IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE
HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE JAI KUMAR PILLAI

ON THE 11th OF SEPTEMBER, 2025

VALUE ADDED TAX APPEAL No. 73 of 2019

M/S HINDUSTAN UNILEVER LTD THROUGH RAJEEV SINGH S/O PRAITHVI SINGH

Versus

COMMERCIAL TAXES DEPARTMENT

Appearance:

Shri P.M.Choudhary – Learned Senior Advocate with Shri Prasanna R. Bhatnagar – Advocate for the petitioner.

Shri Bhuwan Gautam – G.A. for the respondent/State.

WITH

VALUE ADDED TAX APPEAL No. 74 of 2019

SM/S. HINDUSTAN UNILEVER LTD THROUGH RAJEEV SINGH

Versus

COMMERCIAL TAX DEPARTMENT

Appearance:

Shri P.M.Choudhary – Learned Senior Advocate with Shri Prasanna R. Bhatnagar – Advocate for the petitioner.

Shri Bhuwan Gautam – G.A. for the respondent/State.

TAX REFERENCE No. 22 of 2021

IN REFERENCE COMMERCIAL TAX

Versus

M/S HINDUSTAN LEVER LTD. (NOW HINDUSTAN UNILEVER LTD.)

Appearance:

Shri Bhuwan Gautam – G.A. for the petitioner.

Shri P.M.Choudhary – learned Senior Advocate with Shri Anand Prabhawalkar and Madhav Khandelwal- Advocate for the respondent No.1.

TAX REFERENCE No. 23 of 2021

IN REFERENCE COMMERCIAL TAX

Versus

M/S HINDUSTAN LEVER LTD. (NOW HINDUSTAN UNILEVER LTD.)

Appearance:

Shri Bhuwan Gautam – G.A. for the petitioner.

Shri P.M.Choudhary – learned Senior Advocate with Shri Anand Prabhawalkar and Madhav Khandelwal- Advocate for the respondent No.1.

ORDER

Per: ***Justice Vivek Rusia***

The present batch of matters i.e. VATA No. 73/2019, VATA No. 74/2019, Tax Reference No. 22/2021 and Tax Reference No. 23/2021, arises out of a common dispute concerning the proper classification of the product White Petroleum Jelly I.P. under the Madhya Pradesh VAT Act, 2002.

2. About the similitude in the controversy involved in these cases, they are being heard analogously and decided by a common order.

Facts of the case, in short, are as under:-

3. The appellant is a reputed public limited company engaged in the business of manufacturing and marketing a range of fast-moving consumer goods (FMCG), including toilet soaps, detergents, hair oils and allied products. The appellant maintains a branch depot at Indore and is duly registered under the MP VAT Act, 2002, the Central Sales Tax Act, 1956 and is also a registered dealer under the M.P. Entry Tax

Act, 1976.

4. The dispute concerning the proper classification of the product led to the passing of separate assessment orders, appellate orders which have been challenged by the appellant in the present two VAT Appeals and the learned MPCTAB has also preferred Tax reference before this Court, all of which involve the core dispute that whether White Petroleum Jelly I.P. is classifiable as a Drug and Medicine or as a Cosmetic / Medicinal Preparation of Cosmetic.

VATA 73/2019 & VATA 74/2019

5. The present two appeals arise from orders passed by the Madhya Pradesh Commercial Tax Appellate Board, Bhopal Bench at Indore, dated 14.05.2019, in relation to the assessment period from 01.04.2009 to 31.03.2010.

6. It was the consistent case of the appellant before the assessment and appellate authorities that the said product being a medicated formulation and manufactured under a valid drug license falls squarely within the scope of Entry No. 19A, Part II, Schedule II of the MP VAT Act which deals with "Drugs and medicines including vaccines, syringes, medicated ointments produced under drug license and light liquid paraffin of IP grade". Consequently, the appellant claimed a lower rate of tax @ 4% up to 31.07.2009 and @ 5% thereafter under the MP VAT Act and exemption under the Entry Tax Act on the ground that the said product falls within Schedule III (non-taxable goods) under the Entry Tax Act.

