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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
DINESH MAHESHWARI; J., VIKRAM NATH; J.
CIVIL APPEAL NO. 9525 OF 2018; MAY 03, 2023

COMMISSSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD
versus
ASHWANI HOMEO PHARMACY

Central Excise Tariff Act, 1985 - Mere broad-basing of entries under the Act, cannot justify re-classification, without a change in the nature, character or use of the product. The revenue department was not justified in seeking to re-open the settled position in relation to the classification of a product, merely on the ground of the amendment made to the Central Excise Tariff in the year 2012, which had made certain changes in Chapter 30 and Chapter 33. While holding that the said changes had no impact on the product in question, the court by applying the twin test of 'common/commercial parlance test' and the 'ingredients test', held that the said product merited classification as 'medicament' under Chapter 30 and not as 'cosmetic or toilet preparations' under Chapter 33 of the First Schedule to the Act.

For Appellant(s) Mr. Vikramjit Banerjee, ASG Mr. Akshay Amritanshu, Adv. Mr. Abhishek, Adv. Mr. Adit Khorana, Adv. Mr. Prashant Rawat, Adv. Mr. Tathagat Sharma, Adv. Mr. shivam Singhania, Adv. Mr. Sunil Kumar Srivastava, Adv. Mr. Brajesh Kumar, Adv. Mr. Sudhakar Kulwant, Adv. Mr. Ashutosh Jain, Adv. Mr. Samyak Jain, Adv. Mr. Mukesh Kumar Maroria, AOR

For Respondent(s) Mr. V.V.S. Rao, Sr. Adv. Mr. D. Bharat Kumar, Adv. Mr. Aman Shukla, Adv. Mr. M. Chandrakanth Reddy, Adv. Mr. Gopal Jha, AOR

J U D G M E N T

DINESH MAHESHWARI, J.

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Preliminary and brief outline

1. This appeal is directed against the common judgment and order dated 31.01.2018, as passed by the Customs, Excise and Service Tax Appellate Tribunal[1], insofar as relating to Appeal No. E/30050/2016[2], whereby the Tribunal has disapproved and reversed the order

[1] Hereinafter also referred to as 'the Tribunal'.
[2] The order bearing No. 30121 of 2018.

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dated 16.10.2015, as passed by the Commissioner of Customs and Central Excise, Hyderabad[3] in HYD-EXCUS-004-COM-042-15-16.

1.1. By the aforesaid order dated 16.10.2015 in relation to the period from December 2013 to November 2014, the Adjudicating Authority held that the product in question, known as "*Aswini Homeo Arnica Hair Oil*"[4] could not be classified as 'medicament' under Tariff Item 3003 90 14 or under any item stated in Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985[5]-[6]; and that the product in question, being "Hair oil", was required to be classified as 'cosmetic' under Tariff Item 3305 90 19. Accordingly, the Adjudicating Authority confirmed the demand to the tune of Rs.2,72,14,266/- on the respondent for the differential duty payable in terms of Section 11-A (10) of the Central Excise Act, 1944[7]; ordered payment of interest on the said differential duty in terms of Section 11-AA of the Act of 1944; and imposed penalty in the sum of Rs.54,00,000/- under Rule 25 of the Central Excise Rules, 2002.

1.2. However, the appeal preferred by the respondent was allowed by the Tribunal by its impugned order dated 31.01.2018 and the aforesaid order dated 16.10.2015 passed by the Adjudicating Authority was set aside. The Tribunal held that the product in question, AHAHO, fell in the category of 'medicament' and hence, was rightly classified under Chapter 30 of the First Schedule to the Act of 1985.

1.3. An ancillary but intertwined aspect of the matter had been that the product in question was being classified as 'medicament' under the said Chapter 30 since the year 1994. According to the respondent, this classification was regularly accepted by the Department in the past with at least two successive orders of the Commissioner (Appeals) and hence, there was no justification in re-examining the issue. The Adjudicating Authority expressed the view that because of material amendment of the tariff entries in Chapters 30 and 33 in the year 2012, classification of the product in question required re-examination. The Tribunal, however, did not approve of this proposition of the Adjudicating Authority.

1.4. The appellant is aggrieved of the order so passed by the Tribunal and hence, has preferred this appeal while asserting that the product in question had rightly been classified by the Adjudicating Authority as 'cosmetic' in terms of Chapter 33 and hence, the demand in question deserves to be maintained. On the other hand, the respondent supports the order impugned while asserting that the product in question has rightly been classified as 'medicament' in terms of Chapter 30.

2. In view of the above, the primary question in this appeal is as to whether the product in question, AHAHO, would be classified as 'medicament' under Chapter 30 or as 'cosmetic' under Chapter 33 of the First Schedule to the Act of 1985. The other question is as to whether because of amendment of the entries in the said Chapters 30 and 33 in the year 2012, classification of the product in question required re-examination, even though the same was classified as 'medicament' under the said Chapter 30 since the year 1994.

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[3] Hereinafter also referred to as 'the Adjudicating Authority'.

[4] For short, 'AHAHO'.

[5] Hereinafter also referred to as 'the Act of 1985'.

[6] In the discussion hereinafter, reference to the relevant Chapter or the relevant Tariff Item is always pertaining to the 'First Schedule to the Act of 1985', unless indicated otherwise.

[7] Hereinafter also referred to as 'the Act of 1944'.

2.1. With reference to the aforementioned questions, we may take note of the relevant background aspects and stand of the respective parties with reference to the show-cause notice to the respondent and its reply.

The Background: Show-Cause Notice and Reply

3. The respondent, having registration number ADHPB1884HEM003 under the central excise, is engaged in the manufacture of the product in question, AHAHO, in its units at Moosapet (since the year 1994), Maheshwaram and Bala Nagar. Further, the respondent had classified the product under Tariff Item 3003 90 14 as 'medicament' and paid the excise duty at concessional rate accordingly. This classification of the product in question was examined as many as four times during the period 1994-2004 and, according to the respondent, was duly accepted by the Department.

4. It appears that even when classification of the product in question as 'medicament' had been accepted during the period 1994-2004, this classification remained in doubt and, particularly after changes in the Act of 1985 in the year 2012, the respondent was served with different showcause notices pertaining to different periods of consideration, essentially to the effect that the product in question was classifiable as 'cosmetic or toilet preparations' under Chapter 33, Tariff Item 3305 09 19. In the show-cause notice dated 26.12.2014, which forms the subject-matter of this appeal, the Adjudicating Authority, *inter alia,* stated as under: -

"02. The assessees are engaged in the manufacture of 'Aswini Homeo Arnica Hair Oil' which was classified by them under Tariff Item No. 3003 9014 of the First Schedule to the Central Excise Tariff Act, 1985. However, as per Chapter 33 of the Central Excise Tariff Act, 1985, preparations for use on the hair are rightly classifiable under Chapter Sub Heading No. 33050919 and shall be liable for assessment under Section 4A of the Central Excise Act, 1944 @12% adv. creating them as 'Cosmetic or Toilet preparations'. Accordingly, show cause notices as under were issued to the assessees.

Sr. No.	O.R. No.	Period	Duty
1	O.R. No. 21/2013Adjn (Commr) CE dt. 31.1.2013 OC No. 33/2013 (GGP/S-II)	April' 2012 to Sept' 2012	Rs. 73,71,267/-
2	O.R. No. 170/2013Adjn (Commr) CE, dt. 6.9.2013 C. No. V/15/14/CE/Adjn/2 013 Divn. M)	Sept' 2012 to March' 2013	Rs. 1,33,21,827/-
3	O.R. No.49/2014 – Adjn (Commr) CE, dt. 14.3.2014 C. No. V/15/02/CE/Adjn/2014-CE(Divn-M)	April' 2013 to Nov' 2013	Rs. 1,73,17,151/-

03. The present show cause notice is a statement under Section 11A (7A) of the Act covering the demand of duty for the subsequent period, and the grounds are the same as are mentioned in the earlier show cause notices. The details of the short payment of duty for the period from December, 2013 to November, 2014 are as under: -

(Amount in Rs.)

Quantity cleared (Ml)	Assessable Value	Duty payable @ 12.36%	Duty paid @ 6.18%	Duty short paid

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1,18,95,973	44,03,60,296	5,44,28,532	2,72,14,266	2,72,14,266

04. It appears that the assessees have contravened the provisions of Rule 4, 6, 8, 10 and 11 of the Central Excise Rules, 2002 in as much as they have wrongly classified 'Aswini Homeo Arnica Hair Oil' and short the duty of Rs. 2,72,14,266/- which appears to be recoverable from them under Section 11A of the Central Excise Act, 1944. It also appears that they are liable for payment of interest on the said amount of Central Excise duty under Section 11AA of the Central Excise Act, 1944. It also appears that they are liable for penal action under Rule 25 of the Central Excise Rules, 2002 for adopting incorrect classification and thus resorting to short payment of duty and for contravening the provisions of the Central Excise Act, 1944, and the rules made there under with intention to evade payment of duty.

05. Now, therefore, M/s Aswini Homeo Pharmacy, 6-48,49,6-50 Aswini Homeo Pharmacy Unit, Balanagar Hyderabad are hereby required to show cause to the Commissioner of Customs & Central Excise, Hyderabad-IV Commissionerate, Ground Floor, Posnett Bhavan, Tilak Road, Hyderabad within thirty (30) days of receipt of this notice, as to why;

i) Central Excise duty of Rs. 2,72,14,266/ (Rupees Two Crores seventy two lakhs fourteen thousand two hundred sixty six only), should not be demanded from them under sub section (7A) of Section 11A read with sub section (1)(a) of Section 11A of the Central Excise Act, 1944- for the period from December, 2013 to November, 2014.

ii) Interest on the amount of duty mentioned at SI. N. (i) above, should not be demanded from them at applicable rates, in terms of Section 11AA of the Central Excise Act 1944-and iii) Penalty under Rub 25 of the Central Excise Rules, 2002 should not be imposed on them for contravention of the Central Excise-Rules, 2002 mentioned supra.

06. M/s Aswini Homeo Pharmacy are further required to produce all the evidence upon which they intend to rely in support of their defense at the time of showing the cause. They are further required to mention in their written reply whether they wish to be heard in person before the case is adjudicated. If no cause is shown within the stipulated period or if they do not appear before the adjudicating authority when the case is posted for hearing, the case will be decided on merits on the basis of the evidence available on record.

07. The Department reserves its right to amend, modify or supplement or do addition to this notice on the basis of further evidence made available to it prior to the adjudication of this case. This notice is issued without prejudice to any other action that may initiated under the provisions of the Central Excise Act, 1944 and the rules made there under or any other law for the time being in force in India.

08. Reliance for the issuance is based on ER-1 returns furnished by the assessees during the period from December, 2013 to November, 2014 and Labels affixed to the containers cleared by the assessees."

5. The respondent-assessee, in its reply dated 07.04.2015, stated that the product was classified as 'medicament' under Chapter 30 by two successive Commissioner (Appeals) and two subordinate officers during 1994-2004; and the said orders were accepted by appellant, which had attained finality.

5.1. The respondent, *inter alia*, stated the following reasons for which its product, AHAHO, was required to be, and had rightly been, classified as 'medicament':

(i) That the manufacturing process would indicate the presence of four homeopathic drugs namely, Arnica Montana, Cantharis, Pilocarpine and Cinchona in its preparation, which is to be applied to the scalp and not consumed orally.

(ii) That its label indicated the words "Homeopathic Medicine" under

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Schedule K to the Drugs and Cosmetics Rules, 1945[8]; that the product would cure/prevent the lack of blood circulation to the hair roots, hair fall (alopecia), dandruff, headache and lack of sleep (insomnia); and that healing from the said diseases would lead to good health in terms of growth and maintenance of natural colour in the hair.

(iii) That AHAHO was a medicament in terms of market parlance, evidenced by its use over a period of nearly 19 years; by its manufacturing license issued by the Drug Controller and by the Directorate of Ayush; and from listing of the drugs used, in authoritative text books like Materia Medica of Homeopathic Drugs. Thus, the twin tests as accepted by this Court for classification of the product as 'medicament' were duly satisfied.

5.2. The respondent further elaborated in its reply that the product was not 'cosmetic', as the ingredients used had prophylactic properties and it was not applied for cleansing or beautifying or promoting attractiveness or altering the appearance. The depiction of a lady with long flowing hair on its label was only subjective and could be interpreted as indicative of good health evidenced by the long flowing hair upon being treated for hair fall and dandruff.

5.3. It was further submitted that a close look at Circular No.333/49/97CX dated 10.09.1997 would show that in popular parlance, AHAHO was a medicament in the light of its advertisement, marketing and claims on the label and, therefore, the said circular did not justify revising its classification to that of 'cosmetic or toilet preparations'. The respondent asserted that due to the absence of any change in its tariff description, ingredients, process of manufacture and use, the question would not arise of reclassification of the product in question. The respondent also requested that the proceedings be dropped or be kept pending until the Tribunal had adjudicated on the pending issues concerning classification of the product in question.

5.4. The respondent, in order to support its assertion that AHAHO is a medicament, placed reliance on a decision of the Tribunal in ***Bakson Homeo Pharmacy (P) Ltd. v. Collector of Central Excise, New Delhi*: (2001) 136 ELT 485**, wherein a similar product named "*Sunny Arnica Hair Oil*" was held to be a medicament.

Before the Commissioner of Customs and Central Excise

6. The Adjudicating Authority framed two issues for its adjudication as follows: -

"(i) Whether the notice has disturbed the settled position of law by reagitating the classification matter, and if not

(ii) whether the impugned product viz. AHAHO merits classification as a medicament under chapter sub-heading 30039014 or as Hair oil under chapter sub-heading 33059019."

6.1. In the first issue, it was observed by the Adjudicating Authority that the notices were not issued on account of any given judgment but those judgments were mentioned to point out that the classification would need a revision. It was further observed that the changes incorporated in the Act of 1985 from the year 2012 strengthened the view that the classification required reconsideration. The Adjudicating Authority proceeded to reproduce the old tariff entries and the new tariff entries under Chapters 30 and 33 as under: -

"OLD ENTRIES (as per Central Excise Tariff, 2004):

Chapter 30:

30.03 Medicaments (including veterinary medicaments).

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[8] Hereinafter also referred to as 'the Rules of 1945'.

