Alpine Industries Vs. Collector of Central Excise

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SooperKanoon Citation : sooperkanoon.com/8693

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-05-1995

Reported in : (1997)(92)ELT53TriDel

Appellant : Alpine Industries

Respondent : Collector of Central Excise

Judgement :

1. M/s. Alpine Industries, New Delhi manufacture product named Lip Salve. This product, which is supplied exclusively to the Ministry of Defence for use by members of the Defence Forces, was classified by the manufacturer under sub-heading 3003.20 of the Central Excise Tariff without payment of duty. The Department was, however, of the view that the product should be classifiable under Heading 3304.00 leviable to duty @ 105% ad valorem. A show cause notice was, therefore, issued proposing reclassification and consequently recovery of duty. After considering the reply and hearing the party, the Principal Collector, Central Excise, New Delhi, held that the product was not a medicament classifiable under Heading 3003.20 as claimed by the manufacturer, but the product was classifiable under Heading 3304.00. He, however, extended the benefit of Notification No. 339, dated 22-8-1986 and correspondingly confirmed the demand of duty.

2. The Order of the Collector was passed on 26th October, 1988.

Subsequently, the manufacturer, while classifying the goods under Heading 3304.00 claimed the benefit of Notification 27-C.E., dated 20-3-1990. The show cause notice was issued to him by the Assistant Collector of Central Excise proposing denial of the Notification benefit. After considering the manufacturer's claim that the classification under Heading 3304.00 had been claimed under protest and that the product ought to be classifiable under Heading 30.03, the Assistant Collector confirmed the demand for duty. His Order has been upheld by the Collector, Central Excise (Appeals). These two appeals are, therefore, against the Order of the Principal Collector and the Collector of Central Excise (Appeals).

3. We have heard Shri V. Lakshmikumaran, Advocate for the appellant. He said that Lip Salve was a medicament for treatment of sore, inflamed, roughened and cracked lips. Each of the active ingredients bees-wax and lanolin is used for its therapeutic purposes as established in various pharmacopoeias. The product did not satisfy the requirement of Note 2 of Chapter 33. It was put up in crude aluminium cans with the only literature pasted on the cans themselves. The appellant was manufacturing the goods under a Drug Licence. The product was manufactured in accordance with the specifications of the Ministry of Defence, and only supplied to the Army for the soldiers posted in high altitudes. The authorities below had not considered this fact, ignored the decision of this Tribunal in Frezco Corporation v. Collector of Central ExciseHena Export Corporation v.Collector of Central Excise-1993 (67) E.L.T. 907. The literature cited by the appellant regarding the products, therapeutic properties had not been considered. Further, the Principal Collector in its earlier Order had held the goods to barrier cream which would be entitled to the benefit of the Notification 393, dated 22-8-1986. Therefore, till such time as this Notification was amended by Notification 27, dated 20-2-1990, this benefit could not be denied. In any event, he argued that in arriving at the duty, it is the ex-duty price that should be considered and not the cum duty price as has been done. He relied upon a number of decisions in support of this. Further, the demand should prospective from the date of the show cause notice. In view of the Supreme Court's judgment in Rainbow Industries v. Union of India - 1994 (74) E.L.T. 3.

4. Shri V.C. Bhartiya, JDR, Departmental Representative, stated that the product does not figure in Indian Pharmacopoeia, therefore, cannot be considered to be a medicine. Each of the ingredients has no medicinal use. He referred to Hawley's Condensed Chemical Dictionary in support of this proposition. He relied upon the decision of this Tribunal reported in 1994 (23) ECR 262 : 1991 (37) ECR 774 relating to classification of lanolin and paraffin wax as drugs other than medicaments. He pointed out that the Joint Services Specifications of the Ministry of Defence shows the use of the product as protection against chapping of lips. The product contained the label and the Joint Services Specifications were the literature. The requirements of Note 2 to Chapter 33 were, therefore, satisfied.

