

Collector of Central Excise Vs. Nicholas Laboratories India Ltd.

Collector of Central Excise Vs. Nicholas Laboratories India Ltd.

SooperKanoon Citation : sooperkanoon.com/6438

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-10-1991

Reported in : (1991)LC666Tri(Delhi)

Appellant : Collector of Central Excise

Respondent : Nicholas Laboratories India Ltd.

Judgement :

1. Collector of Central Excise, Madras, has filed an appeal being aggrieved from the order passed by the Collector of Central Excise (Appeals), Madras.

2. Briefly the facts of the case are that M/s. Nicholas Laboratories (India) Ltd. loan licensee of M/s. Tamil Nadu Dadha Pharmaceuticals Ltd., Dadha Nagar, Madras, are manufacturers of patent and proprietary medicines under the erstwhile Tariff Item 14E and the present Chapter Heading 30 of the Central Excise Tariff. The respondents were manufacturing "Melalite Cream" and they had filed classification list Nos. 3/85,5/85 and 1/86-87 for their product Melalite Cream classifying the same as mentioned earlier. Their classification as patent and proprietary medicines was approved on 21-7-1986. The change introduced in the description of cosmetics under 14F(1) in the Finance Bill of 1985 to include sunburn preventive preparations and sun tan preparation against skin irritants and also the explanation cosmetic and toilet preparation included preparation whether or not they contained subsidiary pharmaceutical or antiseptic constituents or were held out as having subsidiary curative or prophylactic value, made it necessary for the Revenue to revise the classification of Melalite Cream from 14E to 14F. A show

cause notice was issued to the respondents on 8th August, 1986 requiring them to show cause as to why :- (i) Their product melalite cream should not be re-classified under Tariff Item 14F(1) for the period from 7th June, 1985 to 27th February, 1986 and under sub-heading 3304.00 from 28th February, 1986 onwards.

(ii) Why the assessable value already approved should not be modified according to the proposed re-classification.

(iii) Why the differential duty of Rs. 11,36,911.21 payable on the clearances of Melalite Cream from 7th June, 1985 to 19th May, 1986 and the differential duty involved in the subsequent clearances should not be demanded.

The respondents in their reply dated 6th October, 1986 had questioned the propriety of re-opening the classification already approved by the Assistant Collector and further contended that the re-classification could only be prospective and not for the approved period. They further added that Melalite Cream was manufactured under a licence issued by the State Drugs Controller under the Drugs and Cosmetics Act, 1940.

They also contended that the ingredients Hydroquinone and Glyceryl Mono Para Amino Benzoate were ingredients with prophylactic value finding place in the international formulary. In support of the respondents also adduced evidence to the effect that Melalite Cream was sold only by the licensed druggists, and that too on medical practitioner's prescription. It was also emphasised that their product was meant for curing hyper-pigmentation which was mentioned as a disease in Harrison's Principles of Internal Medicine. In addition, the respondents also added that this product was considered only as medicine by the State Sales Tax Department and they produced the following documentary evidence :- 1. Photostat copy of Harrison's Principles of Internal Medicine - pages 265 to 2. The State Drug Controller's permission for the manufacture of Melalite Cream in the form of licence issued under the Drugs and Cosmetics Act.

4. Affidavit by Medical Practitioner submitting that Melalite Cream was only medicine.

5. Invoice under Sales Tax Act showing that the product had been treated as a drug.

The Assistant Collector had granted personal hearing. The Assistant Collector had observed in his order that the presence of sun screen agent in the cream "Glyceryl Mono Amino Benzoate" might aid classification of product as cosmetics, and this will act as a retarding agent for the hyperpigmentation. The addition of Glyceryl Mono Amino Benzoate will reduce the action of ultra violet rays which enhances the melanin formation of skin, and this function was purely a subsidiary one and not the main function of the Melalite Cream. The ingredient of G.M.A.B. was used only to ward off the effect of ultra violet rays on the skin. This function was purely a minor and not the main function of the Melalite Cream and the fact that this product was manufactured under the licence issued by the State Drugs Controller as a drug and was dispensed by the licensed chemists and druggists on the strength of the prescriptions issued by the doctors also lent support to the fact that the product merited classification as a P or P medicaments, and added to the above overwhelming functions one more could be added that this product was recognised as a medicine by the State Sales Tax authorities also, and he had observed that the main function of the Melalite Cream was curative and therapeutic in nature and the sun screening function was a subsidiary one. The Assistant Collector had held that the Melalite Cream manufactured by the respondents as patent or proprietary medicaments falls under T.I. 14E upto 28th February, 1986 and under Chapter 3003.00 after 1st March, 1986, with the result that the entire proceedings initiated in the show cause notice dated 8th August, 1986 were dropped.