3003.10 – Patent or proprietary medicaments, other than those medicaments which are exclusively Ayurvedic Unani, Siddha, Homeopathic or Bio-chemic

3003.20 – Medicaments (other than patent or proprietary) other than those which are exclusively Ayurvedic, Unani, Siddha, Homeopathic or Biochemic systems:

3003.31 -- Manufactured exclusively in accordance with the formulae described in the authoritative books specified in the First Schedule to the Drugs and Cosmetics Act, 1940 (23 of 1940) or Homeopathic Pharmacopeia of India or the United States of America or the United Kingdom or the German Homeopathic Pharmacopeia, as the case may be, and sold under the name as specified in such books or pharmacopeia

3003.32 -- Medicaments (including veterinary medicaments) used in bio-chemic system and not bearing a brand name

3003.39 -- Other

Chapter 33:

33.05 Preparations for use on the hair

3305.10 - Perfumed hair oils

- Other

3305.91 -- Hair fixer

3305.99 -- Other

PRESENT TARIFF HEADINGS (as per Central Excise Tariff, 2012);

3003 MEDICAMENTS (EXCLUDING GOODS OF

HEADING 3002, 3005 OR 3006) CONSISTING OF TWO OR MORE CONSTITUENTS WHICH HAVE BEEN MIXED TOGETHER FOR THERAPEUTIC OR PROPHYLACTIC USES, NOT PUT UP IN MEASURED DOSES OR IN FORMS OR PACKINGS FOR RETAIL SALE

3003 90 - - Other :

- - - Ayurvedic, Unani, Siddha, Homoeopathic or Bio-chemic systems medicaments:

3003 90 14 - - - - Of Homeopathic system

3305 PREPARATIONS FOR USE ON THE HAIR

3305 10 – Shampoos:

3305 10 10 - - - Containing spirit

3305 10 90 - - - Other

3305 20 00 – Preparations for permanent waving or straightening 3305 30 00 – Hair lacquers

3305 90 - Other:

- - - Hair oil:

3305 90 11- - - - Perfumed

3305 90 19 - - - - Other

3305 90 20 - - - Brilliantines (spirituous)

3305 90 30 --- Hair cream

3305 90 40 --- Hair dyes (natural, herbal or synthetic)

3305 90 50 --- Hair fixers

3305 90 90 - - - Other"

6.2. At this juncture, we may also take note of a few other contents of Chapter 30, which carries the heading 'Pharmaceutical Products'.

6.2.1. Note 1 of Chapter 30 specifies the items not covered thereunder. Clause (e) of this Note 1 has been referred to by the Adjudicating Authority, which reads as under: -

"Notes:

1. This Chapter does not cover :

(e) preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties;

-----"

6.2.2. In this Chapter 30, apart from heading 3003, medicaments have also been specified under heading 3004, the relevant contents whereof read as under: -

"3004 Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale

3004 90 - - Other :

- - - Ayurvedic, Unani, Homoeopathic, Siddha or Bio-chemic systems medicaments, put up for retail sale :

3004 90 14 - - - - Of Homeopathic system"

6.3. Reverting to the analysis by the Adjudicating Authority, it is noticed that the Adjudicating Authority referred to the changes made in Chapters 30 and 33 and proceeded to hold that the notice did not suffer from any imperfection while observing as under: -

"10.6 It can be seen that there is substantial change in the tariff headings requiring a relook into the classification of the impugned product. Particularly, Chapter 30 came to be reworded so as to remove the distinction between Patent/proprietary and generic medicaments and classify them according to whether they are put up in unit containers for retail sale or not. Secondly, the mention about the Drugs and Cosmetics Act and the various Pharmacopeia came to be deleted. Similarly, under Chapter 33 also, the phrase Hair Oil became prominent under which, subsidiary headings of "perfumed hair oil" and "others" came to be specified. All these changes certainly merit interpretation of the new entries vis-à-vis the product in question, than what was decided or settled earlier. Thus, even by applying the very ratio of Vicco Laboratories judgment, a different interpretation of tariff can lead to change of classification of a product even though the constituents and use of the product has not undergone any change. Secondly, the additional evidence adduced in the notices certainly merit consideration. Accordingly, I hold that the impugned notice do not suffer from any imperfection on account of the said judgment. Hence the first question is answered in the negative"

6.4. The Adjudicating Authority also observed that the impugned notice had been issued in the normal period and it was not a case where issue was sought to be reopened for the period for which it was settled. However, according to the learned Adjudicating Authority, the criteria and ideology in the matter of classification of such products was dynamic in character and hence, revision of classification in view of fresh facts coming to light could not be held to be improper.

6.5. As regards second issue, the Adjudicating Authority in the first place observed that classification of the product in question under Tariff Item 3003 90 14 was itself questionable inasmuch that item covered only the medicaments not put up in measured doses or packing whereas AHAHO was indisputably put up for sale in packing of 50ml, 100ml, 200ml and 400ml bottles for retail sale. The Adjudicating Authority observed that the claim of the respondent for classifying the product in question under the said heading remained baseless. However, the Adjudicating Authority proceeded to observe that Tariff Item 3004 90 14 was covering similar goods put up in measured doses and packings and hence, the matter required consideration vis-à-vis Tariff Item 3305 90 19. Thereafter, the Adjudicating Authority pointed out that the main prerequisite for the classification as a 'medicament' was that the product must be for 'therapeutic' or 'prophylactic' use; and with reference to the dictionary meaning, observed that a medicament with 'therapeutic' or 'prophylactic' use would mean that it was for healing or for preventing a disease. The Adjudicating Authority also referred to Circular No. 333/49/97-CX dated 10.09.1997 issued by the Central Board of Excise and Customs[9], which laid down certain criteria for the classification of products under the Act of 1985, which are claimed by the manufacturers as ayurvedic medicines whereas claimed by Department as cosmetics. The Board gave overriding effect to this circular over all previous circulars/instructions unless specified otherwise by Courts/Tribunal. The Adjudicating Authority made reference to the basis laid down by the Board to decide the classification of product to be a medicament or not in the following terms: -

"- whether the product has substantial therapeutic or prophylactic properties and whether it is prescribed as a medicine by a Medical Practitioner for curing of a disease and is prescribed for a limited time & use;

- how the product is construed in the popular sense i.e., how it is advertized and how it is understood by the people who normally sell it or use it;

- the drug license is only a guiding factor and not a decisive one since in terms of Chapter note under Chapter 33, goods falling under sub-headings 3303 to 3307 would merit classification under these headings, irrespective of the subsidiary therapeutic properties of the product."

6.6. The Adjudicating Authority was of the view that AHAHO did not qualify the first criteria as specified by the Board as, though availability of AHAHO in General Stores cannot be sole criteria but, it was common knowledge that one was not required to go to Homeo Stores or Homeo Physician to buy AHAHO; it did not contain the mandatory conditions as prescribed under the Drugs and Cosmetics Act, 1940[10] on contents of the label; there were no specifications relating to its dosage and duration of use and no contra-indications were stated irrespective of quantum or duration of use, which was against the basic concept of a medicament whose overdose result in contra-indications like diarrhoea, acidity, ulceration, rashes, etc.; and it did not claim to cure any particular diseases like alopecia or insomnia but only claimed to be able to prevent and control such diseases.

6.7. The analysis of the learned Adjudicating Authority in relation to the ingredients of the product in question and its properties, leading to the finding that it cannot be categorised as medicament, read as under: -

"11.6 I have perused the labels of the product which are on record. The contents are declared on the label as follows:

i) Arnica Mont Q 0.5 ml ii) Cantharis Q 0.5 ml iii) Cinchona Q 0.2 ml iv) Piocarpine Q 0.2 ml

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[9] Hereinafter also referred to as 'the Board'.

[10] Hereinafter also referred to as 'the Act of 1940'.

(Q= IX in pure coconut oil q.s. Alcohol 0.9°/o V/V)

11.7 On perusal of the label of AHAHO, it was observed that the front side of the label, there is a caption which reads "controls hair fall"; "prevents dandruff". On the reverse of the label i.e. the bottle hind side, it is mentioned that "Indication: Improves blood , circulation to the hair roots, thereby stops hair fall and promotes hair growth. Also controls dandruff, removes headache, induces good sleep and maintains natural color of the hair; "Contra Indications: NIL". "Directions for use: Massage directly on the scalp, for best results leave it on overnight." The label also reads "Aswini Homeo Arnica Hair Oil". It does not contain any condition like "to be sold by authorized medical distributor or retailer under prescription from medical practitioner" even though such mention is a mandatory requirement under Section 97(1) of the Drugs & Cosmetics Act, 1940. Secondly, it does not contain any specification regarding the dosage to be used and the duration for which it is to be used, which is the norm for a medicament. In case of a drug or medicament, we certainly find a direction with regard to prescribed amount of dosage to be used and in addition a direction that " ... or as directed by the physician". These specifications are not to be found on the product labels in this case. Thirdly, it does not claim that it can cure any particular disease like Alopecia (loss of hair). Medical conditions like Alopecia actually tend to happen all of a sudden with patches of baldness not only on the head but anywhere on the body. Similarly lack of sleep i.e. Insomnia is a medical condition which results in sleeplessness emanating from stress and other neurological disorders. Non-mention of Alopecia or Insomnia on the labels indicates that the product is not meant for any substantial curative purpose. Further, the kind of prevention or control claimed by AHAHO indicates a clear non-connection between the diseases and the product in question. Moreover, by mentioning that there are no contra indications, it implies that irrespective of the quantum or duration of usage, there is no adverse effect on the scalp or skin, which is against the basic concept of a medicament, which is prescribed or used for a limited period and overdose of a medicament is known to result in contra indications like diahorrea, acidity, ulceration, rashes etc. Even a medically prescribed skin cream or ointment has a limited use for the particular indication or symptom. We normally find a warning on such creams that prolonged usage will result or cause irritational symptoms, which if persist, should be remedied by a consultation with the Doctor. Nothing of that sort is found herein. In any case, the point that becomes clear is that AHAHO is a neither a prescribed medicament of a medical practitioner nor it is claimed to have any substantial therapeutic or prophylactic properties. I also find that as regards labels, Hon'ble Supreme court observed in the case of Ishaan Laboratories (supra) that "Further it was obvious from the labels of the products which we have ourselves inspected in the court that there is a claim made in each of the label of the medicinal properties of the product. It is also found that there was a specific claim that this is not a cosmetic product." Though in that case, the products were held to be medicaments, the label description on the basis of which such a conclusion was drawn (apart from other factors) indicates that the product should be projected and marketed in I such a manner so as to express the intention of the manufacturer that the product is a medicament and not a cosmetic. Such a situation does not exist in the present case inasmuch as the labels neither contain a positive indication that it is a medicament nor a negative indication that it is not a cosmetic. However, it is certainly labeled as a Hair Oil, prominently. If the intention is to identify the product as medicament, there was no need to label it is Hair Oil. Hence following the finding in the said case, I am inclined to hold that AHAHO cannot be categorized as a medicament but has to be classified as a Hair Oil. Accordingly, AHAHO does not fit into the first criteria prescribed under the said Circular."

6.8. As regards the common parlance criteria i.e., the way the product was marketed, it was observed that AHAHO was accessible in both Medical and General Stores and could be bought across the counter. Moreover, depiction of a lady with long, black flowing hair on its label indicated its categorisation as cosmetic and not as a medicament. The Adjudicating Authority even proceeded to observe that '*Hair growth is at best a cosmetic necessity rather than a disease requiring immediate attention or treatment*'; and held that the product in question failed on the second criteria of common parlance too.

6.9. The Adjudicating Authority also observed that the drug licenses issued by respective authorities, *per se* did not make AHAHO a preparation of homeopathic medicine, thereby failing the third criteria also. While referring to Materia Medica, the Adjudicating Authority expressed his reservations about one ingredient (Pilocarpine) and observed that there was no nexus of the said ingredient with Homeopathy.

6.10. While referring to the significance of general rules of interpretation as regards the Notes attached to the respective Chapters/Tariff Items in the First Schedule to the Act of 1985, the Adjudicating Authority observed that as per Note 1(e) to Chapter 30, the said Chapter did not cover preparation of the headings of Chapter 3303 to 3307, even if they have therapeutic or prophylactic properties.

6.11. The Adjudicating Authority also referred to the Board Circular No. 890/10/2009-CX dated 03.06.2009, clarifying its stance that coconut oil packaged in containers up to 200ml had to be classified as “Hair oil” due to the general view of public; and observed that AHAHO packed in bottles of 50ml, 100ml and 200ml, was to be treated as “Hair oil” and the 400ml pack cannot surpass this classification, merely because it was not fast-moving.
6.12. Hence, the Adjudicating Authority was of the view that the product in question could not be classified under Tariff Item 3003 90 14 or under any item stated in Chapter 30. The Adjudicating Authority further observed that when the intention of the framers of the legislation was to tax “Hair oil” at a particular rate, any attempt to evade the same would result in disregarding the law. Accordingly, the Adjudicating Authority, by its order dated 16.10.2015, confirmed the demand and levied interest and penalty on the respondent, as noticed hereinbefore.

6.13. It may be observed, in all fairness to the learned Adjudicating Authority, that in his elaborate order dated 16.10.2015 (pp. 96-253 of paper-book), several passages from a large number of decisions have also been reproduced, which we have not indicated hereinabove. The relevant of those decisions, as cited on behalf of the parties, shall be referred to and examined at the relevant stage hereafter.

Before the Customs, Excise and Service Tax Appellate Tribunal

7. The assessee’s appeal[11] against the aforesaid order dated 16.10.2015 was taken up for consideration by the Tribunal along with a bunch of its other appeals involving the same issues but pertaining to different periods of consideration.

7.1. The respondent-assessee (appellant before the Tribunal) made various submissions, including that the product was made of four homeopathic medicines in coconut oil base with therapeutic use for curing alopecia (loss of hair) and insomnia (lack of sleep) amongst other diseases; that the product was being manufactured under the drug license issued by the Director, Indian Medicine and Homeopathy, subsequently renewed as a medicament by the Additional Director & Drug Controller (Homeo), Department of Ayush, Government of Telangana; that AHAHO was mentioned at Serial No. 35 of Schedule K to the Rules of 1945, which contains only drugs; that the label clearly listed the ingredients and composition, indications and contra-indications as also mode of use; that the product was commonly understood as homeopathic medicament by its users as well as dealers; that the issue had squarely been decided in ***Bakson Homeo Pharmacy*** (supra); and that there were no such changes, be it in the Act of 1985 or in the ingredients of the product or the manufacturing process, which would warrant a revision

[11] Being Appeal No. E/30050/2016.

of its classification. On the other hand, the Department reiterated the findings of the Adjudicating Authority in opposition to the appeal.

7.2. The Tribunal summarised the substance of the order passed by the Adjudicating Authority as follows: -

“6. We find that the adjudicating authority has mainly confirmed demand on the ground that since the AHAHO is not prescribed by a medical practitioner for the purpose of curing any disease and it is available in the medical shops as well as general stores and any persons desirous using it can purchase across the counter, hence the same is not Homeopathic medicine. He also held that the label does not indicate the condition of sale by the authorized medical distributor or retailer under prescription from medical practitioner even though it is mandatory requirement under section 97 (1) of the Drugs & Cosmetic Act, 1940. It also does not contain the dosage to be used or that the dosage as directed by the physician. That it does not contain any that it can cure any particular disease like alopecia (loss of hair) or insomnia (sleep loss). Further he also held that previous orders passed by the Appellate Authority were on the basis of tariff entry before 2012 and after the said period the entries has changed hence needs relook.”