5. There is no doubt/dispute that the product is manufactured in accordance with the Joint Services Specifications for Lip Salve No.6840-6. This shows ingredients to be white bees-wax, white soft paraffin, liquid paraffin and lanolin-all conforming to I.P. grade; cetyl alcohol C.P. grade. The other ingredients are stabiliser and perfume. Shri Lakshmikumaran has produced an extract from 1923 Edition of a British Pharmaceutical Codex and says that in view of the Note in the Introduction to the British Pharmacopoeia 1988, the monograph in the earlier Edition remains effective. The extract of the 1923 Codex produced by him is for unguentun rosatum, or rose lip salve. The ingredients are Alkana Root bruised, White Bees-wax, Oil of Rose and Prepared Lard. It may no doubt be true as he says that Alkana Root and Prepared Lard have been substituted by other ingredients, taking into use in tropical conditions and abhorrence to use of animal fats in this country. However, it is not possible from this extract alone to conclude that it is used as a medicine and not as a protective cream.

Further the Introduction to the B.P. 1988 says that it supersedes B.P.1980, and only includes monograph that appeared in that Edition. Since it has not been shown that rose lip salve figured in the 1980 B.P., it is not possible for us to conclude that Rose Lip Salve is part of the present British Pharmacopoeia. The march of time bringing with it advances in pharmacology renders obsolete many products which were our household remedies and we cannot conclude that Rose Lip Salve has not suffered the same fate if at all it was used as a medicine, which has not been shown. The extracts from The Extra Pharmacopoeia of Martindale

do not show any therapeutic uses for the ingredients of the Salve.

Bees-wax is stated to be used as an ingredient in ointments and enables water to be incorporated to produce water emulsions. The Extract relating to Lanolin does not show any therapeutic uses either. This is also true of cetyl alcohol. Thus, the principal ingredients, are seen to have no therapeutic action, and the Departmental Representative's argument is well-founded. The fact that the goods are of pharmaceutical grade does not necessarily lead to the conclusion that the product is a medicament. Even goods such as barrier creams are mentioned in the pharmacopoeia. For a product to be considered a medicament, it must be shown to have therapeutic or prophylactic use and a study of ingredients does not lead to this conclusion.

6. Let us now consider the other evidence relied upon in support. These are the drug Certificate dated 9-2-1987 of the Deputy Director (General) of the Directorate General of Health Services and Certificate dated 22nd May, 1987 of Prof. S.T. Seth of the All India Institute of Medical Sciences and the letter dated 17-6-1986 of the Army Authorities. The drug licence itself mentions that the licence is for ointment or cream for external application as a non-pharmacopoeia item.

As has been pointed out, a licence is issued under the Drugs and Cosmetics Act for goods which are not drugs also. In any event, the scope of the expression 'drugs' as defined in Section 3 (D) of the Act is far wider than the scope of medicaments classifiable under Chapter 30. For example, even substances to be used for diagnosis, mitigation or prevention of disease, sub-stances intended for use as components of drug, devices for internal or external use in diagnosis treatment, mitigation or prevention of disease or disorder, all qualify to be drugs under the Drugs Act. The fact of manufacture of an item under licence under this Act, therefore, is no guarantee that it is a medicament. The Certificate dated 9th February, 1987 of the Deputy Director (General) of the Directorate General of Health Services says that Lip Salve is a protective/preventive against treatment of chapping of lips. It further says that chapping of lips includes sores, inflammation, characteristics, fissures and 'similar diseases of mucous membrane of lips'. The thrust of the Certificate, therefore, is that this Lip Salve is used as protective

/preventive against what it describes as 'diseases' of the mucous membrane of lips but are not in fact disorders, since these are not caused by germs. These statements do not again necessarily lead to the conclusion that this is a medicament. The statements made can as well apply to barrier creams, or sun screen lotion which protect the screen against chemical and ultraviolet rays respectively. Both these are classifiable under Chapter 33. The Certificate does contain a sentence that disorders can be cured by use of Lip Salve. It does not, however, state any published data or other evidence in support of the claim. The Certificate dated 22nd May, 1987 of Dr. Seth suffers from similar defects and also considers inflammations, cracks etc., caused by cold and winds as a disease. Since this also does not cite evidence or technical literature in support it has no evidentiary value. The letter dated 19-6-1986 of the army authorities to the appellant is also worded in similar terms as the other two documents and says that the product is for free distribution to soldiers posted in high mountainous regions. It is signed by a Lieutenant Colonel whose designation is Joint Director (Fuel). His competence to decide upon use of the product is not indicated in the letter. In fact, the appellant has produced an accepted tender dated 28-2-1992 of the Director General of Supplies and Disposals for the product. It is interesting that the consignee are seem to be Army Units in Barabanki, Mathura, Delhi, Pathankot and Calcutta. None of these consignees is in a high altitude areas. Shri Lakshmikumaran's attempt to say that the goods would later be sent to high altitude areas is unconvincing. After all, nobody would first send the goods from Delhi to various places for them to be further shifted to high altitude areas. The Advocate has relied upon extracts of the Reader's Digest Medical Adviser to say that Lip Salve is used for the cure of chapped lips. This publication is evidently a guide to a layman and the language used in it is, therefore, not as precise as it would be in a treatise intended for a practitioner. The fact that the appellant has not been able to produce any evidence in the form of extracts from, say, books for treatment of skin conditions is striking.