7. The assessing authority, however, disallowed the claim of the appellant and classified the said product as a cosmetic, thereby subjecting it to a higher rate of tax (12%) under the residuary entry in

the MP VAT Act and 10% under the Entry Tax Act. The AO primarily relied on the reasoning that the appellant, being primarily engaged in the manufacture and sale of cosmetics and toilet articles, cannot classify the said product as a drug, even if it was manufactured under a drug license and interest under Section 18(1) (a) of the MP VAT Act was also levied on the differential tax amount.

8. Aggrieved, the appellant preferred two first appeals before the Additional Commissioner of Commercial Tax, which were dismissed by a common order dated 28.05.2013 confirming the findings of the assessing authority. Thereafter, the appellant preferred second appeals before the Commercial Tax Appellate Board again raising the plea of classification under Entry 19-A and exemption under the Entry Tax Act relying on judgment of the Hon'ble Apex Court in the case of ***Ponds India Ltd. v. Commissioner of Commercial Tax*** reported in ***(2008) 113 STJ 355 (SC)*** wherein the Apex Court held that White Petroleum Jelly of IP grade manufactured under a valid drug license was a drug.

9. Before the Board, the appellant made detailed written submissions and clarified that it manufactures two distinct types of White Petroleum Jelly: (i) a non-perfumed variant with light liquid paraffin of IP grade manufactured under a drug license and sold as a drug and (ii) a perfumed variant sold as a cosmetic on which tax was duly paid at the higher rate. It was submitted that the drug variant alone was claimed under Entry 19A, while the other was always treated as a cosmetic.

10. Despite these submissions, the Appellate Board, by its impugned order dated 14.05.2019, dismissed both appeals and held that the product in question did not qualify as a drug merely because it was manufactured under a drug license. The Board reasoned that the product

was not prescribed by doctors nor exclusively sold through medical shops, and that the appellant's predominant business was in cosmetics and toilet articles.

11. Challenging these findings, the appellant has now approached this Court by way of the present appeals under Section 53(1) of the MP VAT Act, 2002 and Section 13 of the Entry Tax Act, 1976, raising the following substantial questions of law relating to the classification of the said product and the legality of interest levied.

> ***Whether on the facts and in the circumstances of the present case the product 'White Petroleum Jelly of IP grade' manufactured & sold by appellant under valid drug license is classifiable in the category of 'Drugs and Medicines' under Entry 19A of Part II Schedule II of MP VAT Act, 2002?***
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> ***Whether on the facts and circumstances of the present case the MP Commercial Tax Appellate Board is justified in not following the decision of the Apex Court in the case of Ponds India Ltd v/s CTT (2008) 13 STJ 355 which relates to the classification of the same goods viz White Petroleum Jelly of IP grade'?***
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> ***Whether in view of admitted factual position that the appellant has deposited tax that worked as per its returns interest u/s 18(4) (a) is leviable, and whether the Appellate Board is justified in confirming such levy of interest against the appellant?***

T.R. No. 22/2021 & T.R. No. 23/2021

12. These Tax references arise from Reference Case Nos. 01/CTAB/IND/2019 and 02/CTAB/IND/2019 filed by M/s Hindustan Lever Ltd. for the assessment period of 01.04.2004 to 31.03.2005 and 01.04.2005 to 31.03.2006.

13. In the original assessments framed under Section 28(1) of the Act, the product White Petroleum Jelly I.P. was assessed to tax at the rate of 9.2% classifying it under Entry No. 11 of Part IV of Schedule II as

"Drugs and Medicines". Subsequently, reassessment proceedings were initiated by the Department pursuant to an audit objection wherein the product was reclassified under Entry Nos. 41/49 of Part III of Schedule II as a "medicinal preparation of cosmetics and toilet articles", attracting a higher rate of tax.

14. The appellant contested the reassessment, contending that the reopening of the concluded assessments was impermissible under law and that the product in question, being manufactured under a valid drug license and classified consistently as a drug by the competent Drug Control Authorities, could not be reclassified as a cosmetic.