7.3. Having taken note of the background aspects of the case, the findings of the Adjudicating Authority, and various decisions cited by the parties in support of their respective contentions, the Tribunal found no reason for which the classification of the product in question was sought to be changed by the Adjudicating Authority.

7.4. In the course of its analysis, the Tribunal, *inter alia,* observed and held that only for the reason of being sold over the counter and not on a medical prescription would not take the product out of the category of medicine; that when different branches of medicine and licensing authority recognized baldness or hair fall as disease, the Adjudicating Authority was not entitled to take a different view; that the product clearly mentioned its use for other ailments like sleep loss; that the contents of its label clearly mentioned the product as homeopathic medicine and the same was understood as such by its users and traders; and that the product in question indeed passed the common parlance test. The Tribunal further referred to the four homeopathic medicines as being the ingredients of products and the same being covered by Serial No. 35 of Schedule K to the Rules of 1945, which only related to drugs and not cosmetics. The Tribunal yet further observed that the Adjudicating Authority had not been adopting a uniform approach and referred to the fact that the respondent had been issued show-cause notices in the past too and the Adjudicating Authority, upon examining the common parlance test as also the contents and usage of product, had accepted AHAHO as a homeopathic medicine. The Tribunal observed that the product remained the same and its classification as previously accepted was not required to be altered. The Tribunal also observed that on one hand, the Adjudicating Authority noted that the classification made before the amendment had to be re-looked but on the other hand, relied upon the decisions before 2012 along with the circular issued by the Board in 1997.

7.5. Thus, in sum and substance, the Tribunal found no reason for the classification now sought to be adopted by the Department; and proceeded to disapprove the order so passed by the Adjudicating Authority. For ready reference, we may reproduce the relevant parts of the findings of the Tribunal as follows: -

“9. The above judgments of the Hon'ble Apex Court and the Tribunal clearly spells out that even though the goods are sold over the counter and not on a medical prescription, it would not lead to the goods being out of the category of medicine. The adjudicating authority has held that since the hair growth is cosmetic necessity and the product label shows the lady with long hair the goods are cosmetic product. We are not in agreement with the above views of the adjudicating authority. Firstly when the different branches of medicine and the Licensing authorities recognize

the baldness or hairfall as disease in that case the adjudicating authority cannot take a different view which is not recognized by the branches of medicine. Secondly the product clearly mentions that the product in question is used for other ailments also such as sleep loss, increase of blood circulation and it nowhere depicts itself as for hair care or enhancing beauty of hair. The label indicates the product as Homeoptahic medicine under schedule K, ingredients and their composition, indications, contra indications and mode of application. The content of label thus itself shows that even in common parlance it is understood by the users and the traders as Homeopathic medicine. There is no advice on the label nor does it suggests that it can be used as hair oil. It is not disputed about the fact that the product is made of four Homeopathic medicines as ingredients namely Arnica Mount, Cantharis, Pilocarpin and Cinchona and is used to treat the hair loss, insomnia, dandruff, headache and other ailments. It is manufactured under Drug Licence issued under Rule 25 C of Drugs & Cosmetic Rules 1945 and in terms of Rules 85D by the Director, Indian Medicine & Homeopathy. The licence has been renewed from time to time by the Additional Director & Drug Controller (Homeo), Department of Ayush, Government of Telangana State. Even as per analysis report & Drug Controller, Department of Ayush the product is medicine. The product is covered by serial no. 35 of Schedule K of Drugs and Cosmetic Rules (Homeopathic Hair oils having active ingredients upto 3X potency) and the said schedule covers only drugs and not Cosmetics. The product has already been held to be Drug by the Hon'ble Andhra Pradesh High Court in reference to APGST as well as Commercial taxes. The Advance Ruling authority of Commercial Taxes, Government of Tamilnadu for the purpose of TNVAT Act 2006 held that product to be a homeopathic medicine. We find that even before the subject cases, on many occasions in the past, Appellant were issued show cause notices for classification of goods as cosmetic and the Appellate Authority after going into all the aspects of common parlance as well as contents of the product and its usage held that the product is Homeopathic medicine. The adjudicating authority has relied upon the judgment of Hon'ble Supreme Court in case of CCE, Nagpur Vs. M/s Shree Baidyanath Ayurved Bhavan Ltd. 2009 (237) E.L.T. 225 (S.C.) to state that the product in question does not satisfy the common parlance test. We find that the ratio of said judgment is not applicable as in the said case, the product Lal Dant Manjan was known as toilet preparation in common parlance and not as Ayurvedic medicine. Whereas in the present case the facts are entirely different as the Appellant has sold the goods as Homeopathic medicine and it is known as Homeopathic medicine in the common parlance. Even as apparent from facts the label of the product clearly shows the product as Homeopathic medicine, its content and usage. It also says that it should be left overnight. We are of the view that when the product is being sold as Homeopathic medicine and known as homeopathic medicine in the market the goods pass test of common parlance test as Homeopathic medicine. In the light of our observations made in preceding paras, we hold that the reliance placed upon the judgment of Shree Baidyanth case supra is misplaced as the facts are entirely different. Further the adjudicating authority reliance upon the order of the Tribunal in case of Naturence Research Labs (P) LTD. Vs. CCE, DELHI-II. 2003 (154) E.L.T. 672 (Tri. -Del.) is not correct as in said case the product Forest Flower was sold as nourishment to the scalp and hair roots as per the matter mentioned on the packing and it also helped control hair loss and prevents scalp infection, encourages luxurious growth of hairwhereas in the present case the Drug/ licensing Authorities and even the Honble High Court, the Vat authorities and the medical practitioners all have certified the product to be falling under the category of schedule K as Drug and even the product is sold as medicine as known as medicine in common parlance, The judgment of Alpine Industries 2003 (152) E.L.T. 16 (S.C.) as relied upon by the revenue is also not applicable as in the said case the drug licence obtained by the assessee under the Drugs and Cosmetics Act, 1940, itself mentioned that it is a licence for ointment and cream for external application as a nonpharmacopoeia item whereas in the present case the product is registered as Homeoptahic Medicine by the Additional Director, Indian Medicine and Homeopathy Department, Government of Andhra Pradesh. Even the Hon'ble High Court of Andhra Pradesh held the product to be falling under the category of Drug and Medicine and is sold as medicine. The ratio of judgment in case of CCE Vs. ZANDU PHARMACEUTICAL WORKS LTD. 2006 (204) E.L.T. 18 (S.C.) is also not applicable as the product label clearly shows the product as Homeopathic medicine The Judgment of Hon'ble Apex

Court in case of Sujanil Chemco Industries Vs. CCE, Pune 2005 (181) ELT 206 (SC) and Tribunal order in case of Bakson Homeo Pharmacy (P) Ltd. Vs. CCE, New Delhi 2001 (136) ELT 485 (TR-DEL) are absolutely applicable to the present case in view of our above findings and we do not find any reason to differ with those decisions.

10. We also find that the adjudicating authority at the one hand has held that the classification done before amendment in Central Excise Tariff in the year 2012 would require relook into the classification of the product in question and thus refused to accept the settled classification of goods under chapter 30 in terms of Appellate Orders passed in favour of Appellant. However on the other hand the adjudicating authority has relied upon the judgments rendered in the context of Central Excise Tariff before year 2012 and the Board Circular issued in year 1997 which clearly shows that there is no uniformity adopted by him to decide the issue. The adjudicating authority has relied upon the Circular No. 333/49/97 CX dt. 10.09.1997 to hold that the medicine is prescribed by a medical practitioner, used for limited time and not every day unless it is prescribed to deal with specific disease. He also relied upon the judgments in case of Alpine Industries Vs. CCE, Delhi 1997 (92) ELT 53 (TRI), CCE, Mumbai Vs. M/s Muller & Phipps, Richardson Hindustan Ltd. 1998 (35) ELT 424 (TRI) to hold that the word must be construed in popular sense i.e the meaning as understood by the people conversant therewith. The adjudicating authority has held that though the there is no rationale behind applying the 1997 circular in the year 2012 but since the said circular has not been withdrawn or held to be inapplicable in these matter by any court or law, the same would be applicable as it was relied upon by the Courts of law in numerous cases and in the light of said circular the product is not prescribed by a medical practitioner for any disease. We find that the adjudicating authority has chosen to apply pick and choose approach wherever it suited him for confirming demand against Appellant. We are not in agreement with the above approach and views of the adjudicating authority. We find that the Appellant were earlier issued demand notice on four different occasions and on each occasion the issue stands decided in favour of Appellant by the Appellate Authorities holding the goods to be Homeopathic medicine and liable to duty accordingly. The revenue has placed its reliance upon the judgment of Hon'ble Apex Court in case of M/s Shree Baidynath case supra to confirm the demands. However it is to be observed that the Honble Apex Court in said case has relied upon its judgment in case of B.P.L. PHARMACEUTICALS LTD. Vs. COLLECTOR OF C. EXCISE, VADODARA 1995 (77) E.L.T. 485 (S.C.). wherein it was held that Merely because there is some difference in the tariff entries, the product will not change its character. Something more is required for changing the classification especially when the product remains the same. In the present appeals the product has remained same and the classification issue stands decided in favour of the Appellant in all four previous proceedings against the Appellant. In case of CCE Nagpur Vs. Vicco Laboratories 2005 (179) ELT 17, the Honble Apex Court has held that classification cannot be changed without a change in the nature of a product or a fresh interpretation of the tariff heading by such decision. In the present case the goods in question has remained same and there is no change of tariff heading. Thus the contention of the Ld. Adjudicating authority that the change in tariff entry would require relook into classification is absolutely erroneous as the product has remained same and it would remain classified as Homeopathic medicine.

11. After careful appreciation of the facts as narrated above we find no reason to classify the product as Cosmetic under Chapter 33 of the CETA, 1985. We thus hold that the goods are classifiable under chapter 30 of the Central Excise Tariff as Homeopathic medicine and liable to duty accordingly. There is no reason to demand the duties and penalties adjudged against the Appellant."

Rival Submissions

8. In the present appeal, the learned Additional Solicitor General Mr. Vikramjit Banerjee has assailed the impugned judgment and order dated 31.01.2018 on a variety of grounds while asserting that the Tribunal has erred in holding that the product in question would fall under Chapter 30 and not under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985 as amended in the year 2012.

8.1. Learned ASG has stressed upon the necessity for re-look into the classification of the product in question with the submissions that due to the change in tariff structure, the orders prior to 2012 had lost their precedential value. The learned ASG would submit that Chapter 30 has been reworded to remove the distinction between patent/proprietary and generic medicaments and to classify them in terms of whether they are put in unit containers for retail sale or not; and the mention about the Act of 1940 as also various pharmacopeia has also been deleted. The learned ASG would further submit that "Hair oil" under Chapter 33 garnered focus because of the subsidiary headings of "perfumed hair oil" and "others" having been specified. The learned ASG has supported his submissions with reference to the decision in ***Collector of Central Excise, Guntur v. Andhra Sugar Ltd. Venkataraypuram*: 1989 Supp (1) SCC 144** that the change in entries from 2012 of the Act of 1985 showed the legislative intent to bring the product within taxation bracket as "Hair oil", which was added under Chapter 33 as a distinct category.

8.2. Learned ASG has strenuously argued that the product in question does not meet the criteria laid down under Chapter 30. It has been submitted that on a reading of the relevant Notes, even if the product is stated to possess certain curative or prophylactic value, it would still be cosmetic, as it excludes those with subsidiary curative and prophylactic value. The learned ASG would submit that the respondent has classified the product under Tariff Item 3003 90 14 but, the said entry provides for medicaments not put in measured doses or packaging whereas, AHAHO is admittedly sold in packaging of 50ml, 100ml, 200ml and 400ml bottles. According to learned ASG, Tariff Item 3305 90 19, specifically meant for "Hair oils", directly covers the product in question, AHAHO.

8.3. Learned ASG has also argued that a specific entry would take precedence over a general entry, as held by this Court in ***Commissioner of Central Excise, Nagpur v. Shree Baidyanath Ayurved Bhavan Ltd.*: (2009) 12 SCC 419**; and when "Hair oil" is specifically mentioned in Chapter 33 and when AHAHO's common parlance is that of a general cosmetic requisite, classifying it as a 'medicament' is a far-fetched proposition.

8.4. In the other limb of submissions, learned ASG has contended that the common parlance test of the product is not in favour of the respondent, as the product is not prescribed by any medical practitioner, is available freely without any prescription in Medical and General Stores, and could be purchased across the counter, as admitted by the respondent. Additionally, the label does not indicate the condition of sale by authorised medical distributor or retailer under prescription as mandated under the Act of 1940; it does not cure any particular disease; and the claims on the label are for marketing purposes only. Learned ASG has relied upon the decision in ***Alpine Industries v. Collector of Central Excise, New Delhi*: (2003) 3 SCC 111** to submit that any subsidiary therapeutic or prophylactic use of the product would not change its nature as "Hair oil", if in the common parlance, it is treated as a cosmetic. Another decision of this Court in ***Sunny Industries (P) Ltd. v. Collector of Central Excise, Calcutta*: (2003) 4 SCC 280** has also been relied upon.

8.4.1. Learned ASG has again referred to common parlance test to submit that the product is advertised as hair oil and not a medicament; and is perceived by the public who purchase and sell the product as a hair oil (cosmetic) and not as medicament. For the purpose of construing the words in a statute, the learned ASG has referred to the decision in ***Commissioner of Customs, Calcutta v. G.C. Jain and Anr.*: (2011) 12 SCC 713** to submit that unless the statute defined the words and expressions, they '*have to be construed in the sense in which persons dealing with them understand i.e., as per trade*

and understanding and usage.' Further the decision in ***Commissioner of Central Excise v. Wockhardt Life Sciences Limited*: (2012) 5 SCC 585** has been relied upon to submit that for classifying a taxable commodity, there is no fixed test and the decision on the classification of a particular article would depend on the tangible material or as to how it is comprehended in "common parlance" or "commercial world" or "trade circle", or in its popular sense.

9. On the other hand, learned senior counsel for the respondent Mr. V.V.S. Rao has emphasised on the submissions that AHAHO's classification has attained finality, having been examined four times; its composition is of four homeopathic medicines in a base oil medium; it has been licensed for manufacture and sale as a homeopathic medicine by the Director, Indian Medicines and Homeopathy, Government of Andhra Pradesh; it cures/prevents alopecia, dandruff, hair fall, etc., due to its therapeutic and prophylactic properties; and its label indicates the nature of the product as a homeopathic medicine under Schedule K to the Rules of 1945 with ingredients, composition, indications, contra-indications and mode of application.