It is to be noted that the Joint Services Specifications 6840-6 says that it covers the requirement of Lip Salve intended to be used as a protective against chapping in cold weather. Such chapping as is well known occurs because of dryness of air, and is not necessarily limited to high altitude areas although it may be more acute

in those areas because of relatively higher ultra violet radiations.

7. It has, therefore, to be concluded that the appellant has not established that the product has a therapeutic prophylactic effect.

Classification under Chapter 30, therefore, is ruled out. Heading 33.04 is inter alia for preparations for the care of the skin. On consideration of the uses of the product, it is clear that it fits into this heading. The product is used to protect the skin against damage caused by natural factors such as cold and weather conditions.

8. Shri Lakshmikumaran urged strongly that the product did not conform to the requirements of Note 2 of Chapter 33. This Note reads as follows : "Heading 3302 to 3307 apply inter alia to products whether or not mixed suitable for use as goods of these headings and put up in packings with labels, literature or other indications that they are used as cosmetics or toilet preparations or put up in a form clearly specialised for such use and includes products whether or not they contain subsidiary pharmaceutical or antiseptic constituents are held out as having subsidiary curative or prophylactic value." 9. Heading 3304 covers beauty or make-up preparations and preparations for care of the skin. There are, therefore, two categories of goods covered by it, beauty or make-up preparations and preparations for the care of the skin. From the use of the words 'cosmetic' occurring in the Note, it is clear that the Note, in so far as it applies to this Heading, only refers to cosmetic preparations. The use of the phrase 'inter alia' reinforces this conclusion. Cosmetic preparations may have other uses too and the intention behind the Note is obviously to ensure that such preparations are classified under this heading only preferred as such goods. Such requirement would not arise in the case of preparations for the care of the skin. The Note, therefore, does not restrict classification of such preparations.

10. On merits, therefore, the classification of the goods as arrived at by the lower authorities has to be upheld. The Advocate agreed that after amendment of Notification 27,1990 it would not be available.

However, two points further raised by the Advocate have merit. The first is that in arriving at the assessable value, the duty element, if any, has to be excluded there are any number of decisions on this issue following Supreme Court judgment in Bata Shoe Co. v. Collector of Central Excise - ;985 (21) E.L.T. 9. The Departmental Representative was not able to show that such abatement had been allowed in working out the duty.

11. If infact abatment of duty was not allowed, it would have to be done, in order, for valuation to be inconfirmity of Section 4 of the Act. This is a matter which have to be decided by the Asstt. Collector.

12. The other argument that has to be considered is the claim that in view of the Supreme Court judgment in the case of Rainbow Industries 1994 (74) E.L.T. 3 the demand has to be prospective i .e. from the date of issue of Show Cause Notice. In the Rainbow Industries's case, the Supreme Court held that if the department had accepted the price list, acted upon it and the goods were cleared with a knowledge of the Department, in the absence of any amendment of the law or judicial pronouncement, the classification should be effective from the date of issue of Show Cause Notice. The Principal Collector, in his order, has confirmed the demand for a period prior to the issue of Show Cause Notice. In view of the judgment of the Supreme Court, the demand would be effective from the date of Show Cause Notice, and would not cover the previous six months. No intention to evade duty was cited in the Show Cause Notice which the Principal Collector has adjudicated.