2A. The revenue authorities being not satisfied with the order passed by the Assistant Collector, filed a review application under Section 35E(4) of the Central Excises and Salt Act, 1944 before the Collector of Central Excise (Appeals), Madras to be treated as an appeal. The Collector of Central Excise (Appeals) upheld the findings of the Assistant Collector and had held that there was no ground to hold that the said Melalite Cream was cosmetic or toilet preparation in the Central Excise Tariff Act or under the earlier Tariff, and had rejected the appeal.

3. Being not satisfied with the aforesaid order, the revenue has come in appeal before the Tribunal.

4. Shri L.M. Moorthy, the learned JDR has appeared on behalf of the appellant. He has reiterated the facts. He argued that the product in dispute is Melalite Cream and under the erstwhile Tariff upto 28th February, 1986 the respondents had claimed classification under Tariff Item 14E and after 28th February, 1986 the same was claimed to be falling under Heading 3003.19 under the present Tariff. He pleaded that the revenue wants assessment under Heading 14F(1) of the erstwhile Tariff and under Heading 3304 of the new Tariff. Shri Moorthy, the learned JDR referred to the pamphlet which is a part of the paper book and in the pamphlet it is mentioned that "Melalite Cream thus provides a dual approach for faster action and has a smooth non-greasy base which is pleasantly perfumed for cosmetic elegance." Shri Moorthy, the learned JDR read the grounds of appeal where it is mentioned that the ingredients of the Melalite Cream are Hydroquinone USP and Glyceryl Mono Para Amino Benzoate (GMPA). The United States Dispensatory 27th Edition page 595 refers to Hydroquinone as a de-pigmenting agent applied topically in a 2% ointment or lotion to skin blemishes, freckles and other hyperpigmented areas of the skin to reduce pigmentation. The Indian Pharmacopoeia and British Pharmacopoeia do not refer to Hydroquinone as having any therapeutic property. The Extra Pharmacopoeia Martindale holds Hydroquinone is used as a de-pigmenting agent for the skin in the form of 2 to 5% ointment. The other ingredient, Glyceryl Mono Para Amino Benzoate is not mentioned in the Indian, British and European Pharmacopoeias, as having any therapeutic property. The Extra Pharmacopoeia Martindale refers to it as being used in cosmetic preparation in concentration of up to 2% as a sunscreen agent. The learned JDR has also read the Collector (Appeals)'s order and pleaded that the conclusion arrived at by the Collector (Appeals) is not correct. He has also referred to the pamphlet which is enclosed with the appeal and a reading of the pamphlet will show that it is a cream which is to be treated as a cosmetic. He has pleaded for the acceptance of the appeal.

5. Shri A.M. Setalvad, the learned Senior Advocate, Shri C.M. Korde and Shri S.M. Thakore, Advocates have appeared on behalf of the respondents. Shri Setalvad,

the learned Senior Advocate argued that the question before the Bench is what is the true nature of the product.

Shri Setalvad, the learned Senior Advocate pleaded that the classification lists filed by the respondents were duly approved by the Department and in case the revenue chooses to change the classification, the burden of proof is on the Department and the revenue has failed to discharge the burden of proof. In support of his argument, he has referred to the following judgments :-Collector of Central Excise v. Calcutta Steel Industries and Ors.

(2) 1988 (36) ELT 135 (Tri.) - S. S. Enterprises v. Collector of Customs, Bombay.