9.1. Learned senior counsel would submit that although there were changes in the tariff structure in the year 2012 but then, notwithstanding the amendments, AHAHO has remained classifiable under Chapter 30, as its ingredients or manufacturing process did not undergo any change warranting its classification as a cosmetic under Chapter 33. Elaborating on these aspects, learned senior counsel has submitted that until 2004-05 the tariff entry was only 3003 39 for Homeopathic medicines and from 2005-06, 3003.39 was divided into 3003 for wholesale and 3004 for retail sale. Consequent to amendment of the First Schedule to the Central Excise Tariff Act, 1985 during the year 2005-06 introducing eight-digit classification system, the product became classifiable under Chapter heading 3004 90 14 (Medicaments consisting of two or more constituents which have been mixed together for Therapeutic or Prophylactic uses put up in doses or in forms or packings suitable for retail sale). It has been argued with reference to the decisions in ***BPL Pharmaceuticals v. Collector of Central Excise, Vadodara*: 1995 Supp (3) SCC 1** and ***Commissioner of Central Excise, Nagpur v. Vicco Laboratories*: (2005) 4 SCC 17** that some differences in the tariff entries would not change its character when the product remains the same. According to the learned counsel, insertion of Sub-Headings in Chapter 33 makes no difference as the product in question does not fit into any of the revised descriptions of "Hair oil" in Chapter 33, for AHAHO is clearly covered by the definition of 'medicament'.

9.1.1. In regard to the question of re-look at the classification, it has also been submitted that the contention on the part of appellant that the respondent classified the product under 3003 90 14, which provides for medicaments not put up in measured doses or packaging, whereas admittedly AHAHO is sold in packaging of 50ml, 100ml etc., is a new ground which was not a part of the show-cause notice; rather the respondent was never called upon to show-cause as to why the classification should not be changed. Therefore, all the proceedings are vitiated. It has, however, been submitted that even in relation to the assertions of the appellant, AHAHO would still remain under Chapter 30 (Traffic Item 3004 90 14) which is meant for Homeopathic Medicament packed in packages for retail sale and, in any case, it would not fall under Chapter 33 (Tariff Item 3305 90 15); and, notwithstanding the change in sub-classification, the rate of duty would not change and the situation would remain revenue neutral.

9.2. It has further been argued that the observations in ***Shree Baidyanath Ayurved Bhawan*** (supra) rather support the respondent's case, because the ingredients, process

of manufacture and uses of AHAHO having undergone no change from the beginning despite change in group of individual tariff entries. According to the learned counsel, no case is made for treating AHAHO as 'cosmetic' by ignoring its recognition as drug/medicament by the Government authorities as well as by this Court on 27.02.2019 in ***Commissioner of Commercial Taxes v. M/S Aswini Homeo Pharmacy*****: Civil Appeal No.9494-9495 of 2011**.

9.3. Learned senior counsel has submitted that there is no need for invoking the common parlance test as the nature of the product is certified by competent authority as a medicament and that the appellant had not made any market enquiries to establish that the product is a cosmetic besides not disproving the factual evidence in favour of the respondent.

9.4. Learned senior counsel has relied upon the decision in ***Commissioner of Central Excise, Calcutta v. Sharma Chemical Works*****: (2003) 5 SCC 60** to submit that merely because a product is sold across counters and without a prescription, it would not *per se* lead to the conclusion of it being not a medicament. The method of usage of AHAHO is clearly stated on its label; and Materia Medica clearly states the therapeutic properties of ingredients used. It has also been submitted that several drugs like Anacin, Dolo 650, Cough syrups, etc. are available across the counter; and none of the Homeo drugs require any prescription for purchasing. Another decision of this Court in the case of ***Meghdoot Gramodyog Sewa Sansthan, U.P. v. Commissioner of Central Excise, Lucknow*****: (2005) 4 SCC 15** has also been relied upon.

9.5. Learned senior counsel has distinguished the facts of the present case from the case of ***Alpine Industries*** (supra), as AHAHO is a therapeutic/prophylactic medicament in the medium of oil for the diseases relating to the scalp. The product is not advertised as "Hair Oil" but is marketed only as "*Aswini Homeo Arnica Hair Oil*".

9.6. With reference to the majority decision of the Tribunal in the case of ***Bakson Homeo Pharmacy*** (supra) in respect of a similar product, "*Sunny Arnica Hair Oil*", learned senior counsel has submitted that the said decision having attained finality, and in the case of respondent itself, the Department having four times accepted the classification of the product as medicament, the attempt to revisit the classification had been wholly unjustified and has rightly been disapproved by the Tribunal

9.7. It has, thus, been contended on behalf of the respondent that in the impugned order dated 31.01.2018, the Tribunal has rightly set aside the demands raised by the Department after appreciating the facts and the law applicable to the case inasmuch as, during the relevant period, there was no change in the said Chapter 30; and there was no change in the manufacturing process or ingredients of AHAHO. As such, the product remained a medicament under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985 prior to 2012 and even thereafter. Hence, this appeal deserves to be dismissed.

Points for determination

10. For what has been noticed hereinabove, the point essentially arising for determination in this case is as to whether the product in question, AHAHO, merits classification as 'medicament' under Chapter 30 or as 'cosmetic or toilet preparations' under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985; and the interlaced point is as to whether the change in tariff structure by way of amendment brought about in the year 2012 justified a re-look into the classification of the product in question.

11. As noticed, it remains undeniable that the product in question, AHAHO, was classified as 'medicament' under Chapter 30 on at least four different occasions by the Department, including two orders passed by the successive Commissioner (Appeals) during 1994-2004; and the said orders had attained finality. The respondent, in order to support its assertion that AHAHO is a medicament, also placed reliance on the decision of the Tribunal in the case of ***Bakson Homeo Pharmacy*** (supra) wherein a similar product marketed in the name of "*Sunny Arnica Hair Oil*" was held to be medicament, covered under Chapter 30. However, the Department attempted to rely on the amendment of the tariff entries in the year 2012 as its justification for re-examination of the classification of the product in question.

12. We have closely examined the divergent findings recorded by the Adjudicating Authority and the Tribunal and have also taken note of the competing stands taken by the parties. In order to examine the root question as to whether the product in question is classifiable as 'medicament' under Chapter 30 or would fall in the classification of 'cosmetic or toilet preparations' under Chapter 33 as also the other question as regards justification for re-examination of the previous classification of the product in question, we may, in the first place, take note of the principles discernible from the cited decisions.

The principles in the cited decisions

13. As regards justification for re-examination of the classification of the product in question, the Adjudicating Authority observed that there were substantial changes in the tariff entries, particularly when Chapter 30 came to be reworded so as to remove the distinction between patent/proprietary and generic medicaments and classify them according to whether they are put up in unit containers for retail sale or not; the mention about the Act of 1940 and the various Pharmacopeia came to be deleted; and under Chapter 33, the phrase "Hair oil" became prominent under which, subsidiary headings of "perfumed hair oil" and "others" came to be specified. Learned ASG has also relied upon the reasons adopted by the Adjudicating Authority in support of his contentions and has cited the decision in ***Andhra Sugar Ltd.*** (supra) as regards construction of statute with reference to the legislative intent.

13.1. In the case of ***Andhra Sugar Ltd.*** (supra), essentially, the issue involved had been as to whether acetic anhydride manufactured by the respondent and sold to drug manufacturers was eligible to benefit of exemption as drug intermediate. This Court held, having regard to the language and purpose of exemption Notification, that the said product acetic anhydride was covered by the expression 'drug intermediate' in the Notification. In that context, this Court, observed in the referred paragraph as follows: -

"**5.** …It is well settled that the meaning ascribed by the authority issuing the notification, is a good guide of a contemporaneous exposition of the position of law. Reference may be made to the observations of this Court in K. P. Varghese v. ITO [(1981) 4 SCC 173]. It is a well settled principle of interpretation that courts in construing a statute will give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty has been to construe, execute and apply the same enactment."

13.2. In the case of ***BPL Pharmaceuticals*** (supra), cited on behalf of the respondent, the issue before this Court was regarding the classification of "selenium sulfide lotion USP" manufactured and sold by the assessee under the brand name "Selsun Shampoo". This Court, *inter alia*, held that for a product to fall under Chapter 33, in terms of Note 2 therein, it must first be cosmetic and suitable to be used as such. This Court also examined the active ingredient of the product (albeit very small in quantity) and held that having regard to the preparation, label, literature, character, common and commercial parlance, the

product was liable to be classified as a medicament. Further, this Court accepted the submission on behalf of the assessee that merely because of some difference in the tariff entries, the product will not change its character; and something more is required for changing the classification, especially when the product remains the same. The relevant observations and expositions of this Court read as under: -

"**29.** The contention based on chapter notes is also not correct. One of the reasons given by the authorities below for holding that Selsun would fall under Chapter 33 was that having regard to the composition, the product will come within the purview of Note 2 to Chapter 33 of the Schedule to Central Excise Tariff Act, 1985 is without substance. According to the authorities the product contains only subsidiary pharmaceutical value and. Therefore, notwithstanding the product having medicinal value will fall under Chapter 33. We have already set out Note 2 to Chapter 33. **In order to attract Note 2 to Chapter 33 the product must first be cosmetic, that the product should be suitable for use as goods under Headings Nos. 33.03 to 33.08 and they must be put in packing as labels, literature and other indications showing that they are for uses cosmetic or toilet preparation.** Contrary to the above in the present case none of the requirements are fulfilled. Therefore, Note 2 to Chapter 33 is not attracted. Again it is without substance the reason given by the authorities that the product contains 2.5% w/v of Selenium Sulfide which is only of a subsidiary curative or prophylactic value. The position is that therapeutic quantity permitted as per technical differences including US Pharmacopoeia is 2.5%. Anything in excess is likely to harm or result in adverse effect. **Once the therapeutic quantity of the ingredient used, is accepted, thereafter it is not possible to hold that the constituent is subsidiary. The important factor is that this constituent (Selenium Sulfide) is the main ingredient and is the only active ingredient**.

30. As rightly contended by the learned Senior Counsel for the appellants that merely because there is some difference in the tariff entries, the product will not change its character. Something more is required for changing the classification especially when the product remains the same……

*** *** ***

33. The labels which give the warning, precaution and directions for use do make a difference from that of ordinary shampoo which will not contain such warning or precautions for use**. Further no individual would be prepared to say in a social gathering that he or she is using Selsun to get rid of dandruff or other similar diseases whereas nobody would hesitate to state in a similar gathering that he or she is using a particular brand of shampoo for beautifying his or her hair**. Thus there are lot of favourable materials to treat the product in question as a medicine rather than cosmetic. In this connection the reliance placed by the learned counsel for the appellants on a decision of this Court report in case *Indian Metals & Ferro Alloys Ltd. v.* CCE [(1991) 51 ELT 165 (SC)] can be usefully referred to. In that case this Court held:

"It (the Tribunal) seems to say that, even if the goods manufactured by the appellant had been rightly classified under manufactured by the appellant had been rightly classified under Item 26-AA before 1-3-1975, the introduction of Item 68 makes a difference to the interpretation of Item 26-AA. This is not correct. Item 68 was only intended as a residuary item. It covers goods not expressly mentioned in any of the earlier items. If, as assumed by the Tribunal, the poles manufactured were rightly classified under Item 26-AA, the question of revising the classification cannot arise merely because Item 68 is introduced to bring into the tax net items not covered by the various items set out in the Schedule. It does not and cannot affect the interpretation of the items enumerated in the Schedule. This logic of the Tribunal is, therefore, clearly wrong."

34. This judgment supports the case of the appellant when it is contended that there is no good reason to change the classification merely on the ground of coming into force of the new Central Excise Tariff Act, 1985 without showing more that the product has changed its character.

35. The learned counsel also placed reliance on a number of judgments to support his argument that in common and commercial parlance the product is known as medicine rather than cosmetic. As pointed out already and in support of that submission, affidavits and letters from chemists, doctors and customers are filed to show that the product is sold under prescription only in chemists' shops unlike shampoos sold in any shop including provision shops. This conclusion, namely, that the product is understood in the common and commercial parlance as a patent and proprietary medicine was also found by the Central Board of Excise and Customs as early as in 1981 and accepted by the Excise authorities and in the absence of any new material on the side of the respondents there is no difficulty in accepting this contention without referring to decision cited by the counsel for the appellants.

36. Yet another reason given by the CEGAT for not accepting the case of the appellants was that the product is sold with a pleasant odour and, therefore, it must be treated as a cosmetic. Selenium Sulfide has an unpleasant odour and to get rid of it insignificant amount of perfume is used and make it acceptable to the consumers. A medicine, for example, sugar-coated pill will nevertheless be medicine notwithstanding the sugar-coating. Likewise the addition of insignificant quantity of perfume to suppress the smell will not take away the character of the product as a drug or medicine. Again one other reason given by the Tribunal is regarding the packing. The Tribunal has held that the product is cosmetic because it is packed in an attractive plastic bottle. This by itself will not change the character, as cosmetic is put up for sale with some indication on the bottle or label that it is to be used as cosmetic or it is held out to be used as a cosmetic. As already noted the label here gives warnings. The fact that it is packed in a plastic bottles is a wholly irrelevant criteria.

37. On a perusal of the entire material we are satisfied that the product in question, having **regard to the preparation label, literature, character, common and commercial parlance understanding** and the earlier decisions of the Central Board of Excise and Customs, would fall under Sub-heading No. 3003.19 and there is no justifiable reason for changing the classification. As we have reached the above conclusion with reference to the materials placed before us on facts, we do not think it necessary to go into other decisions cited at the Bar. In the result the appeals are allowed holding that the product 'Selsun' will fall under Tariff Item 3003.19."

(emphasis supplied)

13.3. In ***Vicco Laboratories*** (supra), this Court was dealing with the question of classifying turmeric skin cream, vajradanti toothpaste and tooth powder as under Chapter 30 with pharmaceutical products or as under Chapter 33 with essential oils and resinoids, perfumery, cosmetics or toilet preparations. After applying the common parlance test of classification, and while relying on ***BPL Pharmaceuticals*** (supra) and other decisions, this Court held against the attempt at re-classification in the following words: -

"**4**. The mere decision of a court of law without more cannot be justification enough for changing the classification without a change in the nature of a product or a change in the use of the product, or a fresh interpretation of the tariff heading by such decision."

14. At this juncture, it shall be apposite to refer to the two decisions pertaining to the assessee Shree Baidyanath Ayurved Bhavan Ltd.