However, this would not be applicable for the later period, since there was no change in the classification. In the result, therefore, except [the] modification in the preceding paragraphs, we confirm the orders appealed against.

13. In the above appeals, the Learned Member, Shri Gowri Shankar has been pleased to reject the appeals, however, has granted relief for abatement of duty under Section 4 of the Act, as well as has held that duty for six months cannot be collected in terms of the judgment of the Hon'ble Supreme Court as rendered in the case of Rainbow Industries (supra).

14. I could not have the benefit of the views of the learned Vice-President in this matter and he has been pleased to call for my views, and hence I am expressing the same.

15. I agree with my Learned Brother that product 'lip salve', is required to be classified under sub-heading 3304.00 and the product cannot be considered as a medicament and its classification under sub-heading 3002.20 has been rightly rejected.

16. As regards the claim for abatement of duty under Section 4, the matter is required to be remanded for fresh consideration.

17. As regards duty confirmation for six months, I respectfully differ from my Learned Brother's views, as the Hon'ble Supreme Court in the latest ruling as rendered in the case of Ballarpur Industries Ltd. v.Collector of Central Excise, as reported in 1995 (76) E.L.T. 499, has upheld the duty confirmation for six months and has not followed the ratio of the judgment rendered in the case of Rainbow Industries (Supra). Hence, the confirmation of duty for six months by original authority is required to be upheld and penalty is also confirmed.

Sd/- 18. With due respects to my learned colleagues, my views and orders are as follows : 19. I observe that the words and phrases used in rival entries namely 33.04 and 30.03 and respective chapter notes are important for finding out the exact scope of these headings. I am therefore, reproducing them here for convenience of reference.

ESSENTIAL OILS AND RESINOIDS; PERFUMERY, COSMETIC OR TOILET PREPARATIONS 1(c) "Perfumery, cosmetics and toilet preparations containing alcohol or opium, Indian hemp or other narcotics and for this purpose, these expressions have the meaning respectively assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (16 of 1955)".

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 preparation 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." (5) "Heading No. 33.04 applies, inter alia, to the following products: beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skinfoods, skin tonics, face powders, baby powders, toilet powders, talcum powders and grease paints, lipsticks, eye shadow and eyebrow pencils, nail polishes and varnishes, cuticle removers and other preparations for use in manicure or chiropody and barrier creams to give Protection against skin irritants." 33.04 "Beauty or make-up preparations and preparations for the care of the skin (other than medicaments), including sunscreen and suntan preparations; manicure or pedicure preparations".

19. Chapter Note 1 (c) refers to Medicinal and Toilet Preparations (Excise Duties) Act, 1955. This Act contains the definition of Toilet Preparations as allows: "2(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." 20. Insofar as the common understanding of the word 'cosmetics' is concerned we find that Webster's New Dictionary and Thesaurus mentions as follows: "cosmetic [koz-met'ik] adj beautifying or correcting faults in the face, hair etc.; done or made to enhance the appearance of anything in a preparation to enhance beauty." The word 'cosmetic' has been defined in Webster's Ninth New Colgiate Dictionary is as follows : Cosmetic 1 : of, relating to, or making for beauty esp. of the complexion; 2 done or made for the sake of appearance as a) correcting defects esp. of the face b) decorative, ornamental c) not substantive.

These definitions are comprehensive and the dictionary meaning also indicates the common man's perception.

21. The word 'cosmetic' used in the Chapter 33 is in harmony with this conception and the entry emphasises the beautifying and related aspects of make-up and enhancement of appearance etc. The phrase preparation for the tre of the skin

(other than medicament) is in continuation of the words and phrases 'beauty' or 'make-up preparations' and has to be interpreted with reference to the company it keeps. Further, Chapter note 2 emphasises the use of the product as cosmetic or toilet preparation; therefore, the Department was under obligation to show if it wanted to classify the product under Heading 33.04; that the product was one which took care of beauty or enhanced it or improved the complexion or appearance or was used as a make-up preparation or could make one look better.

22. The Department however, not produced even an iota of evidence to this effect. It has merely emphasises that it took care of the lips but such taking care was by itself not sufficient if it only protected or cured the lips and did not otherwise enhance the beauty or appearance or acted as a make-up preparation.