Shri Setalvad, the learned Senior Advocate has referred to the reply to the show cause notice which appears on pages 3 to 11 of the respondents' paper book and has made a particular reference to page 9, where the respondents had duly mentioned that the product was correctly classifiable under Heading 3003.19 of the Central Excise Tariff Act, 1985 and the product Melalite Cream was manufactured under the licence issued under the Drugs and Cosmetics Act and a copy of the licence was duly attached, where the respondents had made a reference to various literature on the subject. He has referred to the drug licence which appears on page 15 of the paper book. Shri Setalvad has referred to Drugs and Cosmetic Rules, 1945; in all he has referred to Rules 72, 73 and 131 of the said Rules. He has also referred to form 26 issued under Rules 73 and 83 of the Drugs and Cosmetic Rules, 1945, which is a Certificate of renewal of licence to manufacture for sale of drugs other than those specified in Schedule C and C(1) and he argued that under Rule 139 an application for grant or renewal of a licence to manufacture cosmetics for sale is made. The same appears on page 15 of the paper book. He has referred to literature viz. USP Pharmacopoeia XXI page 512 which appears on page 20 of the paper book where detailed description of Hydroquinone Cream and Hydro-quinone Topical Solution has been given and he has referred to Harrison's Principles of Internal Medicine 10th Edition Asian Student Edition a photo copy of which appears on pages 22,23,26 and 27 of the paper book where necessary details of pigmentation of the skin and disorders of Melanin Metabolism has been given and the definition of Melanin has also been

given, where it is written that "Melanin is also a filter that decreases the harmful effects of ultra violet light on the dermis and thereby provides protection against acute sunburn reaction and chronic actinic damage, including skin cancer.

Derived from the Greek word melas, "black", melanin is a protein-bound polymer formed by the oxidation of tyrosine by tyrosinase to dihydroxyphenylalanine (dopa) within melanocytes which are specialized epidermal dendritic cells of neural crest origin." Page 268 of the same book deals with disorders of the Melanocyte System; Hypomelanoses and Hypermelanoses. He has also referred to an affidavit of Mr. Rohitbhai H. Gala son of Shri Hirjibhai Gala which appears on page 32 of the paper book. In the affidavit he has mentioned that he is a partner of a firm and in para 3 he has deposed that Melalite Cream is a medicine generally prescribed by doctors and skin specialists for cure of Hyperpigmentation and in para 4 he has deposed that Melalite Cream is regarded as a medicine and is not generally sold by general stores which stock cosmetics and toilet preparations. He has also referred to another affidavit of Dr. Anil J. Manerkar, who is a general medical practitioner, where in para No. 3 he has mentioned that the specialists prescribed Melalite Cream and after consulting him the patients commenced use of the said cream as a medicine and the patients found this to be an effective medicine and he had prescribed this medicine to the patients who were suffering from Hyperpigmentation and regarded Melalite Cream as a medicine and not as a cosmetic or toilet preparation. He argued that for sales-tax purposes Melalite Cream is considered as a medicine. He has referred to the order-in-original where the Assistant Collector has given his observations in coming to the conclusion that the Melalite Cream is a medicine. He has referred to the grounds of appeal filed before the Collector (Appeals) and in the grounds of appeal it is mentioned that the chemical report of Melalite Cream manufactured by the respondents shows that it contains Hydroquinone USP and Glyceryl Mono Para Amino Benzoate and there is also reference to the technical literature. He has referred to the pamphlet filed by the respondents and stated that a simple perusal of the pamphlet shows that Melalite Cream is a medicine. He also referred to the leaflet filed by the revenue in its paper book. That too describes it as a medicine. He has also referred to the order-in-appeal passed by the Collector (Appeals) and stated that there is no infirmity in the order and the appeal filed by the revenue has to be dismissed.

He referred to the grounds of appeal before the CEGAT. He also referred to the following books :- (1) The Extra Pharmacopoeia of Martindale page 922 29th edition Hydroquinone.

"A preparation containing an opaque sunscreen (Eldopaque, Eldopaque Forte) may be required to suppress the effect of sunlight on the lesion completely. An opaque sunscreen also should be applied during the day on areas that cannot easily be protected from exposure to the sun to prevent recurrence of hyperpigmentation." (3) Pharmacology and Pharmacotherapeutics Revised Tenth Edition by R.S. Santoskar and S.D. Bhandarkar page 699.

