

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
CHENNAI**

REGIONAL BENCH - COURT No. I

Excise Appeal No.41369 of 2015

(Arising out of Order-in-Original No.08/2015 (C) dated 24.03.2015 passed by the Commissioner of Central Excise, Puducherry Commissionerate 605 001).

M/s. Hindustan Unilever Ltd.

...Appellant

Skin Care Unit
NH-45A, Vadamangalam
Puducherry 605 102

VERSUS

Commissioner of Central Excise

...Respondent

Puducherry Commissionerate
No.1, Goubert Avenue,
Puducherry 605 001

APPEARANCE:

Ms. Padmavathi Patel / Shri Viraj Reshamvala, Advocate or the Appellant
Shri M. Selvakumar, Authorised Representative for the Respondent

CORAM :

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.40856/2024

DATE OF HEARING : 18.06.2024

DATE OF DECISION : 15.07.2024

ORDER : [PER HON'BLE MR. P. DINESHA]

The facts of the case, as explained during the course of arguments on behalf of the appellant, are that the appellant was manufacturing White

Petroleum Jelly I.P. with various packing sizes, under Food and Drugs License issued by Food and Drug Administration, Puducherry. There is no dispute that the admitted classification of said product was CTH 2712. Thereafter, it appears that they started manufacturing the variants of the White petroleum jelly namely white petroleum jelly – Baby and white petroleum jelly – Aloe Vera and they appear to have applied for license; the license issuing authority is understood to have issued an additional endorsement dated 27.10.2010 to their existing license number. Classification of these two new products/variants appears to be declared under CTH 3304, since according to the appellant, these new products were meant specifically for skin care.

2. It appears that the appellant had informed jurisdictional superintendent *vide* letters dated 7.7.2010 and 20.04.2011 about their manufacturing the variants of perfumed Petroleum Jelly viz. the products under dispute and also explaining the manufacturing process of the same. It was only in 2014, i.e., 29.4.2014, that the Respondent issued the show cause notice proposing to demand ₹94, 53, 853/- along with applicable interest and penalty on the clearance of the disputed products during the period August 2010 to February 2014, on the ground that their classification of the disputed products was incorrect since the same was to be classified under Tariff item 2712 90. It also appears from the record that a detailed reply was filed to the above show cause notice, but however *vide* impugned Order-in-Original No. 08/2015 (C) dated 24.03.2015, the

original authority has confirmed the proposed demands. It is against this order that the present appeal is filed before us.

3. Smt. Padmavathi Patel and Shri Viraj Reshamvala, Ld. advocates appeared for the appellant and Sri. M. Selvakumar, Ld. Assistant Commissioner defended the Department.

4. It is the case of the appellant that they started manufacturing in the year 2009 new products, viz. Petroleum Jelly – Baby and Petroleum Jelly – Aloe Vera and classified the same as cosmetics under Chapter 33 of the CETA. For this, the Food and Drug Administration, Pondicherry [FDA] has issued Food and Drug License dated 06.11.1998 in Form – 25 under Rule 70 of the Drugs & Cosmetics Rules, 1945 which clearly indicates that the products in question are products other than those specified in Schedules C, C (1) & X of the Drugs and Cosmetics Rules, 1945.

5.1 Vaseline perfumed petroleum Jelly was manufactured using Light Liquid Paraffin, Paraffin Wax, Micro Crystalline wax and perfume, is intended for application on skin, for skin care.

5.2 The product in question viz., white / Vaseline Petroleum Jelly – Baby and White / Vaseline Petroleum Jelly – Aloe Vera are manufactured from liquid light paraffin, paraffin wax with additives of fragrance gentle Lily, fragrance aloe vera – for

application on skin as a barrier cream to prevent cracking of skin in dry conditions. The products which were essentially for taking care of skin specifically and hence, they were rightly classifiable as cosmetics under Chapter 33.