14.1. In the decision rendered on 13.04.2009, which has been referred to by the learned counsel for the parties [reported in **(2009) 12 SCC 419**], extensive reference has been made to the previous decision rendered on 30.03.1995 in relation to the same assessee and concerning the classification of the same product namely Dant Manjan Lal[12]. In the said previous decision, being the case of ***Shree Baidyanath Ayurved Bhavan Ltd. v. Collector of Central Excise, Nagpur*: (1996) 9 SCC 402**, the issue was as to whether DML manufactured by the assessee was falling within the meaning of an Ayurvedic

[12] 'DML', for short.

Medicine to qualify for exemption from payment of excise duty under Notification No. 62/78-CE dated 01.03.1978 issued in exercise of power conferred by Rule 8(1) of the Central Excise Rules, 1944. The relevant entry introduced by amendment was reading as 'all drugs, medicines, pharmaceuticals and drug intermediates not elsewhere specified'. The appellant contended that the product in question was a scientific medicine which would attract the aforesaid entry and would, therefore, be exempt from the payment of excise duty. The Tribunal disagreed with these submissions and held that the product in question could rightly be described as a toilet preparation. In that regard, after noticing that the ingredient for the product was stated to be Geru (red earth) to the extent of 70% having a cooling quality, the Tribunal observed that the same was largely used as a filler or coloring agent and was not described as a medicine in common parlance. After going through various texts, definition of 'drug' under the Act of 1940 and ayurvedic books as well as opinion of experts in this behalf, the Tribunal concluded that the product in question could not be described as a medicinal preparation and, accordingly, rejected the claim of the appellant. This Court approved the reasoning and findings of the Tribunal while observing, *inter alia*, as under:-

"3. …. The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellants if the same runs counter to how the product is understood in popular parlance. That is why the Tribunal observed in para 86 of the judgment as under:

"So certificates and affidavits given by the Vaidyas do not advance the case of Shri Baidyanath Ayurved Bhawan Limited in the absence of any evidence on record to show and prove that the common man who uses this Dant Manjan daily to clean his teeth considers this Dant Manjan as a medicine and not a toilet requisite."

It is this line of reasoning with which we are in agreement. The Tribunal rejected the claim of the appellant holding that ordinarily a medicine is prescribed by a medical practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with a specific disease like diabetes. We are, therefore, of the opinion that the Tribunal applied the correct principles in concluding that the product in question was not a medicinal preparation ('Ayurvedic') and, therefore, the appellant was not entitled to the benefit of the exemption notification. Having heard the learned counsel at length and having perused the line of reasoning adopted by the Tribunal with which we are in general agreement, we see no reason to interfere with the conclusion reached by the Tribunal and, therefore, we dismiss these appeals, but make no order as to costs."

14.2. The aforesaid case related to the Rules framed under the Act of 1944 and the Notification issued thereunder. During the pendency of appeal before this Court, the Act of 1985 was enacted which replaced the Schedule to the Act of 1944; and Chapter 30 of the Act of 1985 dealt with pharmaceutical products. With reference to the new enactment and its amendments in the year 1996-1997, the assessee approached the Board with a plea that now, there was specific definition of Ayurvedic medicines and hence, its product DML should be classified on the basis of that definition. This led to the Board sending communication to the Commissioner of Central Excise, Nagpur concerning the classification of DML. These propositions led to different decisions where the assessee contended that the product DML was a medicament under Chapter SubHeading 3003.31 of the Act of 1985 whereas, stand of the Department had been that the said product was a cosmetic/toiletry preparation/tooth powder classifiable under Chapter Heading 3306. West Regional Bench of the Tribunal decided the classification in favour of the assessee

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and held that DML was classifiable under Chapter Sub-Heading 3003.31. A similar view was taken by East Regional Bench of the Tribunal. However, the Larger Bench of the Tribunal, to which the issue of classification of DML was referred, held that DML was classifiable under Chapter Sub-Heading 3306.10.

14.3. In the above backdrop, the second decision concerning the assessee ***Shree Baidyanath Ayurved Bhavan Ltd.*** was rendered by this Court, which has been referred to by the learned counsel for the parties. Therein, this Court took note of the said previous decision rendered on 30.03.1995 [mentioned as the decision of ***Baidyanath I***] and held that since the product in its composition, character and uses continued to be the same, even after insertion of new Sub-Heading 3301.30, change in classification was not justified. This Court elaborated on the twin test for determination of classification of products (common parlance test being one of them) and also held that specific heading shall prevail over the general one. The relevant observations and expositions of this Court could be usefully reproduced as under: -

"**46. As a matter of fact, this Court has consistently applied common parlance test as one of the well-recognised tests to find out whether the product falls under Chapter 30 or Chapter 33.** In a recent decision in *Puma Ayurvedic Herbal (P) Ltd.* v. *CCE* [(2006) 3 SCC 266] this Court observed that in order to determine whether a product is a cosmetic or medicament, a twin test (common parlance test being one of them) has found favour with the courts. This is what this Court observed: (SCC pp. 269-70, para 2)

"2. … In order to determine whether a product is a cosmetic or a medicament a twin test has found favour with the courts. The test has approval of this Court also vide *CCE* v. *Richardson Hindustan Ltd.* [(2004) 9 SCC 156] There is no dispute about this as even the Revenue accepts that the test is determinative for the issue involved. **The tests are**:

I. **Whether the item is commonly understood as a medicament which is called the common parlance test**. For this test it will have to be seen whether in common parlance the item is accepted as a medicament. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer towards the product is very material. One may buy any of the ordinary soaps available in the market. But if one has a skin problem, he may have to buy a medicated soap. Such a soap will not be an ordinary cosmetic. It will be medicament falling in Chapter 30 of the Tariff Act.

II. **Are the ingredients used in the product mentioned in the authoritative textbooks** on ayurveda?"

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48. Applying the twin tests for determination of classification of products (including common parlance test), this Court in Puma Ayurvedic Herbal (P) Ltd. [(2006) 3 SCC 266] held that Items 1, 2, 3, 4, 7, 9, 10 and 11 were medicaments while Items 5, 6 and 8 were liable to be classified as cosmetics under Chapter Sub-Heading 33.04. **We endorse the view that in order to determine whether a product is covered by "cosmetics" or "medicaments" or in other words whether a product falls under Chapter 30 or Chapter 33 the twin tests noticed in Puma Ayurvedic Herbal (P) Ltd. [(2006) 3 SCC 266] continue to be relevant**.

49. The primary object of the Excise Act is to raise revenue for which various products are differently classified in the new Tariff Act. Resort should, in the circumstances, be had to popular meaning and understanding attached to such products by those using the product and not to be had to the scientific and technical meaning of the terms and expressions used. **The approach of the consumer or user towards the product, thus, assumes significance. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products**.

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52. The approach of the West Regional Bench is fallacious in what we have indicated above as it overlooks and ignores common parlance test which is one of the well-recognised tests to determine whether the product is classifiable as medicament or cosmetic and that has been consistently followed by this Court including with regard to this very product. **It also overlooks the well-settled legal position that without a change in the nature or a change in the use of the product and in the absence of a statutory definition, the product will not change its character. The product DML remains the same in its composition, character and uses. We have already held above that Sub-Heading 3003.31 does not define ayurvedic medicine and, therefore, there cannot be any justification enough for changing the classification of the product DML which has not been held to be ayurvedic medicine by this Court**.

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56. There is no doubt that a specific entry must prevail over a general entry. This is reflected from Rule 3(a) of the general Rules of interpretation that states that **Heading which provides the most specific description shall be preferred to Headings providing a more general description**. DML is a tooth powder which has not been held to be ayurvedic medicine in common parlance in Baidyanath I [(1996) 9 SCC 402].

57. We have already observed that common parlance test continues to be one of the determinative tests for classification of a product whether medicament or cosmetic. There being no change in the nature, character and uses of DML, it has to be held to be a tooth powder – as held in *Baidyanath 1*. DML is used routinely for dental hygiene. Since tooth powder is specifically covered by Chapter Sub-Heading 3306, it has to be classified thereunder. By virtue of Chapter Note 1(*d*) of Chapter 30 even if the product DMLhas some therapeutic or medicinal properties, the product stands excluded from Chapter 30.

58. The learned Senior Counsel for Baidyanath relied upon the judgment of this Court in *Vicco Laboratories* [(2005) 4 SCC 17 : (2005) 179 ELT 17] to show that in *Baidyanath I* [(1996) 9 SCC 402], no tests for classification were laid down. First, in *Baidyanath I* [(1996) 9 SCC 402] common parlance test applied by the Tribunal has been approved. Second, and more importantly, with regard to the very same product (DML), this Court held that it could not be classified as ayurvedic medicine and rather the product is a toilet requisite. ***Baidyanath I* [(1996) 9 SCC 402] , no doubt relates to the old Tariff period i.e. prior to enactment of the new Tariff Act but since the product in its composition, character and uses continues to be the same, even after insertion of new SubHeading 3301.30, we have already held that change in classification is not justified as common parlance test continues to be relevant for classification**. *Vicco Laboratories* [(2005) 4 SCC 17: (2005) 179 ELT 17] is of no help to the assessee."

(emphasis supplied)

15. As regards the test to be applied for determination of the proper classification of a product and construction of the tariff entries with reference to a product, we may refer to the other cited decisions as *infra*.

15.1. The case of ***Alpine Industries*** (supra) essentially related to the question of classification of the product 'Lip Salve', manufactured in accordance with the defence services specifications and supplied entirely to military personnel, as a 'medicament' under Chapter 30 or as 'a preparation for care of skin' under Chapter 33. This Court, while dealing with common parlance theory, held that the entries are not to be understood in their scientific or technical sense, but by their popular meaning for the purpose of interpretation. This Court said: -

"**5. It is well established that in interpreting tariff entries in taxation statute like the Excise Act, where the primary object is to raise revenue and for that purpose various products are differently classified, the entries are not to be understood in their scientific and**

technical meaning. The terms and expressions used in tariff have to be understood by their popular meaning that is the meaning that is attached to them by those using the product. See the decision of the Supreme Court on the dispute regarding classification for excise duty, the product — Lal Dant Manjan manufactured by Shree Baidyanath Ayurved Bhavan Ltd. reported in the case of *Shree Baidyanath Ayurved Bhavan Ltd. v. CCE* [(1996) 9 SCC 402]. The manufacturer claimed the product to be an Ayurvedic medicinal preparation product for dental care. The view of the Tribunal was upheld by this Court by holding (at SCC pp. 404-05, para 3) that "ordinarily a medicine is prescribed by a medical practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with a specific disease like diabetes".

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7. ….. **It is firmly established that on the question of classification of a product under the Central Excise Tariff Act, "commercial parlance theory" has to be applied**. It is true that the entire supply by the appellant of its product "Lip Salve" has been to the Defence Department for use of military personnel but that would also not be determinative of the nature of the product for classifying it. It is not disputed that the product "Lip Salve" is used for the care of the lips. It is a product essentially for "care of skin" and not for "cure of skin". It is, therefore, classifiable as a skin-care cream and not a medicament. From the nature of the product and the use to which it is put, we do not find that the claim of the appellant is acceptable that it is primarily for therapeutic use. What we find from the material produced before the Tribunal is that essentially the product is a protective/preventive preparation for chapping of lips. It is not a curative product, maybe, that incidentally on cracked and chapped lips, it has some curative effect. It is also not denied that the product "Lip Salve" is not suitable for use only for soldiers operating in high-altitude areas but it is of use for everyone as protection from dry, cold weather or sunrays. The product, therefore, essentially is protective of skin of lips. It is a lipcare product and not a "medicament". It is neither prescribed by any doctor nor obtainable from the chemist or pharmaceutical shops in the market.

8. The appellant seeks classification of the product as a *pharmaceutical product* under Chapter 30 and as a "medicament" under Heading 30.03. Under the Rules for Interpretation of the Schedule under the Central Excise Tariff Act, 1985, for the purpose of classification chapter notes can be taken as an aid for understanding their various entries under various headings of the tariff. What is to be noted from Chapter 30 of the Tariff Act is that under Note 1(*d*) preparations covered by Chapter 33 even if they have "therapeutic or prophylactic properties" are excluded from Chapter 30. "Medicament" has been defined in Note 2(*i*) to mean "goods which are either products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic use". On a reading of Note 1(*d*) with Note 2(*i*) of Chapter 30 under the heading "*Pharmaceutical Products*", it is clear that preparations which fall under Chapter 33 even *if they have therapeutic or prophylactic properties* are not covered under Heading 30.03 as "medicaments"

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13. ……..Note 2 and Note 5 with Entry 33.04, we find ourselves in agreement with the majority opinion of the Tribunal that the product "Lip Salve" is a kind of "barrier cream" or a protective cream against skin irritants. It, therefore, clearly falls under Entry 33.04 and conforms to the description "*preparations for the care of the skin (other than medicaments)*". The learned counsel of the appellant has not been able to persuade us to take a different view from the one taken in the majority opinion of the Tribunal. We confirm that the product **"Lip Salve" is essentially a preparation for protection of lips and skin and is not a "medicament". Such preparations which have a subsidiary curative or prophylactic value clearly fall under Entries 33.03 to 33.07 as per Note 2 under Chapter 33. The product clearly is covered by Entry 33.04 read with Note 5 of Chapter 33, it essentially being a preparation for protection of lips or skin**. We have also gone through the minority opinion expressed by one of the members of the Tribunal and the reasoning therein supported before us on behalf of the appellant. For the reasons aforesaid, we are unable to agree with the minority view. In the result, we find no merit in these appeals and the same are hereby dismissed."

(emphasis supplied)

15.2. In ***G.C. Jain*** (supra), this Court held that the words and expressions have to be construed as per trade and understanding usage, unless defined in the statute. This Court said: -

"**18.** Admittedly, the expression "adhesive" is not defined in the Act. It is now well settled that the words and expressions, unless defined in the statute have to be construed in the sense in which persons dealing with them understand i.e. as per trade and understanding and usage."

15.3. In ***Wockhardt Life Sciences*** (supra), this Court further elaborated on the common parlance test as under: -

"**33.** There is no fixed test for classification of a taxable commodity. This is probably the reason why the "common parlance test" or the "commercial usage test" are the most common (see *A. Nagaraju Bros.* v. *State of A.P.* [1994 Supp (3) SCC 122]). **Whether a particular article will fall within a particular tariff heading or not has to be decided on the basis of the tangible material or evidence to determine how such an article is understood in "common parlance" or in "commercial world" or in "trade circle" or in its popular sense meaning**. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted (see *Delhi Cloth and General Mills Co. Ltd.* v. *State of Rajasthan* [(1980) 4 SCC 71].