"Its effect is reversed by sunlight and hence it has also been used in combination with an opaque sunscreen." (1) 1980 (6) ELT 598 (M.P.) - Ramesh Chemical Industries v. Union of India and Ors.

(2) 1971 Tax Law Reports 1073 - Calcutta Clinical Research Association Ltd. v. Union of India and Ors.

Where the Hon'ble Calcutta High Court had held that : "For construing what is manufacture of patent and'proprietary medicines one cannot rule out the definition provided in Section 3(d) of Drugs and Cosmetics Act which is even prior to the definition in Central Excise Act as amended in 1962. For medicines to be brought and sold in the market there must be labelling to them. It is a process incidental to or ancillary to the completion of manufacture of products. Manufacture is completed when labelling is completed." (3) 1987 (31) ELT 192 - Pasteur Laboratories (P) Ltd. v. Collector of Central Excise, Calcutta.

"Drugs and medicines which incidentally may be useful also in the protection or care of the skin can hardly, because of their latter attribute, be classifiable as cosmetics or toilet preparations. In the case, of calaminol, calamyl, acquaminol as well as histacalamine, it is stated that the product is indicated in urticaria, exzema, sunburn and allergic dermatitis etc. Cal-calcream is stated to be the drug of choice for patients suffering from all types of dermatitis as mentioned above in dry conditions, calamine is described as being a potent sunscreen effective in reddened and in-flamatory conditions of skin due to sunburn. Calaminol and

Histacalamine, as per the catalogue is indicated in oozing dermatitis. Thus the effect of use of product is curative and not protective. In the face of the catalogue and specimens of cartons which give the nature of the product, its attributes, indications and applications, quite clearly they are not advertised or sold as cosmetics or toilet preparations. The use of special perfume to give pleasant smell to the items in question will not make them cosmetics and toilet preparations. Large supplies of the items in question are made to Hospitals and are prescribed by Doctors for the ailments indicated. Considering all the facts and evidence, it is clear that these are not items which are bought and sold in the market or used as items of toilet preparations or cosmetics and is classifiable under Tariff Item 14E and not 14F(i)." He laid special emphasis on paras 15,16,19,20,21, 22,23 and 27 of the said judgment. He also referred to a judgment of the Gujarat High Court in the case of B. Shah & Co., Surat v. State of Gujarat reported in (1971) 28 Sales Tax Cases 5 where the High Court had held that Nycil medicated powder was not a toilet article. Shri Setalvad referred to current Tariff Note 2 to Chapter 33. He argued that the product is a patent medicine. He argued that Note I(d) of Chapter 30 is irrelevant.

He argued that he does not press the limitation or jurisdiction and a decision be given on merits. He has pleaded for the dismissal of the appeal.

6. Shri Moorthy, the learned JDR pleaded that he has nothing more to argue than what he has argued. He has pleaded for the acceptance of the appeal.

7. We have heard both the sides and have gone through the facts and circumstances of the case. The only issue to be decided by us is whether the Melalite Cream manufactured by the respondents is to be treated as a medicine or as a cosmetic product. We have perused the carton of the Melalite Cream. The composition of the same has been given as :- On the pamphlet it is mentioned that Melalite Cream is a double action remedy for hyperpigmentation. In the Butterworths Medical Dictionary Second Edition published by ELBS English Language Book Society/Butterworths page 847 hyperpigmentation has been described as under :- "Superpigmentation; excess of pigment in tissue (GK hyperpigmentation)".

The composition of Melalite Cream is Hydroquinone and Glyceryl Mono Para Amino Benzoate. In the Condensed Chemical Dictionary 9th Edition revised by Gessner G. Hawley page 453 hydroquinone has been described as under :- Properties: White crystals; soluble in water, alcohol and ether. Sp.

gr. 1.330; m.p. 170C; b.p. 285C. Derivation: Aniline is oxidized to quinone by manganese dioxide and is then reduced to hydroquinone.

Hazard: Tox by ingestion and inhalation; irritant. Tolerance, 2 mg per cubic meter of air.