15. The Appellate Board, by its common order dated 12.02.2019, rejected the challenge to reassessment by relying upon settled precedent. However, finding that the issue of the correct classification of White Petroleum Jelly I.P. under the amended entries of Schedule II raised a substantial question of law, the Board partially allowed the reference and framed the following question of law:

> ***"Whether, in the facts and circumstances of the case, in view of the legislative amendments effective from 15.03.2000 in the classification of goods in the M.P. Commercial Tax Act, 1994, the Madhya Pradesh Commercial Tax Appellate Board was justified in upholding the classification of the White Petroleum Jelly I.P. manufactured by the applicant in the Entry No. 41/49 of Part III of Schedule II instead of Entry 11 of Part IV Schedule II of M.P. Commercial Tax Act, 1994?"***

Submission of Appellant's counsel

16. Shri P.M. Choudhary, learned Senior Counsel, submitted that the central question involved is the proper classification of White Petroleum Jelly I.P., which is manufactured and sold by the petitioner under a valid Drug Manufacturing License. Learned Senior Counsel submitted that

the product squarely falls in the definition of a "drug" as contemplated in the statutory regime and has been recognised as such by binding judicial pronouncements, including the decision of the Hon'ble Apex Court in ***Ponds India (Supra)*** wherein White Petroleum Jelly I.P. was expressly held to be a drug and not a cosmetic.

17. Learned Senior Counsel while referring to Entry 19-A of Part II of Schedule II to the Madhya Pradesh VAT Act, 2002 submitted that the said entry provides for concessional taxation of "Drugs and Medicines" and is a specific entry whereas the Entry invoked by the Revenue (Entry 41 or 49 of Part III) refers to "cosmetics and toilet articles" and is residuary or general in nature. Placing reliance on the well-settled principle that a specific entry must prevail over a general one, the learned senior counsel submitted that once a product is classifiable under a specific entry, the Revenue cannot resort to a broader or residual classification merely to impose a higher rate of tax.

18. Learned Senior Counsel drew attention to the legislative history of the relevant entries under both the M.P. Commercial Tax Act, 1994 and the M.P. VAT Act, 2002, to submit that the intent of the legislature has been consistent in treating essential healthcare items distinctly from luxuries or cosmetics. Learned Senior Counsel emphasized that the classification must be based on functional utility, therapeutic purpose, and predominant usage as laid down in ***Commissioner of Central Excise v. Hindustan Lever Ltd.*** reported in ***(2015) 34 GSTR 497 (SC)*** and further affirmed in ***Reckitt Benckiser (India) Ltd. v. Commissioner Commercial Tax*** reported in***(2023) 112 GSTR 198 (SC)*** wherein Dettol antiseptic liquid similarly manufactured under a Drug License was held to be a drug.

19. Learned Senior Counsel placed reliance on the case of ***Hindustan Unilever Ltd. v. State of Tripura*** reported in ***(WP(C) No. 1284 of 2016)*** wherein the High Court of Tripura upon examination of the identical entry under the Tripura VAT regime and based on a detailed analysis of the judgment in ***Ponds India (Supra)*** had concluded that White Petroleum Jelly is a drug and must be taxed accordingly. Learned Senior Counsel submitted that the authorities had failed to discharge the burden of proof to show that the product in question is used predominantly as a cosmetic and in the absence of any supporting material or market evidence the mere assumption of common parlance understanding is misplaced and further submitted that the burden lies squarely on the department when seeking to classify the product under an entry attracting higher tax liability.

20. Distinguishing the recent decision in the case of ***Heinz India Ltd. v. State of Kerala*** reported in ***(2023) 114 GSTR 22 (SC)*** relied on by the respondents the learned senior counsel submitted that the said judgment turned on its own facts namely that the product in question (Nycil prickly heat powder) was classifiable under a cosmetic entry in the First Schedule to the Kerala General Sales Tax Act which was materially different from the MP VAT entry. Learned senior counsel further pointed out that although the product was manufactured under a drug license the court considered its predominant usage, consumer perception and marketing strategy in arriving at its conclusion where in contrast White Petroleum Jelly I.P. is not marketed as a cosmetic, is not perfumed and is not intended for beautification but is medicinal in nature used for skin ailments, abrasions and wounds and forms part of the essential drug list in several jurisdictions.