34. One of the essential factors for determining whether a product falls within Chapter 30 or not is whether the product is understood as a pharmaceutical product in common parlance [see *CCE* v. *Shree Baidyanath Ayurved Bhavan Ltd.* [(2009) 12 SCC 419] and *CCE* v. *Ishaan Research Lab (P) Ltd.* [(2008) 13 SCC 349]]. Further, the quantity of medicament used in a particular product will also not be a relevant factor for, normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful for the human body. [*Puma Ayurvedic Herbal (P) Ltd.* v. *CCE* [(2006) 3 SCC 266], *State of Goa* v. *Colfax Laboratories Ltd.* [(2004) 9 SCC 83] and *B.P.L. Pharmaceuticals Ltd.* v. *CCE* [1995 Supp (3) SCC 1].]

35. However, there cannot be a static parameter for the correct classification of a commodity. This Court in *Indian Aluminium Cables Ltd.* v. *Union of India*: (1985) 3 SCC 284 has culled out this principle in the following words: (SCC p. 291, para 13)

"*13*. To sum up the true position, the process of manufacture of a product and the end use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal schedule like the Central Excise Tariff. What is more important is whether the broad description of the article fits in with the expression used in the Tariff."

36. Moreover, the functional utility and predominant or primary usage of the commodity which is being classified must be taken into account, apart from the understanding in common parlance. [See *O.K. Play (India) Ltd.* v. *CCE* [(2005) 2 SCC 460] , *Alpine Industries* v. *CCE* [(2003) 3 SCC 111] , *Sujanil Chemo Industries* v. *CCE & Customs* [(2005) 4 SCC 189] , *ICPA Health Products (P) Ltd.* v. *CCE* [(2004) 4 SCC 481] , *Puma Ayurvedic Herbal* [(2006) 3 SCC 266] , *Ishaan Research Lab (P) Ltd.* [(2008) 13 SCC 349] and *CCE* v. *Uni Products India Ltd.* [(2009) 9 SCC 295]]

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39. In our view, as we have already stated, the combined factors that require to be taken note of for the purpose of the classification of the goods are the composition, the product literature, the label, the character of the product and the user to which the product is put. **However, the miniscule quantity of the prophylactic ingredient is not a relevant factor. In the instant case, it is not in dispute that this is used by the surgeons for the purpose of cleaning or degerming their hands and scrubbing the surface of the skin of the patient before that portion is operated upon. The purpose is to prevent the infection or disease. Therefore, the product in question can be safely classified as a "medicament"** which would fall under

Chapter Sub-Heading 3003 which is a specific entry and not under Chapter Sub-Heading 3402.90 which is a residuary entry."

(emphasis supplied)

15.4. In ***Sunny Industries*** (supra), this Court was dealing with the question whether 'Ad-Vitamin Massage Oil Forte' was still classifiable as patent and proprietary medicine even after the change of tariff description after 1985 Budget. This Court dismissed the appeal of the assessee as the product in question was oil, used for massage to take care of the skin, and not to cure the skin and hence, was classifiable under 'cosmetics' and not under 'medicaments'. This Court observed and held as under: -

"**11.** From the aforesaid chapter notes, it is clear that Heading 33.03 would include products whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value and Heading 33.04 would *inter alia* include the products specified therein and other preparations for use in manicure or chiropody and barrier creams to give protection against skin irritants. **Therefore, the product, mainly oil containing some A and D vitamins which is used for massage, even if it prevents ailment of rickets and treats the same cannot be held to be a medicament.**

12. Hence, in our view, after verification of the entire evidence and the certificates produced on record as well as the report of the Chemical Analyser, the Tribunal rightly arrived at the conclusion that **the product in question is oil used for massage and would be covered by Heading 33.04**. Similar contention was raised in *Alpine Industries* v. *CCE* [(2003) 3 SCC 111: JT (2003) 1 SC 130]

The Court observed (at SCC p. 116, para 8) that "medicament" has been defined in Note 2(*i*) to mean "goods which are either products comprising two or more constituents which have been mixed or compounded together for therapeutic or prophylactic use". On a reading of Note 1(*d*) with Note 2(*i*) of Chapter 30 under the heading "Pharmaceutical Products", it is clear that preparations which fall under Chapter 33 even if they have therapeutic or prophylactic properties are not covered under Heading 30.03 as "medicaments". The Court thereafter held thus: (SCC p. 115, para 7)

"The certificate issued by the Army Authorities and the chemical ingredients of the product are not decisive on the question of classification of the product for levy of excise duty. It is firmly established that on the question of classification of a product under the Central Excise Tariff Act, 'commercial parlance theory' has to be applied. It is true that the entire supply by the appellant of its product 'Lip Salve' has been to the Defence Department for use of military personnel but that would also not be determinative of the nature of the product for classifying it. It is not disputed that the product 'Lip Salve' is used for the care of the lips. It is a product essentially for 'care of skin' and not for 'cure of skin'. It is, therefore, classifiable as a skin-care cream and not a medicament. From the nature of the product and the use to which it is put, we do not find that the claim of the appellant is acceptable that it is primarily for therapeutic use."

13. The same would be the position in the present case. The oil is not used for cure of skin but is oil for massage and it takes care of the skin.

14. In this view of the matter, we find no substance in these appeals and they are accordingly dismissed. There shall be no order as to costs."

(emphasis supplied)

15.5. In ***Sharma Chemicals*** (supra), this Court was concerned with the issue as to whether the product Banphool Oil could be classified under as Ayurvedic medicament or as perfumed hair oil. This Court held that mere fact that a product is sold across the counter and not under a doctor's prescription, does not *ipso facto* lead to the conclusion that it is not a medicament. This Court, *inter alia*, observed and held as under: -

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“**12**. ….**It is settled law that the onus or burden to show that a product falls within a particular tariff item is always on the Revenue. Mere fact that a product is sold across the counters and not under a doctor's prescription, does not by itself lead to the conclusion that it is not a medicament. We are also in agreement with the submission of Mr Lakshmikumaran that merely because the percentage of medicament in a product is less, does not ipso facto[13] mean that the product is not a medicament. Generally the percentage or dosage of the medicament will be such as can be absorbed by the human body. The medicament would necessarily be covered by fillers/vehicles in order to make the product usable**. It could not be denied that all the ingredients used in Banphool Oil are those which are set out in the Ayurveda textbooks. Of course the formula may not be as per the textbooks but a medicament can also be under a patented or proprietary formula. The main criterion for determining classification is normally the use it is put to by the customers who use it. The burden of proving that Banphool Oil is understood by the customers as a hair oil was on the Revenue. This burden is not discharged as no such proof is adduced. **On the contrary, we find that the oil can be used for treatment of headache, eye problem, night blindness, reeling head, weak memory, hysteria, amnesia, blood pressure, insomnia etc. The dosages required are also set out on the label. The product is registered with the Drug Controller and is being manufactured under a drug licence**.”

(emphasis supplied)

15.6. In the case ***Meghdoot*** (supra), while dealing with the question of classification of six items namely Bhringraj Tail, Trifla Brahmi Tail, Neem Herbal Sat, Sat Reetha, Meghdoot Herbal Sat, Meghdoot Herbal Powder and following the decision in ***BPL Pharmaceuticals*** (supra), this Court classified the items under the heading of ‘medicaments’ and held that items which may be sold under names bearing a cosmetic connotation but would remain medicines based on the composition of the items, in the following terms: -

“**5**….. **A product may be medicinal without having been prescribed by a medical practitioner. It was also not necessary for a person manufacturing medical products to claim classification under Tariff Sub-Heading 3003.30 without establishing that the product had in fact been tested on patients in controlled situations or that the outcome had not been tested for effectiveness. This would be particularly true in the cases where the products are claimed to be based on traditional Ayurvedic formulae**.

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7. This Court has in similar matters come to the conclusion that items which may be sold under names bearing a “cosmetic” connotation would nevertheless remain medicines based on the composition of the items in *B.P.L. Pharmaceuticals Ltd.* v. *CCE* [1995 Supp (3) SCC 1 : (1995) 77 ELT 485].

8. As far as the first three items listed earlier are concerned, this Court has in *CCE* v. *Pandit D.P. Sharma* [(2003) 5 SCC 288 : (2003) 154 ELT 324] and *CCE* v. *Himtaj Ayurvedic Udyog Kendra* [(2003) 5 SCC 290 : (2003) 154 ELT 323] in connection with Banphool Oil and Himtaj Oil held that the Ayurvedic hair oils, were medicines and should be properly classified under Tariff SubHeading 3003.30, rather than under Tariff Sub-Heading 3305.10 or 3305.50….

9. As far as Items (4), (5) and (6) are concerned, for the reasons stated earlier, we are of the view that they are also properly classifiable under medicaments under Tariff Sub-Heading 3003.30.”

(emphasis supplied)

[13] As per Corrigendum issued by Supreme Court of India No. F.3/Ed. B.J./92/2003 dated 9-9-2003.

16. Apart from the above, on behalf of the respondent, reference has also been made to a decision of this Court dated 27.02.2019 concerning its product in relation to the entry in the Andhra Pradesh General Sales Tax Act, 1957 and it has been asserted that therein, this Court accepted that the product in question was a medicine and not a cosmetic product. This Court observed and held as under: -

"6. Notably, the Commissioner had failed to address the specific plea of the respondent that the hair oil manufactured by the respondent contains 'Arnica Mount Q, Cantharis Q, Cinchona Q and Pilocarpine Q' and would, therefore, qualify to be a drug within the meaning of Section 3 of The Drugs and Cosmetics Act, 1940, and if so, would be covered under Entry 37 of Schedule-I of the APGST Act; and not Entry 36 which is for general hair tonics, hair oils or hair lotions, as such. The High Court, therefore, reversed the conclusion reached by the Commissioner after noting the aforementioned contention of the respondent and, instead, held that the respondent had produced sufficient material to show that the product manufactured by the respondent was a medicine and not a cosmetic product.

7. The fact that the respondent is using the Homeopathic Pharmacopoeia referred to earlier in manufacturing of the hair oil has not been traversed by the appellant. Neither has the Commissioner dealt with that contention of the respondent nor was such a plea taken before the High Court by the appellant. Considering this, we see no reason to deviate from the conclusion reached by the High Court that the product manufactured by the respondent was rightly assessed at the relevant point of time in the assessment years 1994-1995 and 1995-1996, as covered by Entry 37 of Schedule-I of the APGST Act.

8. We once again make it amply clear that the view taken in these appeals is in the fact situation of this case and confined to the assessment years 1994- 1995 and 1995-1996 only and would not apply or be of any avail to the respondent for the subsequent assessment years, in view of the amendment effected in the APGST Act."

17. Before concluding this segment pertaining to the decided cases, we may also take note of the decision of the Tribunal in the case of ***Bakson Homeo Pharmacy*** (supra) which had all through been relied upon by the respondent for the reason that therein, a substantially similar product was held to be a medicament. In fact, in the said decision, the Tribunal examined the questions relating to two products namely, "*Sunny Arnica Hair Oil*" and "*Sunny Arnica Shampoo*". As regards the issue concerning the product shampoo, the Tribunal remanded the matter to the lower authority for decision afresh but, as regards hair oil, the Tribunal upheld the contention of the assessee in terms of the opinion of the majority and held that the said product was answering to the description of Homeopathic medicine while predominantly applying the tests pertaining to the ingredients. In the leading opinion, the learned Member of the Tribunal extensively referred to the individual properties of Homeopathic medicines as also the other natural ingredients of the product. The learned Member further underscored the connotations of Homeopathy system of medical treatment as also the therapeutic and prophylactic properties of the ingredients and observed as under: -

"On a careful consideration and examination of the materials produced and referred to above, we notice that the ingredients utilised in the manufacture of Arnica Hair Oil are exclusively natural substances and their reference has been found in Homoeopathic Pharmacopia of India. The manufacturers have obtained drug licence and the use of the Hair oil, as a medicament, has been recommended by the Homeopaths. The appellants have shown that the ingredients are homoeopathic in nature and having therapeutic and prophylactic. Therefore, their contention cannot be rejected in the light of the evidence produced……In the present case, we are concerned with Arnica Hair Oil, which is claimed to be medicament in terms of the ingredients having necessary **antiseptic, antiphlogistic action for dermatological diseases. It is also used for treatment of baldness and acts as an anti-dandruff agent and as cooling agent. In**

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view of each of the ingredients having one or the other therapeutic or prophylectic functions in terms of homoeopathic science, therefore, it has to be held that the Arnica Hair Oil is not a cosmetic preparation or for use on hair under sub-heading 3505.90 of the Central Excise Tariff, as they are not intended for cleansing, beautifying, promoting attractiveness or altering appearance in terms of the Hon'ble Supreme Court judgment in the case of B.P.L. Pharmaceuticals Ltd. but they are meant for specific treatment for dandruff of other skin and hair problem. **Therefore, the appellant's contention for treatment as a medicament having homoeopathic ingredients and considered as homoeopathic medicine is required to be accepted for classification under TI 14E of erstwhile tariff and under sub-heading 3003.30 of the new tariff.**"

(emphasis supplied)

18. We may usefully summarise the discernible principles from the cited decisions as also the other referred orders, so far relevant for the purpose of determination of points arising in this appeal as follows:

18.1. As regards the question as to whether the product in question, AHAHO, merits classification as 'medicament' under Chapter 30 or as 'cosmetic or toilet preparations' under Chapter 33, the inquiry shall be directed towards a couple of tests taken together, being the common/commercial parlance test i.e., how the product is understood commonly, including by the persons dealing in the same and by the endusers; and the ingredients test i.e., whether the ingredients used in the product are found mentioned in authoritative textbooks [vide ***Shree Baidyanath Ayurved Bhavan Ltd.*** (supra)]. The connotations of common parlance test could further be understood from the case of ***Alpine Industries*** (supra), that the primary object of such taxing statute being to raise revenue and various products being differently classified for that purpose, the entries are not to be understood in their scientific and technical meaning; rather the terms and expressions used in tariff have to be understood by their popular meaning, that is the meaning attached to them by those dealing with or using the product. Further, as observed in ***G.C. Jain*** (supra), the words and expressions, unless defined in the statute have to be construed in the sense in which persons dealing with them understand i.e., as per trade understanding and usage. Yet further, there is no fixed test or static parameter for correct classification of a product and it essentially depends on the meaning assigned to it by the persons concerned with it. One of the essential factors for determining whether a product falls under Chapter 30 or not is as to whether the product is understood as a pharmaceutical product in common parlance. However, the quantity of medicament used in a particular product is not a relevant factor because, ordinarily, the extent of use of medical ingredients is very low as a larger use may be harmful for the human body [vide ***Wockhardt Life Sciences*** (supra)]. Moreover, as held in ***Sharma Chemicals*** (supra), the mere fact that a product is sold across the counters and not under a doctor's prescription, does not by itself lead to a conclusion that it is not a medicament; and in ***Meghdoot*** (supra), that a product may be medicinal without having been prescribed by a medical practitioner. It is held by this Court in ***BPL Pharmaceuticals*** (supra) and reiterated in ***Meghdoot*** (supra) that the items which may be sold under names bearing a cosmetic connotation would nevertheless remain medicines based on the composition. As regards the question as to whether a particular product is classifiable under Chapter 30 as 'medicament' or under Chapter 33 as 'cosmetic', one of the essential features would be as to whether the preparation is essentially for cure or prevention of disease (medicament) or for care (cosmetic); and the preparation having only subsidiary curative or prophylactic value would fall under Chapter 33 [vide ***Alpine Industries*** and ***Sunny Industries*** (supra)].