Uses: Photographic developer (except colour film); dye intermediate; medicine, antioxidant; inhibitor; stabilizer in paints and varnishes, motor fuels and oils; antioxidant for fats and oils; inhibitor of polymerization." In Pharmacology and Pharmacotherapeutics revised tenth edition by R.S.Satoskar and S.D. Bhandarkar page 699 the description of Hydroquinone is given as under :- "Hydroquinone. This drug inhibits tyrosinase and hence melanin synthesis in the melanocytes. It is commonly used in the form of a 2-49% cream or lotion in the treatment of freckles, post-inflammatory pigmentation, and melasma of pregnancy and that due to oral contraceptives. Its effect is reversed by sunlight and hence it has also been used in combination with an opaque sunscreen (see later)." In Drug Evaluation 6th edition American Medical Association, Hydroquinone at 1017 has been described as under :- "A preparation containing an opaque sunscreen (Eldopaque, Eldopaque Forte) may be required to suppress the effect of sunlight on the lesion completely.

An opaque sunscreen also should be applied during the day on areas that cannot easily be protected from exposure to the sun to prevent recurrence of hyperpigmentation." In the Pharmacological Basis of Therapeutics 7th edition by Goodman and Gilman at page 954 hydroquinone has been described as under :- "Hydroquinone (p-dihydroxybenzene) is a safe but weak depigmenting agent used topically in the treatment of hypermelanosis (e.g.

circumscribed brown hypermelanotic macules of melasma in women taking progestational agents, in Berlock dermatitis caused by certain perfumes, in

postinflammatory hyperpigmentation, severe freckling and melasma of pregnancy). Although percutaneous application does not, in most instances, completely remove the hyperpigmentation, results are good enough to help the majority of patients become less self-conscious about their abnormality." In Martindale The Extra Pharmacopoeia 29th edition at page 922 Hydroquinone (USN) has been described as under :- Pharmacopoeias in Belg. Braz. Hung and US Fine white crystals or white crystalline powder which darken on exposure to light and air Soluble 1 in 17 of water. 1 in 4 of alcohol. 1 in 51 of chloroforms and 1 in about 16 of ether. Store in airtight containers, from light.

In the UK maximum concentration of hydroquinone in hair dyes and cosmetic products for localised skin lightening is limited by law to 2%. Concentrations of 2 to 4% are used clinically.

2% hydroquinone, with sunscreens were safe and better than 2% hydro-quinone creams without sunscreens, but less effective than 4% hydroquinone formulations." We have also perused the Principles of Internal Medicine 10th Edition by Asian Student Edition of Harrison which deals with pigmentation of the skin and disorders of Melanin Metabolism at page 265. Both the lower authorities have dealt at length. The Hon'ble Gujarat High Court in the case of B. Shah & Co., Surat v. State of Gujarat reported in (1971) 28 STC 5 had observed as under :- "Nycil medicated powder, with its special qualities and attributes, its character and composition and its recommended or intended use as advertised by the manufacturers is a medicine within the meaning of the word in Entry 13 of Schedule C of the Bombay Sales Tax Act, 1959.

In its popular sense, "medicine" is a remedial agent, a substance which may be sold in various forms such as liquid, tablets, capsules or powder, which is administered in the treatment of disease and which has the property of curing or remedying disease.

The expression "toilet article" in Entry 21A of Schedule E of the Bombay Sales Tax Act, 1959 should be confined only to those articles which produce direct toilet effect, that is, to articles which could be directly used in dressing or grooming a person so as to beautify his appearance. Nycil medicated powder is not an article

which is ordinarily used for the purpose of grooming a person by beautifying his appearance. It is, therefore, not a "toilet article" within the meaning of Entry 21A of Schedule E." *Pasteur Laboratories (P) Ltd. v. Collector of Central Excise, Calcutta* reported in 1987 (31) ELT 192 (Tribunal) had observed as under :- "15. We have carefully considered the facts of the case and the submissions made before us. Before we deal with the arguments put forward by either side, let us first examine as to what are the items, the classification of which has to be decided by us. The containers of the item carry the following print: (i) Calaminol: Liniment Calamine - protects skin from sunburn - Calamine 50% - On an oil in water emulsion base perfume.

Indications : As a soothing antiseptic and astringent it is used in all forms of allergic (atopic contact and occupational) dermatitis, urticaria, angioneurotic edema and other irritable conditions of the skin.

Application : To be dabbed on the affected part twice daily with a cotton wool swab. Apply three times a day or more if the skin is irritable.

