A.F.R.

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

Neutral Citation No. - 2024:AHC:126556
Court No. 40

SALES/TRADE TAX REVISION No. – 274 of 2018

THE COMMISSIONER, COMMERCIAL TAX

v.

M/S EMAMI LTD.

With

SALES/TRADE TAX REVISION No. – 251 of 2019

THE COMMISSIONER, COMMERCIAL TAX, U.P., LUCKNOW

v.

M/S EMAMI LTD.

With

SALES/TRADE TAX REVISION No. – 252 of 2019

THE COMMISSIONER, COMMERCIAL TAX, U.P., LUCKNOW

v.

M/S EMAMI LTD.

With

SALES/TRADE TAX REVISION No. – 33 of 2021

THE COMMISSIONER, COMMERCIAL TAX, U.P., LUCKNOW

v.

S/S EMAMI LTD.
With

SALES/TRADE TAX REVISION No. – 10 of 2023

THE COMMISSIONER, COMMERCIAL TAX, U.P., LUCKNOW

v.

S/S EMAMI LTD.

With

SALES/TRADE TAX REVISION No. – 98 of 2023

THE COMMISSIONER, COMMERCIAL TAX, U.P., LUCKNOW

v.

S/S EMAMI LTD.

For the Revisionist :	Mr. Manish Goyal, Additional Advocate General assisted by Mr. Bipin Kumar Pandey, Additional Chief Standing Counsel
For the Respondent :	Mr. S.K. Bagaria, Senior Advocate assisted by Mr. Kumar Ajit Singh and Mr. Rahul Agarwal, Advocates

Last heard on: May 23, 2024
Judgement on: August 6, 2024

HON'BLE SHEKHAR B. SARAF, J.

1. The instant revision petitions have been preferred by The Commissioner, Commercial Tax (hereinafter referred to as the 'Revisionist') under Section 58 of the Uttar Pradesh Value Added Tax, 2008 (hereinafter referred to as 'the Act') against the orders dated June 8, 2018, October 8, 2018, October 8, 2018, July 17, 2020, November 1, 2022, and April 28, 2023, passed by the Commercial Tax Tribunal, U.P., Lucknow (hereinafter referred to as the 'Tribunal'). All the revision petitions involve the common question of law as to whether, under the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in holding that Boro-Plus

Antiseptic Cream (hereinafter referred to as the 'BPAC') is a medicated ointment and covered under entry no. 41 of Schedule II Part (A).

2. As the issue involved in all the revision petitions is common, the said petitions are being decided by a common order.

3. The factual matrix in all the revision applications is also similar. Accordingly, I have outlined the factual matrix of only one case (STRE No. 274 of 2018) below:

a. The instant revision petition pertains to the rate of tax to be levied on the sale of BPAC.

b. The Assessing Authority in the instant case had levied tax on BPAC at the rate of 14% after categorising it as an 'unclassified item'.

c. Being aggrieved by the aforesaid assessment order passed by the Assessing Authority, M/s Emami Ltd. (hereinafter referred to as the 'Respondent') preferred an appeal before the First Appellate Authority which was dismissed vide order dated July 26, 2016.

d. The Respondent then filed an appeal before the Tribunal which was allowed vide order dated June 8, 2018. The Tribunal held that BPAC falls within the category of 'medicated ointment' and hence is liable to be taxed at the rate of 5% under the heading 'drugs and medicines' in Entry 41 Schedule II.

e. Hence, the instant revision petition has been preferred by the Revisionist against the order dated June 8, 2018, passed by the Tribunal.