23. It was equally important to demonstrate whether or not the use of the product as cosmetic or toilet preparation was advertised or otherwise indicated in the ways mentioned in Chapter note 2 by labels or literature etc. of it was 'put up in a form clearly specialised to such use'.

24. The department has however, not been able to produce an) material in this regard.

25. The learned DR has argued that it was similar to sunscreen and suntan preparations which protect the skin from ultra violet rays and barrier cream which gives protection against irritants; and in this connection, he has drawn attention to the observations and findings of the Principal Collector ii his order No. 79/88 dated 26-11-1988.

However, this contention has not been substantiated. It is noteworthy that sunscreen and suntan preparations and barrier cream have been specifically mentioned by name in Heading 33.0 and Chapter Note 5 respectively, and in view of use of the word 'inter alia in Chapter Note 5 similarity with these products has to be established before their provisions could be invoked. The department has, however, failed to do so.

26. As per Martindale Extra Pharmacopoeia, Typically Barrier Cream (which vary in composition) are used to prevent damage to the skin be mechanical, chemical or bacteriological action. Such preparations normally contains suitable powders such Zinc Oxide, Kaolin, Fuller's earth and talc and silicon may be included for the water repellant and protective properties. The are, therefore, normally used for protection against acid and neutral irritants alkalis and soaps, explosives and photographic chemicals, paraffin oils, paint dusts and tars etc.

whereas the lips salve has different composition and different use and purposes. It is mainly for protection and curing of lips during cold weather.

27. The product also does not appear to be similar to any of the type c other products mentioned in Heading 33.04 Chapter Note 5 as, inter alia, n evidence has been produced in this respect.

29. This still leaves the question as to whether the product can be considered as a medicament classifiable under Chapter 30. Here again, have reasons to differ from my learned colleagues on a number of important aspects.

The term 'medicament' has been defined in Chapter Note 2 of Chapter 30 as follows: (i) 'Medicaments' means goods (other than foods or beverages such as dietetic, diabetic or fortified goods, 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 used; or (b) unmixed products suitable for such uses put up in measured doses or in packings for retail sale or for use in hospitals".

30. It has been argued by the ld. DR and upheld by my learned colleagues that none of the constituents have individually prophylactic or therapeutic value. In this connection, my view is that it is not necessary to show that each of the constituents has therapeutic or prophylactic use or value. What we are concerned basically is the final product not the raw materials of which it is made. Furthermore, in the case of chemical products, the properties of the products can be (and generally are) different from the properties of the starting material (s). To give an elementary example from Chemistry: if nitrogen and hydrogen are

combined in suitable proportions in certain conditions, the result is NH3 i.e. Ammonia. It is well known that the properties of NH3 differ from those of nitrogen and hydrogen. The examples can be multiplied; and this is equally true in respect of pharmaceutical products also. Therefore, with respects, I find it difficult to agree with the observations of my learned colleagues on this point and consider that the whole debate on therapeutic or prophylactic value of ingredients was of no relevance for the purpose of the case before us; and in any eventuality it cannot be a determining factor.

31. Further, the fact that the constituents have been shown to be of IP grade or CP grade shows that they were of a standard or quality suitable for use as ingredients of some medicine i.e. a product which has therapeutic or prophylactic use.

32. In my opinion, what is really important for us to note is that the product with which we are concerned was mentioned in various pharmacopoeias in one form or another.

33. It is immaterial in this context that the ingredients do not exactly tally, because on one hand there is variation in composition of the product as indicated in different Pharmacopoeia, on the other hand it is well known that some of the ingredients may be modified or substituted depending upon the advances in research or requirement.

34. In this context, while, it is true, as mentioned by my learned colleague, that the later edition of Pharmacopoeia supercedes earlier one and some items become obsolete when more effective ones are discovered, yet, this cannot be the determining factor for deciding whether a product was a medicament or not. This is because of the fact that while advances in science and technology may result in development of more effective products and therefore, may replace the old ones which may go out of use; but this does not mean that the old ones ceased to be medicaments as such. It is also to be remembered that degree of advances or use of latest medicines may be different in different countries and also different in various regions of the same country or even in the same region from time to time. For example, while in big cities more advanced and effective medicines may come in use which in smaller towns or villages, the older ones may still, be popular.