(ii) Calamyl: Liniment Calamine - Composition Calamine I.P. 10% w/v in oil in water emulsion base, agreeably perfumed. **Indications :** Indicated in eczema, urticaria and all forms of allergic, (atopic, contact and occupational) dermatitis, caterpillar, dermatitis, insect-bites, sunburn and any other irritable conditions of the skin.

Application: Dab Calamyl on the affected area with a piece of cotton wool three times a day or more frequently if the skin is irritable.

(iii) Aquaminol: (Calamine lotion) Composition : Calamine I.P. 10% w/v (in aqueous base). **Indications :** As a soothing lotion, Aquaminol is indicated in eczema, urticaria, all forms of atopic, allergic, contact and occupational dermatitis, or any other irritable conditions of the skin like insect bite, caterpillar, dermatitis etc.

Application : Dab Aquaminol on the affected areas with a piece of cotton wool three times a day or more frequently if the skin is irritable or as advised by the

physician.

(iv) Calacream : A soothing and Astringent cream in Lanolin Base - Gently rub Calacream on the effected area twice a day or more frequently for a quick relief. Composition : Calamine IP 5% w/v in washable cream base. Use calacream to have an instant soothing effect in sunburn and to keep the skin soft and healthy.

(v) Histacalamine: Calamine with antihistaminic agent. Calamine IP 5% Chlorpheniramine Maleate USP 0.4%. Indications: Indicated in urticaria, eczema, sunburn etc. or allergic dermatitis of any kind.

Application : Apply locally twice or thrice daily or as directed by the physician.

16. The essential question for us to consider is whether the impugned products are cosmetics and toilet preparations under Tariff Item No. 14F; sub-item (ii) which covers shaving creams, have to be straightaway ruled out. What survives for consideration is whether they are classifiable under sub-item (i) as preparations for the care of the skin.

19. The Assistant Collector in his order-in-original has taken the view that while as per the Indian pharmacopoeia, calamine is categorised as astringent but preparations of calamine are shown as protective. He, therefore, concludes that such preparations cannot be "curative or preventive". The Assistant Collector then makes the general observation that there are many products in the category of cosmetics and toilet preparations which are useful in the protection of the skin against certain effects on the skin, but that does not make those products, drugs or medicines. In this connection he mentions the cosmetics preparation available in the market by the name of Lactocalamine. He points out that this item is used, sold and known as cosmetics.

20. It seems to us that there is a fallacy in these arguments.

Cosmetics and toilet preparations, which incidentally or secondarily have curative or prophylactic use, cannot be classified as drugs or medicines. At the same time, it is equally true that drugs and medicines, which incidentally may be useful also in the protection or care of the skin can hardly, because of their latter attribute, be

classifiable as cosmetics or toilet preparations.

21. The argument in regard to lactocalamine is self defeating.

Firstly, it is not shown that the impugned products are identical to lactocalamine or are of the same variety. Secondly, while it is known that lactocalamine is widely used, sold and known as a cosmetic preparation, it is not at all shown by any evidence produced before us by the department, that the impugned products are used sold or known as cosmetics.

22. The order-in-original refers to the pamphlet covering the calamine range of products stating that the products afford "protection of skin from sunburns, roughness, cracks and defatted conditions" and comes to the conclusion that these are properties of cosmetics preparations used for the care of the skin. We, however, observe that the Assistant Collector has chosen to extract from the catalogue certain properties attributed to the products to the complete exclusion of everything else that is stated in the catalogue and on the cartons. In the case of calaminol, calamyl, aquaminol as well as histacalamine, it is stated that the product is indicated in urticarie, eczema, sunburn and allergic dermatitis etc.

Calacream is stated to be the drug of choice for patients suffering from all types of dermatitis as mentioned above in dry conditions, Calamine is described as being a potent sunscreen effective in reddened and inflammatory conditions of skin due to sunburn.

Calaminol and Histacalamine, as per the catalogue is indicated in oozing dermatitis.

23. The argument in the orders of the lower authority that the attributes of the impugned products are of a protective rather than curative nature does not appear to be well founded. It is seen that in the case of all products other than Calacream, there are instructions as regards application according to which the "affected area" should be dabbed with the product a number of times a day.