21. Learned Senior counsel further relied on the decisions of this court in ***M/S Popular Sales v. State of M.P.***, reported in ***(2012) 20 STJ 287; M/S Pidlite Industries Ltd. vs. The commissioner of Commercial Tax*** *in* ***W.P. 14268 of 2010***and***Indian Oil Corporation Ltd. v. State of M.P.,*** reported in***(2018) 32 GSTJ 185*** to reinforce the proposition that classification based on trade perception or audit objection cannot substitute the legal test of predominant character. Learned senior counsel thus prayed that the classification of White Petroleum Jelly I.P. as a drug under Entry 19-A be affirmed and the impugned orders be set aside.

Submissions of the respondent's counsel

22. Shri Bhuwan Gautam, learned Government Advocate appearing for the respondents, submitted that the learned MPCTAB has correctly assessed the product after considering all relevant materials and applicable legal principles and thus no substantial question of law arises for adjudication by this Court.

23. Learned G.A. further submitted that the appellant is a manufacturer of cosmetics and toilet articles and is not engaged in the manufacture of any drug or medicine, and the product in question, namely White Petroleum Jelly, IP Grade, though manufactured under a drug license, is neither prescribed by medical practitioners nor sold exclusively through medical stores. Learned counsel further submitted that the product is primarily marketed and used as a skin-care item and not as a curative medicament. The packing and labeling of the product also do not indicate its use for the treatment of any particular disease affecting the human body. It is submitted that it is a well-settled principle that classification of goods must primarily depend upon

common parlance understanding and the manner in which such goods are marketed, and thus the product has been rightly classified under the "Cosmetics and Toilet Articles" entry.

24. Learned Government Advocate for the respondent/State further submitted that the reliance placed by the appellants on the decision of Hon'ble Apex Court in ***Ponds India Ltd (Supra)*** is wholly misplaced as that case pertained to non-perfumed petroleum jelly under the U.P. Trade Tax Act and was based on a long history of classification as a drug. In the present case, the product is perfumed, and the department has consistently classified it as a cosmetic without any change over the years. Learned Government Advocate has rejected the contention that the presence of Light Liquid Paraffin IP Grade as an ingredient automatically makes the product a drug and submitted that such a contention is erroneous, as the product must be assessed on its primary purpose and use rather than the nature of one of its ingredients.

25. Learned Government Advocate has relied on the decision of the Hon'ble Apex Court in ***Heinz India Ltd. v. State of Kerala (Supra)*** wherein the Apex Court summarized the test for distinguishing medicaments from cosmetics. Learned G.A. also relied on the decision of this Court in ***M/s Popular Sales, Jabalpur (Supra)***to assert that even if a product has some curative elements if its primary purpose is care rather than cure it cannot be classified as a drug or medicine and further also relied on the decision of this court in ***M/s Mondelez India Foods Pvt. Ltd. vs. Commissioner of Commercial Tax*** in ***VATA 24/2018*** wherein it was held that the definition of "drug" under the Drugs and Cosmetics Act, 1940 cannot be mechanically imported for classification under the VAT Act. Learned G.A., thus prayed that the VAT appeals be

dismissed and the tax reference be answered in favour of respondents, upholding the order of the MPCTAB and directing the appellant to pay the tax, interest and penalty as determined.

Our appreciation and conclusion

26. The appellant manufactures and sales two distinct types of White Petroleum Jelly: (i) a non-perfumed variant with light liquid paraffin, which is manufactured under a drug license and (ii) a perfumed variant, salable as a cosmetic on which tax is being paid at the higher rate. The appellant has categorized two different types of White Petroleum Jelly and paid the taxes accordingly under the respective categories. Admittedly, the perfumed variant White Petroleum Jelly is a cosmetic product, and the appellant has been paying tax at the higher rate. So far as the non-perfumed variant of White Petroleum Jelly is concerned, the revenue department charged tax as a Drug, but the dispute arose when that assessment was reopened, and it was a cosmetic product.