35. I am also unable to agree with the observations that certificates produced by the appellants from army authorities and Director General of Health Services are not acceptable because they do not indicate that the disease or disorder was caused or not caused by germs. It is well known that the diseases or disorders are of various types including physiological ones. In other words, diseases or disorders need not necessarily be caused by germs or worms or bacteria, virus, fungus. In fact, many diseases or disorders are caused in human beings due to disturbance in harmones (example, Hyper and Hypo Thyriod condition).

Similarly, it is well known that vitamin deficiency diseases are not caused by any micro-organisms.

36. The appellants have produced the certificates in support of their contention that the product was supplied to the army for medicinal use.

The certificate of the Lieutenant Colonel has to be looked into mainly from the point of view that the intention was to show that it was actually used by the army for medicinal purposes.

37. The department has not produced any evidence to show that the certificate was in any way in correct or false in respect of this basic fact. The other details are not really of any significance from our point of view. The fact that the consignees were the Army Units located at Barabanki, Mathura, Delhi, Pathankot etc. does not by itself show that the product was not a pharmaceutical one because it is well known that in winter cold waves pass through plains of North India where Mathura, Delhi, Pathankot, etc. lie; And the people living here do suffer from the disorder of the lips particularly chapping and cracking. This is particularly true of those people who have moved from other climatic areas during their first winter and such people could be there, for all we know, in the units located in North India. Therefore, this is no ground to either disbelieve the certificate or treating the product as other than pharmaceutical one.

38. Since the appellants product has protective and curative properties satisfying the definition of medicament as given in Chapter 2 (1) (a) of Chapter 30; Therefore, it has to be treated as such. In this connection, it is significant that the

emphasis here is not on the property of the constituents but on the properties of the mixture or the product as it emerges after the constituents have been compounded together i.e. it is the final product which must be shown to have therapeutic or prophylactic use.

39. Even the Principal Collector has also stated that lips salve has not got prophylactic and therapeutic properties but treated them as subsidiary properties and compared it with barrier cream. But in my opinion, the Department has not been able to show that it was mainly a cosmetic preparation for beautifying or for better appearance and the prophylactic therapeutic properties were only subsidiary and that it was used like a barrier cream. Further, in view of the certificate of the Director General of Health Services, New Delhi that the lips salve has a medicinal use, I would like to put it the other way that it was primarily a medicament which may have subsidiary uses as well.

40. What we are required to essentially see is whether the product really serves the purpose of a drug or pharmaceutical product and since it has been certified that it is used for treatment for curing and protection of lips by the Army by two independent authorities (one by the Army and the other by the Director General of Health Services), therefore, in spite of slight variation and modification of the formulation from the pharmaceutical definitions, it could be considered as a medicament.

41. In so far as the question of Cosmetics and Drugs Act and licence thereunder is concerned, it may be mentioned that it is already well settled that one has to be very careful and cautious in applying other enactments and orders or permissions issued thereunder. It is not that, we cannot call other provisions in aid of our understanding and interpretation of Excise Law. But then we should resort to them only if and when absolutely necessary and only to the extent that the provisions, principles or objects could be shown to be pari materia with our law and covering common ground. It is in this context also necessary to see whether a particular term or phrase has been used in the same or similar sense and intended to have the same scope. The Central Excise Tariff includes provisions which are inter-related or effected by provisions in other chapters and sections and all these are

governed by principles of interpretation specifically meant to be applied to the Central Excise Tariff. All this has to be kept in view.

My learned colleagues have already indicated in their order some instances of difference between Central Excise Tariff and the provisions of Cosmetics and Drugs Act and many more can be cited.

42. In any eventuality as apparent from my observation in the above paragraphs, we are in a position to arrive at a correct decision even without reference to the Drug and Cosmetics Act or the licence issued thereunder, straightway on the basis of clear provisions of Central Excise Tariff itself. Therefore, it is not necessary to refer to them.

