

E 22. The High Court however held that the plea of plaintiff Vicco Laboratories raised an oral arguments that the products were "exclusively ayurvedic medicines (and therefore, wholly exempt under Entry 14E) could not be accepted since there were no pleadings to that effect: therefore they were taxable at 12½ % as "patent and proprietary F medicines". (Entry 14E)

23. The respondent and the Revenue both approached this Court by SLPs being SLP No. 14082 of 1988 (by Vicco Laboratories) and SLP No. 1918 of 1989 (by Department) against the judgment and order G dated 27.4.1988 of the Bombay High Court. SLP No.1918/1989 was dismissed by this Court on 6.9.1990 whereas consent order dated 19.4.1983 came to be passed in SLP No.14082/88.

"We have heard Sri K.K. Venugopal, learned senior counsel for the appellants and Sri K.T.S. Tulsi, learned Additional Solicitor H

General for the respondents. Leave granted. A

2. The parties have broadly agreed to certain terms for the final disposal of this appeal.

3. In terms of the said agreement the parties accept judgment of the Bombay High Court that the products in question are rightly B classifiable as Ayurvedic Medicines. The stand of the Revenue is that Ayurvedic medicines are excluded from tariff Item No. 14-E and are classifiable under tariff item 68 of the erstwhile Central Excise Tariff and entitled to full exemption under Serial No. 21 of Notification No. 234/82-CE dated 1st November 1982, a position C which the appellants accept.

4. The question of the refund of the amounts paid would depend on whether the amounts were passed on to the purchasers or not. The consequential relief, if any, shall therefore, be subject to the D provisions of Section 118 of the Central Excises and Salt Act, 1994 as amended by ACT 40 of 1991.

5. In terms of the compromise we affirm the judgment of the Bombay High Court dated 27th April, 1988 subject to the modifications indicated above. E

6. The appeal is disposed of accordingly, No. costs."

24. Clarification application filed before this Court by the Department that the Consent Order dated 19.4.1993 did not apply to the Tariff Act was dismissed as withdrawn on 17.7.2000. F

25. Meanwhile, the Tariff Act, came to be passed which repealed the old Tariff Act. The new entries were:

Chapter 30 - dealt with Pharmaceutical products G

Chapter 33 - dealt with Essential Oils and Resinoids, Perfumery, Cosmetic or Toilet Preparations.

26. Meanwhile before the judgment and order of Bombay High Court and of this Court in Thane Suit, afresh (2nd) round of Show cause notices H

A for the period December 1986 to March 1989 were issued. In the show cause notice it was alleged as follows:

> "Whereas it appears that these products namely Vicco Vajradanti Powder Paste are meant for oral or dental hygiene and are used as tooth powder and tooth paste, the same appear to be classifiable under sub-heading 3306.00 and chargeable to duty at 15%. Similarly, Vicco Turmeric appears to be a Vanishing Cream falling under subheading 3304.00 and;
>
> "Whereas no material change in the composition of above mentioned products has been taken place, these products appear to be tooth powder, tooth paste and vanishing cream classifiable under heading 3306.00 and 3304.00 respectively, and
>
> Whereas, Vicco Turmeric Cream has mainly prophylactic cosmetic effect and it cannot be considered Ayurvedic medicine, it appears to be Vanishing Cream only and;
>
> Whereas as per Note 1(d) of Chapter 30- "Preparation of Chapter 22 even if they have therapeutic and Prophylactic properties, they are classifiable, under Chapter 33 and are excluded from Chapter 30 and;
>
> Whereas, Vicco Vajradanti Powder is put up in the form of "Dant Manjan" and paste has been put up in the form of "Tooth Paste" and Vicco Turmeric has been put up in the form of Cosmetic/ Vanishing Cream; and
>
> Whereas, for the last so many years you were advertising and marketing these products as tooth powder, tooth paste and vanishing cream respectively. Accordingly, Vicco Vajradanti Powder and Paste appear to be preparation for oral and dental hygiene falling under sub-heading 3306.00 and Vicco Turmeric appears to be falling under sub-heading 3304.00."

27. Advice was received from the Central Board of Excise and Customs by letter dated 12.5.1989 which stated as follows:

"Sir,

Sub: Central Excise - Vicco Vajradanti (powder and paste) and Turmeric - Classification under the Central Excise Tariff Act, 1985 -regarding.