27. White Petroleum Jelly has some ingredients for caring and protection from specific skin problems, but it is not saleable as a beauty product. It is correct that it can be purchased from any shop, especially in a general store, without a prescription from a dermatologist; therefore, the taxing authorities have concluded that it would fall within the entry relating to the cosmetic material. The learned Tax Board has considered this White Petroleum Jelly as not exclusively a medicine for treating the special medical condition, but also a skin care product. It is correct that this petroleum jelly is a skin care product. The word "care" denotes that the product is used to prevent skin-related ailments in a particular weather condition or situation. It is also not a product which is exclusively used for beautification; sometimes it is recommended as a

medicine for curing the skin during the extreme winter season. The fact remains that the appellant is manufacturing this product, White Petroleum Jelly, under the drugs and medicines license.

28. White petrolatum is highly effective for healing minor cuts, scrapes, and scratches. Creating a moist environment prevents the wound from drying out and forming a scab, which can prolong the healing process and contribute to scarring. Studies have shown that a thin layer of petrolatum is as effective as a topical antibiotic ointment for non-infected wounds. It also serves as a protective barrier against external dirt and irritants. For minor burns, applying a thin layer of petrolatum up to three times per day creates a waterproof layer that protects the skin as it heals. This prevents external irritants from reaching the sensitive skin while also locking in moisture to support the body's natural healing process. In case of baby care, it is the primary active ingredient in many diaper rash creams, where it protects the chafed skin and seals out wetness.

29. Apart from that, the White petrolatum is used as a highly effective moisturiser for dry areas of the body, such as the hands, feet, elbows, and knees. By forming a barrier on the skin it prevents water from evaporating, helping to lock in moisture and alleviate dryness. Its moisturising effect is enhanced when applied to slightly damp skin immediately after a shower or bath. The product's properties make it an ideal ingredient for lip care, serving as a standalone lip balm, a gloss, or a base for homemade formulations, which creates confusion that it is a beauty product.

30. The taxability of this product had been under consideration i.e. White Petroleum Jelly, before the Supreme Court of India in ***Ponds***

India (Supra), and specifically held in favour of the assessee that it is a medicament. The appellant had taken over the "Ponds India" with the same name and brand of **Veseline Intensive Care Heal Guard**. The Apex Court shifted the burden on the revenue to establish that the goods ceased to fall under the entry of drugs and medicines, whereas the chemical examiner submitted a report in favour of the assessee. The Apex Court has held that the product used for the purpose cannot be described as a cosmetic simply because it has ultimately led to improvement in the appearance of a person, like in a case of hair grow products which primarily grow the hair of the head by curing baldness, which finally enhanced the appearance of the person in public. The apex court had already answered all the points raised. The learned Government Advocate. The Tripura High Court has followed the aforesaid judgment in the case of ***Hindustan Unilever Ltd. (supra)*** and classified the White Petroleum Jelly as coming in the pharmaceutical category.

31. The similar issue came up for consideration before the Apex Court as to whether the **Veseline Intensive Care Heal Guard** is to be treated as merely a skin care preparation or it is a medicament having curing properties for the purpose of classification under the Chapter sub-heading 3304 00 of the First Schedule to the Central Excise Act in the case of ***Commissioner of Central Excise vs. Hindustan Lever Ltd. reported in (2015) 34 GSTR 497 (SC).*** For ready reference, paragraphs No.7, 8, 9, 10, 14 and 16 are reproduced below:-