CONTENTIONS BY THE REVISIONIST

4. Learned counsel appearing on behalf of the Revisionist has made the following submissions:

a. BPAC has been sold by the Respondent for a long time, and prior to 2018, it has always been assessed as a cosmetic by this Court. Reliance is placed upon the judgments of this Court in **M/s. Balaji Agency -v- Commissioner of Sales Tax, U.P.** reported in **1994 (19)-STJ-150, M/s. Paras Pharmaceuticals Limited -v- Commissioner, Trade Tax, U.P. Lucknow** reported in **2007-NTN-(Vol-33)-313**, and **Commissioner Commercial Taxes U.P. -v- Singhal Bros. Hathras**, reported in **2006 (43) STR 579**.

b. The instant matter relates to the assessment year 2012-13. With effect from October 11, 2012, antiseptic cream has been excluded from the entry of 'drug and medicines' in Entry 41 Schedule II. Therefore, it is liable to be classified and taxed as an 'unclassified item'.

c. This Court on a previous occasion has held that BPAC is a medicament. The commodity is being sold by the Respondent as an antiseptic cream and the legislature has excluded antiseptic cream from the category of 'drugs and medicines'.

d. The Hon'ble Supreme Court in **Godrej Sara Lee Ltd. -v- Assistant Commissioner (CT) INT LTU Secunderabad Division, Hyderabad and Anr.** reported in **2017 (106) VST 97** has held that the goods referred to in an 'exclusion clause' are to be excluded from the ambit of that entry. Furthermore, the Hon'ble Supreme Court in **Commissioner of Central Excise, Nagpur -v- Sri Baidyanath Ayurved Bhawan Ltd.**, reported in **2009 (12) SCC 419**, has held that a specific entry must prevail over a general entry.

e. In the instant case, BPAC has been specifically excluded from Entry No. 41 and hence it is liable to be taxed as an 'unclassified item'.

f. Efforts of the Respondent are to reduce the rate of tax by arguing that BPAC is to be classified as a 'medicated ointment'. However, the Respondent itself sells BPAC as an antiseptic cream and advertises the same on electronic media as an antiseptic cream.

g. The respondent has specifically advertised that "Millions of users believe in Boroplus- India's number one **antiseptic cream**…". According to the respondent, the fact that BPAC is a 'medicated ointment' is not advertised or mentioned.

h. The Tribunal has wrongly concluded that the authorities below have ignored the contents mentioned in the drug licence and have decided the classification of BPAC based on the prescription on the packet.

i. Common parlance has always been accepted by the Hon'ble Supreme Court for the determination of nature and character of goods. BPAC is being purchased by the consumers for its regular use without any prescription of the doctor. Consumers never use it to cure any disease. On the other hand, a 'medicated ointment' is always used for an ailment and its use comes to the end when the ailment comes to the end. Hence, BPAC cannot be held to be a 'medicated ointment'.

j. The Hon'ble Supreme Court in **CTT -v- Kartos International Ltd**. reported in **2011 NTN (Vol 146) 17** has held that classification of any commodity cannot be made on its scientific and technical meaning. It is only the common parlance meaning of the commodity which should be taken into consideration for the purpose of determining the tax liability.

k. The Tribunal has held that if the Revenue wants to classify any product in a particular entry, the burden of proof lies with the Revenue. This observation is against the law laid down by the

Hon'ble Supreme Court in **Commissioner of Customs (Import) Mumbai -v- M/s. Dilip Kumar and Company and Ors.**, reported in **2018 (9) SCC 1**, wherein it was propounded that if any exemption or reduction is claimed, the burden shifts on the Assessee to prove the basis for claiming the said exemption or reduction. Therefore, the burden of proof falls on the Respondent in the instant case.

l. Once the legislature had consciously excluded antiseptic cream from the category of 'drugs and medicines' then the fact that the commodity has been manufactured after obtaining a drug license does not matter. Consumers purchase a good after looking at its use and consumption, not the conditions mentioned in the drug license.

m. The First Appellate Authority has rightly pointed out that survey report has been obtained by the Respondent on his own from a little local area despite the fact that BPAC is sold throughout the State. At the time of survey, no information was given to the Department.

n. In **Heinz India Pvt. Ltd. -v- State of Kerala and Ors.** reported in **(2017) 104 VST 292 (Ker)**, the Kerala High Court has held that since medicated talcum powder has been included in the category of cosmetic, it is to be taxed as a cosmetic and not as a medicine although it is a medicated talcum powder.