5.3. White petroleum jelly was without any additive or perfume and hence, the same was classifiable only under Chapter 27. The products in question which are added with fragrance which were primarily for skin care and hence, were rightly classified under Chapter 33049990, based on their combined understanding of Heading 3304 read with Explanatory Notes to Chapter 27 of the HSN which provides for specific exclusion of Petroleum Jelly used for skin care.

6.1. With effect from 28.02.2005, the Central Excise Tariff was aligned in toto with Explanatory notes to HSN as well as customs tariff and hence, Explanatory notes to HSN is to be taken as a persuasive aid for correct classification of the products under central Excise Tariff. In this regard, they have relied upon the following Supreme Court judgements:-

- a) Wood Craft Products – 1995 (77) ELT 23 (SC)
- b) Thermax Ltd. – 2022 (382) E.L.T. 442 (S.C.)
- c) Phil Corporation – 2008 (223) E.L.T.9 (S.C.)

- d) Business Forms – 2002 (142) E.L.T. 18 (S.C.)
- e) O.K.Play – 2005 (180) E.L.T. 300 (S.C.)

6.2. They have also referred to one another Order of the Tribunal in the case of **Pond's (India) Ltd. Vs. CCE, Trichy [2005(190) ELT 082 (Chennai)]** wherein, the product Vaseline Petroleum Jelly Perfumed Pomade used for lubrication and protection of hair was held to be rightly classifiable under heading 3305.

6.3. It was argued that the quantity of fragrance that is present in a product could not be of any criteria insofar as classification of a product is concerned, as long as the presence of such perfume is not disputed because, the statute does not prescribe such quantity / quantum or percentage.

7. Insofar as the invocation of extended period of limitation on the grounds of alleged suppression is concerned, it was contented that as early as in 2012, the revenue had recognized the classification of Vaseline perfumed white petroleum jelly – Baby to be classified under Chapter 33 and on their claim for refund of the difference in duty from the originally declared under Chapter 27 vis-à-vis under Chapter 33, the original authority had sanctioned the refund thereby agreeing with the classification of the perfumed white petroleum jelly under Chapter 33 and hence, there is no suppression of any facts at all as alleged in the SCN or even the impugned order. They also refer to various correspondences with the

Department whereby, they claimed to have made known their manufacturing of the products in question, through letter dated 01.11.2010, 07.07.2010 & 29.04.2011. Ld. Advocate would thus pray for allowing the appellant's appeal.

8. Revenue's case, as we understand upon hearing the Id. AC and from the reading of the impugned order, are that till August 2010, the appellant was manufacturing and classifying the variants of White Petroleum Jelly under Chapter 27, however, by adding a small quantity of perfume to the same, they named it as white / Vaseline Petroleum Jelly – Baby, white / Vaseline Petroleum Jelly – Aloe Vera and classified the same under Chapter 33. For this, the taxpayer had placed reliance on the HSN for classification of its new products. From the very HSN, it is the case of the Commissioner that there was a deviation from HSN for the product description in the CET, under the eight digits tariff 2712.10 has two sub-headings as 2712.10.10 – crude and 2712.10.90 – others; when entries in HSN and the tariff were not aligned, no reliance could be placed upon HSN for classification of the goods and therefore, the classification issue involved was required to be decided as per CET, 1985. Reliance is placed in this regard on a decision of Apex Court in the case of **Camlin Ltd. Vs. Commissioner [2008 (230) ELT 193]**.

8.1. Reference is made to the Tribunal's decision in the case of **Ponds India Ltd. [2000 (116) ELT**

708] wherein it was held that white petroleum jelly would be rightly classifiable under chapter sub-heading 2712.10, the tariff having provided for a specific entry covering the white petroleum jelly, would clearly supersede all other considerations. Further, even if the additional information that the jelly could be used as lip guard or as a neutral dressing for minor burns, cuts, scraps, etc. is considered, such use would not change the nature of contents which remain as white petroleum jelly only.

8.2. Whether the addition of less than 0.30% of perfume to a product distinctly classified under Chapter 27, would enable it to be classified under Chapter 33, was required to be considered. There is no doubt that the taxpayer has classified Vaseline perfumed petroleum jelly Baby & white petroleum jelly – Aloe Vera under sub-heading 3304 9990, they have manufactured quite similar product Vaseline white petroleum jelly classifying the same under Chapter sub-headings 2712 1090.