> "7. In BPL Pharmaceuticals Ltd. v. CCE, Vadodra, this Court has laid down the principles which are to be kept in mind while deciding as to whether a particular product would fall under Chapter 30 or under competing Chapter 33. That was a case where the assessee was engaged in manufacture of Selenium Sulfide Lotion which contained 2.5% selenium

sulfide W/V. The assessee was manufacturing this product under a loan licence from Abbott Laboratories in accordance with Abbott's specifications, raw materials, packing materials and quality control. It was sold under the private name 'Selsun'. The assessee in that case claimed that this product was used in the therapeutic quantity i.e. 2.5% W/V which was the only active ingredient and other ingredient merely served the purpose of a bare medium. It was also claimed that the product is manufactured under a drug licence issued by the Food and Drug Administration. The assessee, thus, wanted the product to be classified under heading 3003.19 as Pharmaceutical Product under Chapter 30. However, the Revenue took the plea that it would fall under sub-heading 3305.90 i.e. under Chapter 33. Thus, the respective contentions of the Department as well as the assessee were almost on the same lines as in the present case, namely, whether the said product was Pharmaceutical product or it was a cosmetic/toiletry preparation. The only difference was of sub-headings under those Chapters. This Court went into the essential characteristics of the product and found it that dominant use of the product was medicinal, as it was sold only on medical prescription as a medicine for treatment of disease known as Seborrhoeic Dermatitis, commonly known as Dandruff. It was manufactured under a Drug Licence; the Food and Drug Administration had certified it as a Drug; and the Drug Controller had categorically opined that Selenium Sulfide present in Selsun was in a therapeutic concentration etc. The relevant passages from the said judgment throwing light on these aspects are reproduced below:

> *"19. So far as medicinal properties of the product are concerned it can be gathered from the technical and/or pharmaceutical references that Selenium Sulfide has anti-fungal and anti-seborrhoeic properties and is used in a detergent medium for the treatment of dandruff on the scalp which is milder form of Seborrhoeic Dermatitis and Tinea Versicolour 2.5% of this compound is the therapeutic quantity.*
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> *24. Elaborating the above submissions, the learned counsel for the respondents invited our attention to chapter notes of Chapter 30 and Chapter 33 and also the rules of interpretation. According to the learned counsel a careful reading of chapter notes of Chapter 30 would show that preparations of Chapter 33 even if they have therapeutic or prophylactic properties would not fall under Chapter 30. However, he fairly admitted that 'medicaments' are those that have therapeutic or prophylactic uses. Nevertheless those medicaments, if they are classifiable under Chapter 33 or Chapter 34 will not fall under Chapter 30, according to him, if they are more specifically preparations falling under Chapter 33 or Chapter 34. In other words, he wants to equate the product in question to 'shampoo' enumerated under Heading No. 33.05. He also invited our*

attention to the fact that the appellants before the coming into force of the new Tariff Act described the product as shampoo and they have omitted the word 'shampoo' deliberately only to claim that the product would fall under Chapter 30.

25. We do not think that we can accept all the contentions of the learned counsel for the respondents except certain obvious admitted positions. The submission that the product in question must be equated to shampoo falling under Chapter 33 is not at all correct.

26. It is true that the learned counsel for the appellants have placed reliance on the definition of the words "cosmetic and drug" as defined in the Drugs and Cosmetics Act, 1940. On a perusal of the definitions, we can broadly distinguish cosmetic and drug as follows:

"A 'cosmetic' means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic." and "A 'drug' includes all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects."

27. We cannot ignore the above broad classification while considering the character of the product in question. Certainly, the product in question is not intended for cleansing, beautifying, promoting attractiveness or altering appearance. On the other hand it is intended to cure certain diseases as mentioned supra.

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."

8. The aforesaid case draws and delineates a clear distinction between a 'cosmetic' and a 'drug'. It further lays down that essential character of the

product in question is to be kept in mind for ascertaining whether it would be a cosmetic or a drug. Another relevant consideration, which is highlighted, is to see whether in common and commercial parlance the product is known as medicine or cosmetic/skin care product. If the product is registered as medicament by the Drug Controller, that would be a strong factor to consider it as having curative or prophylactic value and it is not for the care of the skin per se.