18.2. Ordinarily, we would not have delved into another decision of the Tribunal but have found it appropriate to refer to the said decision in the case of ***Bakson Homeo Pharmacy*** (supra), which had all through been relied upon by the respondent, for the reason that it related to a similar product marketed in the name of "*Sunny Arnica Hair Oil*", which was held to be a 'medicament'. The said decision has also been relied upon by the Tribunal in the order impugned. The significant feature of the said decision is that therein, in the leading opinion of majority, ingredient test has extensively been dealt with and the medicinal qualities; and therapeutic/prophylactic use of several of the ingredients have been analysed, which include all the ingredients of the product involved in the present case[14].

18.3. As regards the question of justification for re-classification or reexamination of the classification, this Court has clearly held that there is no good reason to change the classification merely on the ground of change of tax structure or tariff entries without showing a change in the nature and character of a product or a change in the use of the product [vide the decisions in ***BPL Pharmaceuticals*** and ***Vicco Laboratories*** (supra)]. As noticed in ***Shree Baidyanath Ayurved Bhavan Ltd.*** (supra), this Court rejected the contentions seeking reclassification of the product in question therein, DML, after enactment of new Tariff Act because the product in its composition, character and uses continued to remain the same even after insertion of new Sub-Heading 3301.30.

19. Having thus summarised the discernible principles, so far as relevant for the present purpose, we may take up the points arising for determination. As noticed, the principal point arising for determination in this case is as to whether the product in question, AHAHO, merits classification as a 'medicament' under Chapter 30 or as 'cosmetic or toilet preparations' under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985. For determination of this point, the inquiry would be directed towards the twin tests as noticed above.

Application of the principles and twin test

20. Before applying twin tests for the purpose of the product in question, we may usefully recapitulate the divergent propositions presented in this case, where the findings of the Adjudicating Authority and the submissions made on behalf of the appellant stand on one side whereas, the findings of the Tribunal with the submissions made on behalf of the respondent stand on the other.

20.1. As noticed, the Adjudicating Authority examined the contents of the product as also its label and observed that it did not contain any condition like "to be sold by authorized medical distributor or retailer under prescription from medical practitioner" even though such a mention was a mandatory requirement under the Act of 1940; and it did not contain any specification regarding the dosage to be used and the duration for which it is to be used, which is the norm for a medicament. The Adjudicating Authority yet further observed that there was no claim that the product could cure any particular disease like Alopecia (loss of hair); that the medical conditions like Alopecia actually tend to happen all of a sudden with patches of baldness not only on the head but anywhere on the body; and that

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[14] It appears from the facts of the present case and the observations occurring in the said case of ***Bakson Homeo Pharmacy*** (supra) that all the ingredients of the product involved in the present case (AHAHO) were equally the ingredients of the product under consideration therein, namely, Arnica Montana, Cantharis, Pilocarpine, Cinchona. As noticed from the relevant pages of Materia Medica placed before us, in the Homeopathic terminology, Cinchona Officinalis is also termed as China Officinalis; and Pilocarpine is essentially isolated from Jaborandi. The similar product involved in ***Bakson Homeo Pharmacy*** (supra) was said to be containing the ingredients Arnica Mont, Jaborandi, Cantharis and China, apart from other ingredients.

Insomnia was a medical condition resulting in sleeplessness due to stress and other neurological disorders. According to these observations, non-mention of Alopecia or Insomnia on the labels indicated that the product was not meant for any substantial curative purpose. The Adjudicating Authority also observed that by mentioning no contraindications, it implied that irrespective of the quantum or duration of usage, there was no adverse effect on the scalp or skin, which was against the basic concept of a medicament, which is prescribed or used for a limited period and overdose is known to result in contra-indications like diarrhoea, acidity, ulceration, rashes etc. The Adjudicating Authority further observed that the label neither contained a positive indication that it was a medicament nor a negative indication that it was not a cosmetic but it was certainly labelled as a "Hair Oil"; and if the intention was to identify the product as medicament, there was no need to label it as "Hair Oil". Hence, the Adjudicating Authority held that AHAHO could not be categorized as a medicament but had to be classified as "Hair oil". As regards common parlance test, the Adjudicating Authority observed that AHAHO was accessible in both Medical and General Stores and could be bought across the counter. Moreover, the depiction of a lady with long, black flowing hair on its label indicated its categorisation as cosmetic and not as a medicament. The Adjudicating Authority even proceeded to observe that '*Hair growth is at best a cosmetic necessity rather than a disease requiring immediate attention or treatment*'. The Adjudicating Authority also observed that the drug licenses issued by respective authorities, *per se* did not make AHAHO a preparation of homeopathic medicine. While referring to Materia Medica, the Adjudicating Authority noted his reservations about one ingredient (Pilocarpine) and observed that there was no nexus of the said ingredient with Homeopathy. While referring to the significance of general rules of interpretation as regards the Notes attached to the respective Chapters/Tariff Items in the First Schedule to the Act of 1985, the Adjudicating Authority observed that as per Note 1(e) to Chapter 30, the said Chapter did not cover preparation of the headings of Chapter 3303 to 3307, even if they have therapeutic or prophylactic properties.

20.1.1. Learned ASG, while supporting the aforesaid findings of the Adjudicating Authority and while assailing the findings of the Tribunal, has argued that the product in question does not meet the criteria laid down under Chapter 30; that even if the product is stated to possess certain curative or prophylactic value, it would still be cosmetic as it excludes those with subsidiary curative and prophylactic value; and Tariff Item 3305 90 19, specifically meant for "Hair oil", directly covers the product in question for, a specific entry would take precedence over a general entry. The ASG has contended that the common parlance test of the product is not in favour of the respondent, as the product is not prescribed by any medical practitioner, is available freely without any prescription in Medical and General Stores, and could be purchased across the counter, as admitted by the respondent. Moreover, the label does not indicate the condition of sale by authorised medical distributor or retailer under prescription; it does not cure any particular disease; and the claims on the label are for marketing purposes only. The learned ASG has relied upon the decision in ***Alpine Industries*** (supra) to submit that any subsidiary therapeutic or prophylactic use of the product would not change its nature as "Hair oil" if in the common parlance, it is treated as a cosmetic. Learned ASG has also submitted that the product is advertised as hair oil and not a medicament; and is perceived by the public who purchase and sell the product as hair oil (cosmetic) and not as medicament.

20.2. In contrast to what has been observed by the Adjudicating Authority and what has been argued by learned ASG, it is noticed that in the very first response to the show-cause notice, the respondent asserted that the twin tests for classification of the product as

'medicament' were duly satisfied in relation to its product AHAHO in view of the facts and factors: (i) that the manufacturing process, undertaken in terms of the manufacturing license issued by the Drug Controller and by the Directorate of Ayush, would indicate the presence of four homeopathic drugs in the product namely, Arnica Montana, Cantharis, Pilocarpine and Cinchona; (ii) that the drugs so used are mentioned in the authoritative text books like Materia Medica of Homeopathic Drugs; (iii) that its label indicated the words "Homeopathic Medicine" under Schedule K to the Rules of 1945; (iv) that the product is to be applied to the scalp and not consumed orally; it would cure/prevent the lack of blood circulation to the hair roots, hair fall (alopecia), dandruff, headache and lack of sleep (insomnia), and healing from the said diseases would lead to good health in terms of growth and maintenance of natural colour in the hair; and (v) that the product was a medicament in terms of market parlance, evidenced by its use over a period of nearly 19 years. The respondent also submitted that the product was not 'cosmetic', as the ingredients used had prophylactic properties and it was not applied for cleansing or beautifying or promoting attractiveness or altering the appearance; and depiction of a lady with long flowing hair on its label was only subjective and could be interpreted as indicative of good health evidenced by the long flowing hair upon being treated for hair fall and dandruff.

20.2.1. The Tribunal took note of the observation and findings in the order impugned as also the evidence placed before it and the cited decisions and held, *inter alia*, that even though the goods were sold over the counter and not on a medical prescription, it would not lead to the goods being out of the category of medicine; that when different branches of medicine and the Licensing Authorities recognized baldness or hair fall as disease, the Adjudicating Authority could not take a different view which was not recognized by the branches of medicine; that the product clearly mentioned that it could be used for other ailments also such as sleep loss, increase of blood circulation and it nowhere depicted itself as for hair care or enhancing beauty of hair; that the label indicated the product as Homeopathic medicine under Schedule K to the Rules of 1945, ingredients and their composition, indications, contra-indications and mode of application and such contents of label itself showed that even in common parlance, it was understood by the users and the traders as Homeopathic medicine; that there was no advice on the label nor did it suggest that it could be used as hair oil; and indisputably, the product was made of four Homeopathic medicines as ingredients namely Arnica Mont, Cantharis, Pilocarpine and Cinchona and was used to treat hair loss, insomnia, dandruff, headache and other ailments; and the product was manufactured under Drug Licence issued under the relevant rules which had been renewed from time to time by the Additional Director & Drug Controller (Homeo), Department of Ayush, Government of Telangana; that even as per analysis report of Drug Controller, Department of Ayush, the product was medicine; the product was covered by Serial No. 35 of Schedule K to the Rules of 1945 (Homeopathic Hair oils having active ingredients upto 3X potency) and the said Schedule covered only drugs and not cosmetics. The Tribunal also observed that the product had already been held to be drug by the Andhra Pradesh High Court in reference to Commercial Taxes; and the Advance Ruling Authority of Commercial Taxes, Government of Tamil Nadu for the purpose of TNVAT Act 2006, held the product to be a Homeopathic medicine. The Tribunal also took note of the fact that even in the past, the respondent was issued show-cause notices for classification of the product as cosmetic and the Appellate Authority, after going into all the aspects of common parlance as well as contents of the product and its usage, held that the product was a Homeopathic medicine. The Tribunal distinguished the case of ***Shree Baidyanath Ayurved Bhavan*** (supra) while observing that the product in question therein did not satisfy the common parlance test and the said product DML was

known as toilet preparation in common parlance and not as Ayurvedic medicine. The Tribunal further pointed out that the decision of this Court in the case of ***Alpine Industries*** (supra) was not applicable as in the said case, the drug license obtained by the assessee under the Drugs and Cosmetics Act, 1940, itself mentioned that it was a license for ointment and cream for external application as a nonpharmacopoeia item whereas in the present case, the product was registered as Homeopathic Medicine.

20.2.2. While supporting the findings of the Tribunal, learned senior counsel for the respondent has contended that AHAHO is a therapeutic or prophylactic medicament in the medium of oil for curing diseases relating to the scalp. The product is not advertised as "Hair Oil" but is marketed only as "*Aswini Homeo Arnica Hair Oil*".

21. In an overall comprehension of the matter, and with application of the relevant principles to the facts of the present case, we are clearly of the view that the product in question sails through the twin tests without any doubt and has rightly been held as medicament by the Tribunal.

22. Taking up the test relating to the ingredients, there appears absolutely no reason to suggest that the product in question, AHAHO, does not pass this test. It remains indisputable that the product has been manufactured as a drug after being duly licensed by the competent authorities and carries the combination of as many as four Homeopathic medicines, Arnica Montana, Cantharis, Pilocarpine, and Cinchona in its preparation. These Homeopathic medicines are duly found mentioned in Homeopathic Pharmacopoeia of India[15] as also in the Dictionary of Practical Materia Medica[16] placed before us by the learned counsel for the respondent.

22.1. Having gone through the elaborate order passed by the Adjudicating Authority, we are constrained to observe that in the over-anxiety to somehow hold the product in question as cosmetic, the Adjudicating Authority even attempted to suggest his reservations as regards the utility of Pilocarpine as a Homeopathic drug contrary to the authoritative texts[17]. Be that as it may, the Adjudicating Authority in its elaborate order could not otherwise doubt the recognition of other ingredients of AHAHO as being Homeopathic drugs. The approach of the Adjudicating Authority in his micro analysis of the contents of label had also been in the nature of a fishing inquiry as if only to find some gap or some loophole therein, without looking at the substance of the matter that the product in question was clearly indicated to be a Homeopathic medicine under Schedule K to the Rules of 1945. Looking to the nature of the product and its properties, the relevant indications have also been specified in reasonable terms and looking to its nature and purpose, directions for use have also been given in the manner that it was to be massaged directly on the scalp and should be left overnight for best results. Hence, the Adjudicating Authority's observations about want of specification regarding the dosage to be used and the duration for which it is to be used carry their own shortcomings. As noticed, the product in question is essentially meant for dealing with the conditions arising in and on the scalp with hair being the integral part thereof. The product consists of Homeopathic medicines. Its manner of use is to put the same on the scalp and to leave it overnight. Looking to the nature of the product and its uses, the observations about want of specification regarding

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[15] Volume I 1971 ed. and Vol. V 1986 ed.

[16] A Dictionary of Practical Materia Medica by John Henry Clarke; B. Jain publishers (P) Ltd., New Delhi.

[17] As explained at p. 821 of the extract of Materia Medica placed before us, "*Pilocarpine* is one of the most characteristic of several alkaloids which have been isolated from Jaborandi (*Pilocarpus pinnalus*)". In the decision by the Tribunal in the case of ***Bakson Homeo Pharmacy*** (supra), the properties of this ingredient have been distinctly indicated, including that "for treatment of baldness" with reference to the relevant medical texts.

the dosage do not take the product out of its pharmaceutical value. Further, the Adjudicating Authority's observations of dissatisfaction because of there being no contra-indications have gone miles away from the reasonableness of approach. If the respondent has stated in clear terms on the label that the product carried nil contraindications, looking to its nature, purpose and the manner of use, it does not cease to be a medicament.

22.2. The perversity and unreasonableness of approach of the Adjudicating Authority is also noticed from the observations that, if the intention was to identify the product as medicament, there was no need to label it as "Hair Oil". While the expression "Hair Oil" does appear on the label, the other integral expressions "Homeo" and "Arnica" preceding the expression "Hair Oil" could not have been ignored and could not have been left aside. The Adjudicating Authority had gone to the extent of observing that hair growth was at best a cosmetic necessity rather than a disease requiring immediate attention or treatment! The Tribunal has rightly observed that when hair fall or baldness is recognised as a medical condition, the Adjudicating Authority could not have taken a different view, which was not recognized by any branch of medicine. The Tribunal has also rightly pointed out that the product clearly mentioned that it could be used for other ailments like headache and that it induces good sleep.