o. This Court in **M/s. Hamdard Waqf Laboratories -v- Commissioner of Commercial Tax** reported in **2018 NTN (67) 160** has held that at the time of determining the rate of tax, common parlance test as well as trade understanding and popular meaning of goods is a determining factor.

p. The High Court of Rajasthan in **M/s. Johnson and Johnson Ltd. -v- Commercial Tax Officer** reported in **(2017) 105 VST**

227 has held that for the purpose of levy of tax under sales tax law or value added tax law, classification under central excise is not binding nor the manufacturing of goods under drug license is binding.

q. The Hon'ble Supreme Court in **Baidyanath Ayurved (supra)** held that 'Baidyanath Dant Manjan' is liable to be taxed as an unclassified item even though the same was manufactured under a drug license issued by the competent authority.

r. In the instant case, antiseptic cream has been excluded from the schedule and hence the same is liable for taxation as an 'unclassified item'.

s. Once the product that is 'antiseptic cream' stood excluded from Part-A of Schedule – II and did not fall either in Schedule – I or Schedule – III or Schedule – IV or in any other entry of Schedule – II in either Part-A or Part-B, the product 'antiseptic cream' was thus classified under Schedule – V in terms of Section 4(1)(d) of the Act by the Revenue.

t. There is a clear diversion made by the legislature which is for a definitive purpose. The classification entry was amended in terms of Section 4 of the Act whereby 'antiseptic cream' was specifically excluded. The Revisionist discharged its burden by placing on record the fact that there has been amendment in the schedule and this fact was duly noted by the Assessing Officer, Appellate Authority and the Tribunal. The Revisionist has established that it has taken the product out from the ambit of a particular classification. The burden of the Revisionist thus stood discharged, and therefore, all the authorities cited by the Respondent to the effect that the Revisionist did not discharge its burden of classification are of no relevance.

u. It is also necessary to note that exclusion is of a specific product that is 'antiseptic cream' which is not being considered by the legislature as a drug or medicine. 'Antiseptic cream' is a specialised entry, which has been excluded from the entry of drugs and medicines and hence it cannot be included in the general entry of medicated ointment. 'Medicated ointment' is a term of general import whereas the term 'antiseptic cream' is very specific. The term of general import then will give way to the term of specific import. Tested on the touchstone of the principle '*generalia specialibus non derogant*', 'antiseptic cream' will prevail over the general term 'medicated ointment' and under the circumstances the whole entry is to be read and cannot be dissected in the manner the Respondent wants it to be read. Therefore, drugs and medicines exclude 'antiseptic cream' even though there are other medicated ointments on the market that may be included under drug or a medicine.

v. It is a settled principle of law that no word of legislature can be made otiose through judicial interpretation. If the legislature has employed a certain term it is to be given its due meaning and the entry has to be read plainly as it stands. The cardinal principle of interpretation is that words are to be given their clear and plain meaning as they stand in the statute.

w. If the Respondent's argument is accepted then the term 'antiseptic cream' will become redundant as it will be included in 'medicated ointment'. Under the circumstances, applying the principles of interpretation, Entry 41 of Part-A of Schedule-II of the Act is to be read as it stands and 'antiseptic cream' stands excluded from Entry 41 even though it includes other medicated ointments. Reliance is placed upon the judgments of the Hon'ble Supreme Court in **Balram Kumawat -v- Union of India and Ors.** reported in **(2003) 7 SCC 628**, **M.T. Khan and Ors. -v- Govt. of A.P. and Ors**. reported in **(2004) 2 SCC 267**,

Union of India and Anr. -v- Hansoli Devi and Ors. reported in **(2002) 7 SCC 273**, and **State of Gujarat -v- Patel Ramjibhai Dana** reported in **(1979) (3) SCC 347** and the judgment of the Privy Council in **Quebec Railway, Light Heat and Power Co. Ltd. -v- Vandry and Ors**. reported in **AIR (1920) PC 181**.