Affected areas can only be areas already affected by disease or infection, and the effect of the use of the product, in such cases can only be curative and not

protective.

27. The lower authorities have sought to dismiss the curative or prophylactic properties of the product by saying that they are subsidiary. In the face of what has been discussed above this is not supportable, as in the first instance, it has not been shown that the items in question are known, sold or used as cosmetics and toilet preparations.

31. We are not inclined at all to go into the question of the ingredients of the impugned products or to weigh the arguments in terms of therapeutic value of the different contents. We are of the view that decision in such cases must rest on consideration of the basic issue as to what are the products known in the market as and how are they treated in the medical profession. We have noted that the products are being prescribed by doctors for specific ailments and diseases and supplied for use in various hospitals. Considering all the facts and evidence produced before us, it is clear that these are not items which are bought and sold in the market or used as items of toilet preparations or cosmetics." Hon'ble Calcutta High Court in the case of Calcutta Clinical Research Association Ltd. v. Tlie Union of India reported in 1971 Tax Law Reports 1073 had observed as under in para 7 :- "7. The manufacturer or producer had to comply with the requirements of Drugs Act because Mr. Roy Chowdhury contended that no patent medicine could come into the market unless it had so complied and these goods would not be marketable without such compliance. Mr. Roy Chowdhury drew my attention to certain observations in Craies on Statute Law, Sixth Edition, at page 145. It appears to me that manufacture of patent and proprietary medicine can only be completed when it is in accordance with the provisions of Drugs Act. There cannot be manufacture of patent and proprietary medicines unless they are in accordance with Drugs Act. Indeed, Section 18 of the Drugs Act prohibits manufacture and sale of drugs unless certain things are contained in the labels of such drugs. Therefore, it appears to me that the definition of the Drugs Act is relevant even prior to the introduction of sub-clause (iii) of Section 2(f) of the Central Excises and Salt Act, 1944. In the case of Mayor of Portsmouth v. Smith - (1885) 10 AC 364 (HL) at p. 371 Lord Blackburn had observed : "Where a single section of an Act is introduced into another subsequent Act, it must be read in the sense which it bore

in the original Act from which it was taken, and consequently it is perfectly legitimate to refer to all the rest of the Act in order to ascertain what the section meant, though those other sections are not incorporated into the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which was incorporated, that should be referred to; but all others, including the interpretation clause, if there be one, may be referred to." Therefore, in my opinion, it is not possible to rule out the definition provided in the Drugs Act, 1940, in construing what is manufacture of patent and proprietary medicine. In that view of the matter I am of the opinion that labelling is manufacture; when labelling is completed, manufacture is completed. It is in this context relevant also to refer to the observations of the Supreme Court in the cases relied on by Mr. Dutta. In the case of *S.B. Sugar Mills v. Union of India*, AIR 1968 SC 922, it was observed by the Supreme Court at p. 928 of the report: "The Act charges duty on manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The duty is levied on goods. As the Act does not define goods, the Legislature must be taken to have used that word in its ordinary, dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market. That it would be such an article which would attract the Act was brought out in AIR 1963 SC 791." Therefore, it is in order to be bought and sold in the market in case of the patent and proprietary medicine there must be labelling and such labelling is, therefore, manufacture. Quite apart from that question, independent of the Drugs Act and independent of sub-clause (iii) of Section 2(f) of the Central Excises Act, 1944,¹ I am of the opinion that in view of the peculiar nature of the patent and proprietary medicines labelling is a process incidental to or ancillary to the completion of manufacture of that product. From that point of view in my opinion the imposition of levy in this case was valid. Unlabelled medicines are not and cannot be described as patent and proprietary medicines. Mr. Dutta's second contention therefore fails." In view of the above discussion, we are of the view that Melalite Cream is a medical preparation and cannot be treated as a cosmetic or toilet preparation. Classification under erstwhile

Tariff up to 28th February, 1986 under Tariff Item 14E and classification after 28th February, 1986 under the present Tariff under Heading 3003.19 is in order. We do not find any infirmity in the orders passed by the lower authorities. We uphold the findings of the Collector of Central Excise (Appeals). The appeal filed by the revenue is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com