8.3. They have claimed that white petroleum jelly is the pure form of petroleum jelly and when perfume is added to the same, then perfume petroleum jelly is obtained that would merit classification as they have done, as a cosmetic.

8.4. After going through the manufacturing process, formulation and specification of white petroleum jelly and that of perfumed petroleum jelly are held to be one and the same as it was evident for the FAA from the constituents that the content of

perfume is very minuscule.

8.5. Both these products are manufactured out of the same raw material i.e. petroleum jelly, adding a minuscule of perfume would not make it a different product under a different chapter and nor would naming the same as Vaseline Petroleum Jelly – Baby and Vaseline Petroleum Jelly – Aloe Vera in any way change the basic character of the product viz., petroleum jelly.

8.6. Addition of negligible quantity of perfume to a product already classified under Chapter 27 would not alter the classification in the absence of any change in the manufacturing process and the formulation of the contents. At the most, the products in question could be the variants of Petroleum Jelly.

9. With regard to the limitation, the commissioner has opined that but for the investigation by the headquarters preventive unit, the fact that the petroleum perfumed jelly was only a variant of petroleum jelly would not have come to light; only the sustained verification undertaken by the department has brought to surface all relevant facts. Therefore, he has concluded that the contentions of the appellant that its activities were known to the department lacks merit. The intent of the taxpayer was very much in doubt as they were classifying the product viz., white petroleum jelly under Chapter 27 and when the duty structure was favouring them,

they changed their stance by classifying the same under Chapter 33 by adding a negligible quantity of perfume, which fact also came to light only during the investigation. Thus, the appellant is held to have suppressed facts and thereby willfully misdeclared the classification of its product as cosmetics under Chapter 33 and therefore, there was willful suppression of fact on the part of the taxpayer. Hence, the extended period was rightly invoked.

10. We have considered the rival contentions, perused the documents placed on record and the Judicial precedents relied upon; we find that the following question of law emerges for our consideration:

"Whether, in the facts of the case, the product under dispute deserve to be classified as petroleum jelly under CTH 2712 or cosmetics, under CTH 3304"?

11. 3304 covers *inter alia* cosmetics or toilet preparations while Heading 27.12 – HSN covers Petroleum Jelly but however excludes Petroleum Jelly suitable for use for the care of skin. When it is used for skin care, it gives an indication that it may be a medicament but the clear exclusion as of above throws the item under CTH 3304 which clearly covers *inter alia*, cosmetics. That means, the intention appears to be that as long **it is a cosmetic** and used for skin care, it would fall under CTH 3304

as claimed by the appellant, or else under CTH 2712, as contended by the revenue.

12. In the reported case of **Heinz India Ltd. -Vs- State of Kerala** [2023 (385) ELT 162 (SC)], although under State VAT Act, Apex Court had an occasion to interpret classification of “medicated talcum powder”. Hon’ble Court has referred to a number of its own earlier judgements insofar as the issue of classification is concerned. At paragraph 41 of the said judgement Hon’ble Court has indicated a three – step test indicated in **CIENS laboratories** [2013 (295) ELT 3 (SC)]. Further, the court has summarised other tests that have been indicated in different judgements.

Paragraph 41 of the said decision reads as under:

"41. *In CIENS Laboratories (supra), the court had indicated a three-step test to determine, if a product were a medicament or not. Other tests have been indicated in different judgments. All these may be summarized as follows :*

- (i) *When a product contains pharmaceutical ingredients with therapeutic/prophylactic or curative properties, the proportion of the ingredients is not decisive. The curative attributes of the ingredients render it a medicament and not a cosmetic. (CIENS Laboratories)*
- (ii) *A product can be sold without a prescription from a medical practitioner. Yet it does not lead to*

the conclusion that the sale of over-the-counter products are cosmetics. Several products are sold over-the-counter and are yet, medicaments. (CIENS Laboratories)