x. In the instant case, the Respondent is claiming to be classified under Part-A of Schedule-II of the Act and is claiming to be covered under Entry-41 whereas it stands already classified under Schedule-V of the Act. As a consequence, the Respondent is claiming to be entitled to pay a reduced rate of tax by taking aid of the fact that it falls under a different head. Where the Assessee claims to pay a lower rate of tax, the burden falls on the Assessee to establish that they are liable to pay a lower rate of tax under a different head. Therefore, the primary burden is to be discharged by the Respondent in the instant case and not by the Revenue.

y. The Respondent never put to challenge the amendment introduced by the notification dated October 10, 2012 by filing a separate writ petition. Therefore, the notification dated October 10, 2012 by which the amendment was made by the state legislature remains operative and is binding on the Respondent.

z. There is a difference between exemption and classification. Under Section 7 of the Act, the provisions for exemption are contained and the goods that stand exempted find due mention in Schedule – I of the Act. Classification and exemptions are two different aspects but when it comes to exemption and payment of reduced rate of tax, the principles applicable would be the same namely the burden will be on Assessee to claim payment at a reduced rate of tax. Reliance is placed on the

judgments of the Hon'ble Supreme Court in **Commissioner of Customs (Import), Mumbai -v- Dilip Kumar and Company and Ors. (supra)**, **Triveni Glass Limited -v- Commissioner of Trade Tax, U.P.** reported in **2023 SCC OnLine SC 1295**, **Heinz India Limited -v- State of Kerala** reported in **2023 SCC OnLine SC 561**, and **Commissioner of Central Excise -v- Shree Baidyanath Ayurved Bhawan (supra)**.

aa. The order passed by the Tribunal suffers from perversity in as much as it relies upon extraneous material and does not take into consideration any material as prescribed under the law. Hence the finding holding BPAC to be an ointment is perverse.

ab. BPAC fails to qualify as an Ayurvedic drug and also fails to qualify as a patented or proprietary medicine. In light of the non-consideration of the same, the order of the Tribunal is rendered perverse.

ac. Instead of considering compliance with the requirements prescribed by law for a product to qualify as an Ayurvedic Drug or a patented or proprietary medicine, the Tribunal has instead erroneously relied upon extraneous and irrelevant material that was produced by the Respondent to support its claim.

ad. When the statute itself provided for authoritative texts that were to be relied upon along with the requirements that were to be satisfied by the Assessee, the Tribunal was bound to analyse the claim of the Respondent strictly in accordance with these statutory requirements.

ae. The Tribunal was bound by Article 144 of the Constitution of India and while applying the twin test it was supposed to consider the authoritative texts relating to Ayurvedic Drug or Ayurvedic proprietary medicine. The said principle could not have been deviated from by the Commercial Tax Tribunal.

Reliance in this regard is placed upon the judgments of the Hon'ble Supreme Court in **Kantaru Rajeevaru (Sabarimala Temple Review – 5J) -v- Indian Young Lawyers Assn.** reported in **(2020) 2 SCC 1**, **Spencer & Co. Ltd. -v- Vishwadarshan Distributors (P) Ltd.** reported in **(1995) 1 SCC 259**, and **State of Karnataka -v- State of T.N.** reported in **(2016) 10 SCC 617**.

af. The core issue is that whether from the evidence that was led by the Respondent with respect to BPAC, the formulation was antiseptic or not. There is no discussion by the Tribunal of the formulation of an antiseptic. For qualifying as a drug or medicine it is antiseptic quality or its properties that are to be considered as relevant factors. The vehicle to carry antiseptic property or quality will be irrelevant. It is a well-known fact that all ointments are creams but all creams are not ointments. However, no finding in this regard has been returned by nor any evidence has been led before the Tribunal. For common parlance, 'antiseptic' is not understood as medicine.

ag. The proper approach in the instant case would be to remand the matter and give opportunity to both the parties to bring fresh material on record and to lead evidence so that proper conclusion may be drawn by the Tribunal. Reliance is placed upon the judgment of the High Court of Uttarakhand in **Cadbury India Ltd. -v- Commissioner, Commercial Tax, Uttarakhand** reported in **2019(65) GSTR-283** wherein in a nearly identical situation, the High Court of Uttarakhand had remanded the matter to the tribunal.

ah. In view of the aforesaid contentions, the instant Revision is prayed to be allowed.