I am directed to refer to your letter F. No. V. Ch. 39 (30) 1/89/ 1369, dated the 4 n January, 1989 on the subject mentioned above and to say that the matter of classification of Vicco Vajradanti (powder and paste) and Vicco Turmeric Cream manufactured by M/s Vicco laboratories has been got examined in consultation with he Advisor (Ayurvedic and Siddha) in the Directorate General of Health Services.

2. The Board has taken note of Note (2) to Chapter 30 and 33 of the Schedule to the Central' Excise Tariff Act, 1985 coupled with the opinion of the Advisor (Ayurvedic and Siddha) in the Directorate General of Health Services including the decision of the Bombay High Court feels that there are stronger reasons to treat the subject good as Ayurvedic medicines.

3. Accordingly, it is viewed that the above-mentioned products would be appropriately classifiable as Ayurvedic Medicaments under sub-heading No.3003.30 of the Schedule of the Central Excise Tariff Act, 1985".

28. At this juncture, it would be necessary to take note of the stand of learned counsel for the appellants that in the packages meant for export different descriptions were given. In this context it is to be noted that in the packing meant for export instead of the word 'Ayurved', the expression 'Herbal' is used. The special permission was taken from the Drugs Control Authority for such use. The letter dated 14.6.1996 of the Government of India, Ministry of Health & Family Welfare (Department of ISM & H) is relevant. The same reads as follows:

"New Delhi, dated 14.6.1996

A To

The Asstt. Drug Controller (India),
New Custom House, Fort,
Bombay-400038.

B Sub: Export of Vicco Vajradanti Tooth Paste, Powder and Turmeric Cream- regarding

A representation received from the firm in regard to export of the subject products with labeling acceptable to importing countries and the modification made in the labels, which are otherwise used C in the country. Having examined the matter, it is opined that there may be no objection in export of subject products labeled as herbal products. This permission is limited to export purpose only.

Sd/- Illegible.
(Ashwini Kumar)
D For Drug Controller General (I)

Copy to:
Shri G.K. Pendharkar,
Vicco Laboratories,
25, Jerbai Wadia Road,
E Parel, Bombay -400012"

29. Normally, the writ court should not interfere at the stage of issuance of show cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the F concerned authorities and to satisfy the concerned authorities about the absence of case for proceeding against the person against whom the show cause notices have been issued. Abstinence from interference at the stage of issuance of show cause notice in order to relegate the parties to the proceedings before the concerned authorities is the normal rule. However, G the said rule is not without exceptions. Where a Show Cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show cause notice. The interference at the show cause notice stage should be rare and not in a routine manner. Mere assertion H by the writ petitioner that notice was without jurisdiction and/or abuse of

process of law would not suffice. It should be *prima facie* established to be so. Where factual adjudication would be necessary, interference is ruled out.

30. Case of the respondent that the classification of the said products having attained finality pursuant to the decision of this Court, the appellants have no jurisdiction to issue impugned show cause notice on the ground on which it has been issued and it virtually amounts to re-opening of the issue which stands concluded by the decision of this Court, and that therefore it is an abuse of process of law. The High Court after referring to the history of litigation rightly concluded that the matter stood concluded by judgments of this Court and the High Court in respondents' case.

31. In the earlier judgment this Court had given liberty to the Department in the following terms:

> "Although the adjudicating authority had found in the course of the hearing that the market survey indicated that the product in question was known as a cosmetic we do not go into the question as this was not the ground on which the show cause notice was issued. The show cause notices having proceeded on a misapprehension of the tests laid down in Shree Baidyanath's case, the same cannot be sustained.
>
> The appeals are accordingly dismissed without any order as to costs. It will be open to the Department to take such test if otherwise so entitled in respect of the products for the purpose of classifying the products under the appropriate tariff heading as they may be advised."

32. However, as rightly observed by the High Court the impugned show cause notice was nothing but a repetition of the earlier show cause notices with slight variations which in no way was relatable to any different test.

33. When the factual *scenario* is considered in the background of the legal principles set out above, the inevitable conclusion is that the appeal is sans merit, deserves dismissal which we direct. Costs made easy.

K.K.T. Appeal dismissed.