- (iii) *Before adjudicating whether a product is a medicament or not, courts have to consider what the people who use the product understand it to be. **If a product's primary function is "care" and not "cure", it is not a medicament. Cosmetic products are used in enhancing or improving a person's appearance or beauty,** whereas medicinal products are used to treat or cure some medical condition. A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients even in small quantities, is to be branded as a medicament. (CIENS Laboratories)*
- (iv) *Products cannot be classified as cosmetics solely on the basis of their outward packing. (Meghdoot Gramodyog Sewa Sanasthan, UP. v. Commissioner of Central Excise, Lucknow, [2005] 4 SCC 15 = 2004 (174) E.L.T. 14 (S.C.) = 2004 taxmann.com 182 (SC).*
- (v) *Mixing medical ingredients with other products, or preservatives, does not alter its character as a medicament (Amrutanjan Ltd. v. Collector Central Excise, [1996] 9 SCC 413 = 1995 (77) E.L.T. 500 (S.C.) = 1995 taxmann.com 474 (SC).*
- (vi) *That a license under the Drugs Act is necessary is not a determinative or decisive factor always*

[emphasis added by us]

13. From the above it is clear that -

- the proportion of the ingredients is not decisive;
- prescription is not decisive;
- the primary function is to be looked into; product cannot be classified solely based on their outward packing;
- mixing medical ingredients with other products or preservatives do not alter the character; and
- License under the Drugs Act, even if necessary, is not a determinative or decisive factor always.

14. Here, in the case on hand, the scope of litigation is whether the products in question are drug or Cosmetic and the addition of ingredient would result in any change in their classification? The observations by the Hon'ble Supreme Court at paragraph 41 is categoric that the proportion of the ingredients is not decisive and the primary product, if it is care and not cure, then it is a cosmetic.

15. The claim of the appellant is that petroleum jelly Baby and petroleum jelly Aloe Vera are intended for application on skin for skin care, to act as a barrier cream to prevent cracking of skin in dry

conditions and therefore, the product in question were essentially for taking **care** of Skin.

16. But however, it is contended by the appellant before us that

- Petroleum Jelly is manufactured from liquid light paraffin, paraffin wax with additives of fragrance gentle Lily, fragrance aloe vera,
- White petroleum jelly was without any additive or perfume;

hence, the presence of perfume/fragrance makes their case for classification of the products in question as 'Cosmetics' and not medicaments and therefore, the classification adopted by them was required to be upheld.

17. It is relevant now to refer to both to Chapter Headings; Chapter 27 of CETA refers to **"Mineral Fuels, Mineral Oils and Products of their distillation; Bituminous Substances; Mineral Waxes."** Entry at 2712 gives the description of goods as *"Petroleum jelly, paraffin wax, microcrystalline petroleum wax, ozokerite, etc. obtained by synthesis or by other processes, whether or not coloured"*. This gives an indication to be covering petroleum jelly *per se*, in pure form, obtained by synthesis or by other processes, without any additives. Interestingly, Heading 27.12 of HSN at (A) has provided for specific exclusion, as noted earlier, for petroleum jelly suitable for use for the care of skin, which is also indicated to be covered under heading 33.04.

18. Chapter 33 of CETA refers to "**Essential Oils and Resinoids, Perfumery, Cosmetic or Toilet Preparations**". Entry at 3304 gives the description of goods as *"Beauty or make-up preparations and preparations for the care of skin (other than medicaments)...."*. Further, the Heading 33.04 of HSN at (A) specifically covers *'...preparation for the care of the skin '..... Petroleum jelly put up in packings of a kind sold by retail for the care of the skin'*.

19. The relevance, purpose and importance of HSN Explanatory Notes has been held to be paramount by the Apex Court on several occasions. We deem it appropriate to refer to some of those decisions relied upon by the Id. Advocate.