22.3. Moreover, the Adjudicating Authority seems not to have given adequate attention to the contents of Chapter 30 and the fact that for being accepted as medicament, the product is not invariably required to carry only therapeutic use. A product having prophylactic use is also envisaged under the Headings 3003 and 3004. If the product claims to improve blood circulation to the hair roots and thereby controlling hair fall, its prophylactic use cannot be gainsaid.

22.4. The product in question, being undoubtedly covered by Serial No. 35 of Schedule K to the Rules of 1945 and being manufactured in terms of the license issued under the Act of 1940, in our view, clearly satisfies the ingredients test. In other words, on its ingredients, the product is indeed a medicament carrying the combination of Homeopathic medicines.

23. In regard to the overt reliance of the appellant on the expression "Hair Oil" used for the product by the respondent, it may also be observed that small doses of the medicines in question would invariably require some medium of administration. Learned counsel for the respondents has rightly submitted that in relation to the product in question, hair oil is only a medium through which the medicine is to be applied on the scalp, particularly when it is meant for nourishing the hair roots.

23.1. It is also apparent in the present case that the stand of the Department to classify the product in question as 'cosmetic' under Chapter 33 is essentially based on the distinct entry "Hair Oil" occurring therein; and it appears that the expression "Hair Oil" occurring on the label of the product has been taken as decisive by them. For what has been discussed hereinabove, it would also follow as a natural corollary that the expression "Hair Oil" occurring on the label of the product is only indicating the medium through which Homeopathic medicines comprising the product are to be applied. We are unable to accept the submissions and the efforts on the part of the appellant to take the product in question to Chapter 33 merely because of its label carrying the expression "Hair Oil" while ignoring the preceding significant expressions "Homeo" and "Arnica". As observed by this Court in ***BPL Pharmaceuticals*** (supra), for a product to be taken to Chapter 33, it has first to be a 'cosmetic'. Similarly, reference to Note 1(e) of Chapter 30 also turns out to be of no relevance because the product in question cannot be said to be a preparation of Heading 3305 and then having insignificant or subsidiary therapeutic or prophylactic properties. As regards the product in question, which is essentially made of Homeopathic

medicines which have therapeutic and prophylactic uses, it cannot be said to be carrying only subsidiary pharmaceutical value. Putting it differently, we are satisfied that the product in question, AHAHO, is predominantly of pharmaceutical value and the item of cosmetic therein, i.e., hair oil, is nothing but a medium for appropriate use of that pharmaceutical value.

23.2. In regard to the above, we find the consideration of this Court in the case of ***BPL Pharmaceuticals*** (supra) to be apposite to the questions before us. Therein, this Court was considering a product sold by the assessee under the brand name "Selsun shampoo". This Court found it to be medicament with reference to a variety of tests applied from different angles and after finding that its active ingredient was selenium sulfide. In that context, this Court also indicated that an individual using such product may not be prepared to say that he or she was using a particular compound to get rid of dandruff or other similar diseases but would not hesitate to state that he or she was using a particular brand of shampoo. The observations in ***BPL Pharmaceuticals*** in this regard correlates with ingredient test as also the common parlance test; and in our view, fortify the case of the respondent.

23.3. The submissions about specific entry to be preferred to the general entry do not take the case of appellant any further. In the present case, in fact, the referred entry of Chapter 33 relating to the Tariff Item 'Hair oil' under the Heading 3305 is itself to be taken as a general entry and in any case, when hair oil is being used only as a medium for use/administration/application of the medicine, the case would fall in the specific entry pertaining to medicament under Headings 3003 or 3004; and it being of the medicines of Homeopathic system, it would fall either in Tariff Item 3003 90 14 or in Tariff Item 3004 90 14. In any case, the product in question cannot fall under Chapter 33.

24. As observed, we have considered it appropriate to refer to the said decision of the Tribunal in the case of ***Bakson Homeo Pharmacy*** (supra), which had all through been relied upon by the respondent for the reason that it related to a similar product marketed in the name of "*Sunny Arnica Hair Oil*". The said decision clearly makes out the ingredient test in favour of the respondent and we are satisfied with the detailed analysis of the same ingredients by the Tribunal while holding the product to be a medicament. The ingredient test, as extensively dealt with in the leading opinion of majority of the Tribunal in the case of ***Bakson Homeo Pharmacy*** (supra), with reference to the fundamental principles of Homeopathy and the medicinal properties and therapeutic/prophylactic use of several of the ingredients, inspires confidence and when AHAHO is found carrying all such Homeopathic medicines which were the ingredients of the product under consideration of the Tribunal, we find it just and proper to endorse the views of the majority of the Tribunal in ***Bakson Homeo Pharmacy*** (supra) and there appears no requirement to re-analyse the medicinal properties of the ingredients. Suffice it would be to observe that the product in question, AHAHO, passes the ingredients test beyond any doubt.

25. On the other features of common parlance test, i.e., the manner in which the product in question is commonly understood, it is noticed that one of the grounds placed at the forefront by the appellants and the Adjudicating Authority had been that AHAHO was accessible in both Medical and General Stores and could be bought across the counter. This feature of availability of the product in question has absolutely no relevance. In ***Sharma Chemical*** (supra), this Court clearly held that merely for a product being sold across the counter and not on doctor's prescription, does not by itself lead to a conclusion that it is not a 'medicament'. Similarly, in ***Meghdoot*** (supra), this Court made it clear that a product may be medicinal without having been prescribed by a medical practitioner. In

Meghdoot, this Court has also made it clear with reference to other decided cases that the items which may be sold under names bearing a cosmetic connotation would nevertheless remain medicines based on the composition. Viewed from any angle, merely for being available across the counter, the product in question, AHAHO, does not cease to be a medicament.

26. Another essential feature while examining the question as to whether a particular product is classifiable as medicament under Chapter 30 or as cosmetic under Chapter 33 would be as to whether the preparation is essentially for cure or prevention of disease i.e., with therapeutic or prophylactic properties or only for care. Tersely put, when the preparation is for cure or prevention, it would be medicament but, if only for care, it would be cosmetic. Of course, a cosmetic would not become medicament even if having subsidiary curative or prophylactic value, as held by this Court in ***Alpine Industries*** (supra). However, the product in question, AHAHO, does not fail on this count for the reason that it is a preparation of Homeopathic medicine and when it is marketed as carrying those medicines, in commercial as also common parlance, with its name carrying the significant expressions "Homeo" and "Arnica", the product could only be understood as the one carrying predominantly pharmaceutical value and not mere cosmetic value.

27. The other suggestion on behalf of the Adjudicating Authority and the appellant, relating to the common parlance test with reference to the depiction of a lady with long black flowing hair on its label and thereby treating it as cosmetic, is also stretching the matter to the brink of absurdity. When the product in question is intended to control hair fall as also to prevent dandruff and to induce good sleep, which all carry their own therapeutic and prophylactic connotations, the picture of a lady with long black flowing hair cannot be said to be unrelated to the indications related with the product. In any case, such a picture, by itself, cannot make the product in question a cosmetic. Interestingly, right at the top of the said picture and below the name of the product, it proclaims "Controls hair fall. Prevents dandruff". The Adjudicating Authority has taken his process of analysis to further illogical heights by proclaiming that hair growth was at the best a cosmetic necessity rather than a disease requiring immediate attention or treatment. We have reproduced these expressions of the Adjudicating Authority verbatim to show the irrationality of reasoning and want of logic. A treatment or prevention of hair fall by way of medication was sought to be rejected by the Adjudicating Authority by his impression that hair growth was only a cosmetic necessity. We could only disapprove such an approach.

27.1. The substance of the matter remains that in common parlance, the product in question would be approached essentially for its claimed medicinal qualities and not as another hair oil. This aspect, in our view, is itself sufficient to reject the contentions of the appellant and the observations of the Adjudicating Authority. The Tribunal has rightly dealt with the matter in accordance with the law applicable to the facts of the present case.

28. The Adjudicating Authority has also observed that drug licenses issued by respective authorities *per se* did not make AHAHO a preparation of Homeopathic medicine. However, the Adjudicating Authority has failed to consider that such drug license issued under Schedule K to the Rules of 1945 had not been a factor to be ignored altogether. Both in relation to common parlance test as also the ingredients test, this factor carries its own relevance even if not finally decisive of the matter. The submission about want of condition of sale by authorised medical distributor or retailer under prescription has its own shortcomings for it has not been shown if such a preparation falling under Schedule K to the Rules of 1945 was also requiring such a mention in terms of Rule 97. In any case, any such requirements for adherence to the Act of 1940 and the Rules of

1945 could only be a matter for consideration of the authorities dealing with licensing and regulating the manufacture and sale of drugs. The only relevant aspect for the present purpose is that the product in question being manufactured as a Homeopathy medicine, and being marketed and used as a Homeopathic medicine for its pharmaceutical value, would fall in Chapter 30 and cannot be branded as cosmetic, so as to fall under Chapter 33 of the First Schedule to the Act of 1985.

29. In the passing, we may also observe that the very product in question, in relation to the entry in the Andhra Pradesh General Sales Tax Act, 1957, has been accepted by this Court to be answering the description of a medicine and not being a cosmetic product, after it was found that the respondent-assessee's assertion about its ingredients and thereby the product qualifying to be a drug within the meaning of Section 3 of the Act of 1940 could not be refuted by the Revenue. The said decision of this Court may not have a direct bearing on the question of classification of the product in question for the purpose of the Act of 1985 but, it cannot be denied that the product in question has been found answering to the description of a 'drug' for the purpose of the Act of 1940 as also for the purpose of the said Andhra Pradesh General Sales Tax Act, 1957. Viewed from any angle, it remains a medicament.

Whether re-look at classification of the product in question justified

30. For what has discussed hereinabove, it is apparent that the product in question had rightly been classified as 'medicament' in the past and nothing material had changed so as to re-classify the same. However, the Revenue has attempted to rely on the amendment of the tariff structure in the year 2012 as justification for re-look at its classification. The Adjudicating Authority stated this justification in the manner that there were substantial changes in the tariff headings, particularly when Chapter 30 came to be reworded so as to remove the distinction between patent/proprietary and generic medicaments and to classify them according to whether they are put up in unit containers for retail sale or not; the mention about the Act of 1940 and the various Pharmacopeia came to be deleted; and under Chapter 33, the phrase 'Hair oil' became prominent under which, subsidiary headings of 'perfumed hair oil' and 'others' came to be specified. According to the Adjudicating Authority, all these changes merited interpretation of the new entries vis-à-vis the product in question than what was decided or settled earlier. Learned ASG has also relied upon these very reasons in support of his contentions. In our view, there had been no justification in the Department seeking to re-open the settled position in relation to the product in question merely with reference to certain changes made in Chapter 30 and Chapter 33, which had essentially broadened their ambit and scope and provided modified marginal notes and tariff entries with detailed specifications. These changes had otherwise no impact, so far as the product of the respondent, AHAHO, is concerned.

31. In support of the proposition for re-classification, the decision in ***Andhra Sugar Ltd.*** (supra) has been cited on behalf of the appellant. We have extracted the relied upon paragraph of the said decision hereinbefore and it is difficult to accept that the proposition therein, to the effect that the meaning ascribed by the authorities issuing Notification is a good guide of a contemporaneous composition of exposition of law, has any application to the present case. The applicable principles, as noticed from the decisions in ***BPL Pharmaceuticals*** and ***Vicco Laboratories*** (supra) remain that change of classification cannot be countenanced merely on the ground of coming into force of different tax structure without showing that the product has changed its character. The decision in ***Shree Baidyanath Ayurved Bhawan*** (supra) is pertinent to the point wherein, after an

unsuccessful attempt to have the product DML accepted as a medicinal preparation (in ***Baidyanath I***), the assessee-company made another attempt for change of classification after coming into force of the Act of 1985. While rejecting such an attempt on the part of the assesseecompany, this Court held that since the product in its composition, character and uses continued to be the same, even after insertion of new Sub-Heading 3301.30, change in classification was not justified (*vide* paragraph 58 of the decision in ***Shree Baidyanath Ayurved Bhawan***, reproduced hereinbefore). Thus, mere broad-basing of the entries in Chapter 30 and Chapter 33 of the First Schedule to the Act 1985, by itself, could not have been the justification for an attempt at re-classification of the product in question.

32. Even as regards the amendment of the entries, as noticed, the stand of the appellant-Revenue has been that Chapter 30 was reworded so as to remove the distinction between patent/proprietary and generic medicaments and to classify them according to whether they are put up in unit containers for retail sales or not. Further, it has been stated that reference to the Act of 1940 and various pharmacopoeia had been deleted. Thirdly, it has been contended that in Chapter 33, the phrase hair oil had become prominent with subsidiary entries of perfumed hair oils and other. We could only reject such an attempt on the part of the Revenue as a hairsplitting exercise, away and detached from the substance. This is apart from the fact that the specification of medicament under Heading 3004 would, in any case, cover the product in question in the form it is marketed for retail sale.

32.1. By way of the amendment of 2012, even if the relevant entries pertaining to preparation for use on the hair have been provided with micro classifications in comparison to the entries standing earlier (as could be seen from the entries extracted hereinbefore), it could never be taken to mean that anything which is prepared for being used on the hair and carries the name “Hair Oil”, would lose its character as medicament if otherwise it has been prepared for therapeutic or prophylactic uses. Moreover, rewording and regrouping of different entries in medicaments are hardly of any impact on the character of the product in question.

32.2. As noticed, in Chapter 30, apart from Heading 3003 relating to medicaments consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses not put up in measured doses or in forms or packing for retail sale, Heading 3004 pertains to the medicaments consisting of mixed or un-mixed product for therapeutic or prophylactic uses put up in measured doses or in form of packing for retail sale. Viewed thus, we are inclined to accept the submissions on behalf of the respondent that even with reference to its packaging, the product AHAHO would remain a homeopathic medicament and would be covered under Chapter 30, where it could be placed in Sub-Heading 3004 90 14. Similarly, deletions of the reference to the Act of 1940 or to various pharmacopoeia cannot be interpreted to mean that a product like the one in question, which is otherwise a medicament, has to be classified on the basis of the base through which the application of medicine is being provided.

33. We have already discussed hereinabove that with application of the relevant principles, the product in question, AHAHO, comes clean through the twin test. Therefore, in the ultimate analysis, we are clearly of the view that there had been no justification for making any attempt to re-classify the product in question with reference to the amendments brought about in Chapters 30 and 33 in the year 2012.

Conclusion

34. For what has been discussed hereinabove, answers to the points arising for determination are that the product in question, AHAHO, merits classification as ‘medicament’ under Chapter 30 and not as ‘cosmetic or toilet preparations’ under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985; and the change in tariff structure by way of amendment brought about in the year 2012 did not justify any re-look at the classification of the product in question.

35. In view of the above, this appeal fails and is, therefore, dismissed. No costs.

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