9. This Court in Muller & Phipps (India) Ltd. v. Collector of Central Excise, Bombay-I was called upon to decide as to whether prickly heat power, which was manufactured and marketed by the appellant/assessee therein under the brand name Johnson's Prickly Heat Powder and Phipps Processed Talc, was a medicament or was simply a product for care of the skin. The case put- forth by the assessee therein was that prickly heat power contains a range of medicines and is used only for the treatment and prevention of a skin ailment known as Milaria Rubra, commonly known as prickly heat. Prickly heat powders are manufactured under a Drug Licence issued under the Drug and Cosmetics Act, 1940 and have been treated as a drug and not a cosmetic by the authorities under the Drugs Act. On a reference made by the Finance Ministry, the Drug Controller of India has opined that due to the high content of 5% boric acid in a prickly heat powder, it would be classifiable as a drug or medicament and not as a cosmetic. From 1970 till 1985, prickly heat powders have been classified and assessed under Tariff Item 14E of the old tariff as 'Patent or Proprietary Medicines'. It was also contended that prickly heat power not only relieves prickly heat faster but actually helps prevent it. When a person perspires profusely the sweat stays on the skin too long and the person becomes a potential victim of prickly heat. This specially formulated prickly heat powder absorbs the sweat better and faster and prevents the buildup of bacteria on the skin. Therefore, the person avoids getting a red rash, itching and burning. No person who requires ordinary talk for the purposes of beautifying her or himself would use the said products which contain the aforesaid active therapeutic ingredients. These products are known as, as already mentioned above, prickly heat/ Milaria Rubra. The sale of these products is much higher in hot summer months when this disease frequently erupts.

10 Accepting the aforesaid case set up by the assessee therein, the Court held that the said prickly heat power was a medicament for treatment of red rashes, itching and burning and not merely a powder for care of skin or for the purpose of beauty. The Court was greatly influenced by the fact that a department like Drug Controller and Central Sales Tax authorities had accepted the product in question as medicinal preparation. The discussion which is relevant for our purposes is contained in paras 11 and 12 of the said judgment and we reproduce the same hereinbelow:

11. But in the present case when throughout the meaning given to products in question not only by the department itself but also by other departments like Drug Controller and Central Sales Tax authorities is that the product in question is a medicinal preparation should be accepted.

12. Applying the principles enunciated in BPL Pharmaceuticals Ltd. case and taking into consideration various circumstances as to the manner in which the goods had been treated on the earlier occasions by the department and the product having been utilised with reference to the commercial parlance and understanding, that it had been treated as a drug it would not cease to be one even though new tariff act has come into force. What is to be seen in such cases is when in the common parlance, for purposes of the Drug Act, for purposes of Sales Tax Act and in various findings recorded on earlier occasions by the department itself, having been noticed, the conclusion is inevitable that the products in question must be treated as medicinal preparations."

14. Main feature which needs to be taken note of from the discussion above is that small percentage of the ingredients of pharmaceutical constituents would not be a reason by itself to conclude that pharmaceutical constituents are subsidiary in nature. On the other hand, what is more relevant is the purpose for which the product is used, namely, functional test. On that basis, the product in that case was treated as medicament. What is important is that the Court, in the process, laid down the guiding principles which are to be kept in mind while determining the classification. These principles are formulated in the following manner:

"22. Thus, the following guiding principles emerge from the above discussion:

22.1. Firstly, when a product contains pharmaceutical ingredients that have therapeutic or prophylactic or curative properties, the proportion of such ingredients is not invariably decisive. What is of importance is the curative attributes of such ingredients that render the product a medicament and not a cosmetic.

22.2. Secondly, though a product is sold without a prescription of a medical practitioner, it does not lead to the immediate conclusion that all products that are sold over/across the counter are cosmetics. There are several products that are sold over the counter and are yet, medicaments.