43. In view of the above discussion, I hold that the product is classifiable under Heading 30.03.

44. As regards the sub-classification (although it has been mentioned in the appeal memo), detailed arguments have not been advanced on the subheadings of this heading and we do not have sufficient material to conclude whether it could be considered as a Patent or propriety medicine falling under 3003.10. Neither the Principal Collector in his order-in-original nor the Collector (Appeals) in the impugned order have gone into this aspect in view of the irrespective findings; The learned Members have also not dealt with this subheading. The learned counsel has, of course, shown that the lips salve is mentioned in Swiss Pharmacopeia and Polish Pharmacopeia and the older British Pharmaceutical Codex; but he has not been able to show that the composition of the product in question is exactly the same as in these pharmacopeias and has argued that some of the ingredients could be substituted for a variety of reasons. While this may be so the reasons advanced namely tropical conditions, does not appeal to me and is not apparently correct because if the product was meant for use in high altitudes in Himalayan regions, then certainly the climate of such regions cannot be described as 'tropical' by any stretch of imagination. In fact, as we go higher and higher in the Himalayan regions, the climate becomes similar to the European climate. That of course, does not mean that the argument that substitutes could be permitted in certain circumstances for specific reasons is incorrect.

(Only example regarding tropical region is incorrect).

45. Since admittedly, the composition is not exactly the same as mentioned in the Pharmacopeias and the product does not find mention in Indian Pharmacopoeia later edition of British Pharmaceutical Codex, therefore, it throws open the question of sub-classification and the actual rate of duty leviable.

46. Further, it view of the above position, while I differ from my learned colleagues regarding classification, I agree with them that in so far as the valuation aspect is concerned, but it will be necessary to go into this aspect only if the material was found to be dutiable and the duty was ad valorem.

47. After the matter had been heard and the orders reserved, the learned counsel for the appellants had sent a communication on 1st June, 1995 enclosing resume of their submissions during the hearing and a copy of the Supreme Court judgment in the case of BPL Pharmaceuticals Ltd. v. Collector of Central Excise reported in 1995 (8) RLT 569 (SC).

This judgment and order do not relate to lips salve and its classification but to another product 'selsun' manufactured by another firm.

48. The classification of products depends upon a number of criteria and each item has to be classified on merits keeping in mind the tariff entries, relevant section notes and chapter notes and principles of interpretation. Insofar as the judgments of Courts are concerned, that are undoubtedly to be honoured but it is open to the rival parties to contend whether a particular product or issue is or is not covered by these judgments (wholly or partially). And accordingly whether one or more pleading(s) is/are required to be accepted in the light of a particular judgment is a matter for argument.

49. It would therefore, be unfair to consider any material which in the opinion of one of the two parties supports its contention(s) without giving chance to the other side to have its say in the matter. Taking into consideration the citation now forwarded in support of its pleas and argument by the appellants would therefore, amount to violation of principles of natural justice. Of course, if the judgment cited

was on the product itself, or the issue was fully covered in the opinion of learned brothers, it would have been a different matter but even in that case, I would have preferred reopening the proceedings in the interest of justice.

50. Further, the concluding and operative portion of this judgment reads as follows: "36. On a perusal of the entire material we are satisfied that the product in question, having regard to the preparation level literature character, common and commercial parlance understanding and the earlier decisions of the Central Board of Excise and Customs, would fall under sub-heading 3003.19 and there is no justifiable reason for changing the classification." On all these aspects, arguments have already been advanced during the course of hearing and they have also been duly considered by my learned brothers as well as myself in the light of our respective understanding. Therefore, there is no reason for us to reopen the matter at this stage.

51. In the end, looking to the totality of the facts and circumstances including the certificates produced before us, the pharmacopeias, the common parlance, the chapter notes of relevant chapters, the language of the rival entries and the proven characteristics and use of the product, I consider it as a medicament classifiable under 30.03, but the sub-classification is required to be redetermined. I, therefore, remand the matter to the Assistant Collector with the direction that he should reclassify as above and determine the sub-classification (and apart from assessable value) the effective rate of duty applicable.

53. In view of the majority opinion, the orders appealed against are confirmed in respect of the classification and rate of duty.

54. The duty could however be demanded only for a period upto six months prior to the date of the issue of Show Cause Notice in view of Hon'ble Supreme Court's Judgment in the case of Ballarpur Industries.

Even this demand will however be required to be re-calculated after redetermination of assessable value by the Assistant Collector.

55. Further, in view of the majority opinion, the penalty imposed is confirmed.