20.1. In **COMMISSIONER OF CUS. & C. EX., GOA -Vs - PHIL CORPORATION LTD. [2008(223) ELT 9(SC)]**, the Apex Court has ruled as under :

"---

28. We have heard the learned counsel for the parties at length and carefully analysed the judgments cited at the Bar. The Central Excise Tariff Act is broadly based on the system of classification from the International Convention called the Brussels' Convention on the Harmonised Commodity Description and Coding System (Harmonised System of Nomenclature) with necessary modifications. HSN contains a list of all the possible goods that are traded (including animals, human hair etc.) and as

such the mention of an item has got nothing to do whether it is manufactured and taxable or not.

*29. In a number of cases, this court has clearly enunciated that the HSN is a safeguard for the purpose of deciding issues of classification. In the present case, **the HSN explanatory notes to Chapter 20 categorically state that the products in question are so included in Chapter 20. The HSN explanatory notes to Chapter 20 also categorically state that its products are excluded from Chapter 8 as they fall in Chapter 20.** In this view of the matter, the classification of the products in question have to be made under Chapter 20.*

---".

20.2. In **COLLECTOR OF CUSTOMS, BOMBAY -Vs - BUSINESS FORMS LTD. THR. O.L. 2002 (142) E.L.T. 18 (S.C.)**, it was held as under:

"---

2. This Court in Collector of Central Excise, Shillong v. Wood Craft Products Limited [1995 (77) E.L.T. 23] has said :

"We are of the view that the Tribunal as well as the High Court fell into the error of overlooking the fact that the structure of the Central Excise Tariff is based on the internationally accepted nomenclature found in the HSN and, therefore, be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated by the Central Excise Tariff Act, 1985 itself. The definition of a term in the ISI Glossary, which has a different purpose, cannot, in case of a conflict, override the clear indication of the meaning of an identical expression in the same context in the HSN. In the HSN, block board is included within the meaning of the expression 'similar laminated wood' in the same context of classification of block board. Since the Central Excise Tariff Act, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Act must, as far as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian Tariff of a different intention."

Clearly, therefore, the HSN Explanatory Notes are entitled to far greater consideration than the Tribunal has given there.

3. *The Tribunal has also said that the Collector (Appeals) had not relied upon the HSN Explanatory Notes. That was clearly an oversight of the Tribunal because its order says, earlier, thus : “The Collector (Appeals) held that the photographic apparatus, as has been imported, for making printing blocks were excluded from Chapter Heading 84.38 vide Explanatory Notes to CCOM at Page 1288.”*
 ---”

20.3 In **O.K. PLAY (INDIA) LTD. – Vs – COMMISSIONER OF C. EX., DELHI-III, GURGAON - 2005 (180) E.L.T. 300 (S.C.)**, the Court held as under :

“---

6. *Before dealing with the issue of classification, certain points are required to be clarified.*

7. *In the case of A. Nagaraju Brothers v. State of Andhra Pradesh reported in [1994 (72) E.L.T. 801], it has been held by this Court that no one single universal test can be applied for correct classification. There cannot be a static parameter for correct classification.*

8. *Further, the scheme of the Central Excise Tariff is based on Harmonized System of Nomenclature (for short “HSN”) and the explanatory notes thereto. **Therefore, HSN along with the explanatory notes provide a safe guide for interpretation of an Entry.***

---”

[emphasis added by us]

21. Viewed thus, explanatory notes are very much crucial insofar as deciding an issue regarding classification is concerned, it cannot be ignored. Thus, the classification with due support of the explanatory notes is required to be adopted. Here,

we find that the same specifically 'does not include' petroleum jelly used for skin care and hence, that cannot be ignored since there itself it is suggested the heading, as 3304.

22. In the light of the above discussions, we are of the view that the products in question viz, petroleum jelly – Baby and petroleum jelly – Aloe Vera are those meant exclusively for the care of skin, petroleum jelly meant for skin care specifically excluded from CTH 2712 and therefore, they are cosmetics which are correctly classifiable under CTH 3304. Hence, the appellant should succeed.

23. In the result, the impugned order upholding wrong classification cannot sustain for which reason, we set aside the same and allow the appeal.

(Pronounced in open court on 15.07.2024)

(M. AJIT KUMAR)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

ra