22.3. Thirdly, prior to adjudicating upon whether a product is a medicament or not, the courts have to see what the people who actually use the product understand the product 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.*
>
> 16. As pointed out above, the product in question, Vaseline Intensive Care Heel Guard, is marketed as a solution for cracked heels and it is claimed that this solution is specially developed by the scientists at Vaseline Research. The composition of this product includes salicylic acid I.P. 1.5% w/w. lactic acid 8.0% w/w. Triclosan 0.1% w/w. Cream base – q.s. Salicylic acid is described as keratolytic substance having bacteriostalic and fungicidal properties used in the treatment of fungus infection of the skin. The Tribunal, while deciding that the aforesaid product is a medicament, pointed out that the product was formulated and essentially used for treatment of 'cracked heels', protection from further cracks in the human heels due to extreme climatic conditions and low humidity, constant exposure of feet to water and due to absence of shoe or other protection while walking. It also found that this product was manufactured under a drug licence as drug authorities had treated the same as a medicament. The Tribunal also found that the usage of this product was related to the effect of therapeutic or mitigating substance of prophylactic substances added. Thus, the effect of mitigation of an external condition is primary effect and the effect of smoothing the skin was secondary in nature and, therefore, it was to be treated as a medicament and classified under Chapter 30.

32. The Apex Court in the case of ***Reckitt Benckiser (India) Ltd. vs. Commissioner Commercial Taxes and Others reported (2023) 112 GSTR 198 (SC)*** applying the principle laid down in the case of ***Ponds India (supra)*** as well as ***Hindustan Lever (supra)*** in which the Apex Court has held that considering the dominant use of Dettol and the active ingredients of Dettol referred to in hereinabove, the same is used as an antiseptic and is used in hospitals for surgical use, medical use would fall under entry 36(8)(h)(vi) as claimed by the appellant and would not fall under the residuary entry as claimed by the Revenue it means it is a medicine.

33. The learned Government Advocate has placed heavy reliance on ***Heinz India Limited (supra)***, where the product ***Nycil Prickly Heat***

Powder was under consideration, whether it is a talcum powder including medicated medicinal ingredients, is a drug or a cosmetic. In this case the Apex Court in para 47 has considered the expression "including" in the Karnataka state tax enactment in which the talcum powder is classified as a cosmetic with an expression "including" used in entry 127 "medicated talcum powder", therefore, the Apex Court has held that such entries have not come up for consideration before this Court in the cases cited by the assessee is ***Ponds India (supra)***. The Apex Court has finally held that the use of the term "includes" after talcum powder, followed by "medicated talcum powder" in this court's opinion, can lead to only one inference, which is that the clear legislative intent means that all kinds of talcum powders should necessarily be treated as cosmetics falling under entry 127.

34. In the VAT Act as well as in Entry Tax there is no such specific entry for White Petroleum Jelly; the Revenue is trying to bring such in the cosmetic and beauty product whereas, under Entry No. 19A, Part II, Schedule II of the MP VAT Act the Drugs and medicines including vaccines, syringes, medicated ointments produced under drug license and light liquid paraffin of IP grade and the White Petroleum Jelly IP having light liquid paraffin of IP grade. Hence, it is manufactured and marketed by the appellant under a valid drug and medicine licence; therefore, we hereby answer the question in favour of the assessee. That a White Petroleum Jelly of IP grade manufactured and sold by appellant under a valid drug licence is liable to be classified as a category of drug and medicine under Entry 19-A of Part II, Schedule II of the MP VAT Act. Hence, the M.P. Commercial Tax Board was not justified in following the decision of the Apex Court in the case of ***Ponds India Ltd.***

vs. CCT (supra). Accordingly, the appellant is not liable to pay interest under Section 18(1)(a) of the MP VAT Act.

35. In the facts and circumstances of the case, the learned Madhya Pradesh Commercial Tax Appellate Board was not justified in upholding the classification of the White Petroleum Jelly I.P. manufactured by the applicant in the Entry No. 41/49 of Part III of Schedule II instead of Entry 11 of Part IV Schedule II in view of the legislative amendments effective from 15.03.2000 in the classification of goods in the M.P. Commercial Tax Act, 1994.

36. In view of the above, the impugned order dated 14.05.2019 passed in both the VAT Appeals is hereby quashed. The questions of law in VAT appeals, as well as in Tax References, are hereby answered.

37. With the aforesaid, VAT appeals and Tax References are hereby disposed of.

Let a copy of this order be kept in the record of connected cases.

(VIVEK RUSIA)
JUDGE

(JAI KUMAR PILLAI)
JUDGE

Vatan