CONTENTIONS BY THE RESPONDENT

5. Learned Senior Counsel appearing for the Respondent has made the following submissions:

a. BPAC is manufactured by the respondent under Ayurvedic system of medicine under a drug license issued by the Drug Licensing Authority under the provisions of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the 'Drugs Act') and the Drugs Rules, 1945 (hereinafter referred to as the 'Drugs Rules').

b. All raw materials used in the manufacture of BPAC are mentioned in the authoritative books on Ayurvedic system of medicine specified in the 1st schedule to the Drugs Act. In the Drug License, details of all ingredients along with their medicinal properties and names of authoritative Ayurvedic books are mentioned.

c. The composition and packing of BPAC was also approved by the designated statutory authority which administers and regulates the Drugs Act. The Drug License inter alia mentioned the following:

"Product Name: Boroplus Healthy Skin Antiseptic Cream

(For External Use only)

Category: Ointment – Ayurvedic Medicine

Ayurvedic Raw Materials, their botanical names, quantities Curing/medicinal properties of each raw material

Book Reference (name and page number of concerned authoritative book)

Direction of Use"

d. On the tubes/packs of BPAC, the product name Boroplus Healthy Skin Antiseptic Cream is mentioned. It is further declared as under:

"Ayurvedic Medicine Ointment. FOR EXTERNAL USE ONLY"

"A preventive, curative and healing Ayurvedic ointment for dry skin diseases, cuts, scratches, minor burns, wounds, cold sores, chapped skin, furuncle, impetigo and intertrigo."

e. The label also contains the pictorial illustration of various medicinal uses of the product viz., moisturises the skin, cures minor cuts and wounds, protects skin from dryness, heals cracked foot, softens chapped skin and lips and prevents nappy rash.

f. By the amendment dated October 11, 2012, antiseptic cream was excluded from drugs and medicines but medicated ointment was included. Thus, the entry made a distinction between antiseptic cream and medicated ointment. The Tribunal considered meaning of both the said expressions and held that from the evidence it was clear that antiseptic cream and medicated ointment have different characteristics. In the drug licence also, BPAC was categorised as "ointment – Ayurvedic medicine".

g. As per the expert evidence of Shri Loknath Pramanik (formerly Additional Director, Drugs Control and Member, Pharmacist Council of India), BPAC is "an ointment with approximately 67% oil ingredient and 10% water content and the balance being active ingredients and excipients. Moreover, BPAC is occlusive in nature which is the property of an ointment". As per various authoritative publications such as British Pharmacopoeia, International Journal of Pharmaceutics, Remington's Pharmaceutical Manufacturing (Part V) and other publications cream and ointment are two different items. Comparatively, in cream the quantity of water is much more

whereas in ointment the quantity of water is much less as compared to the quantity of oil. Due to this reason, cream spreads easily on the skin and skin absorbs the same quickly and easily. As against this, ointment is a greasy product and does not spread on the skin easily nor is it absorbed easily by the skin.

h. As per the drug licence of BPAC, the quantity of oil is much more than the quantity of water and it has been specifically categorised as "ointment". It has already been established in the earlier proceedings that BPAC is a medicine having all the required drugs and properties of medicine. Consequently, the said product is a "medicated ointment" and is classifiable under Entry 41.

i. The findings about nature and characteristics of BPAC were given by the Additional Commissioner (Appeal) and the Tribunal relied on undisputed and uncontroverted documents and evidence produced by the Respondent. The Revenue did not produce any evidence whatsoever to the contrary. The Tribunal's findings in the order dated June 8, 2018 and in other orders following the said order, were pure findings of fact and these were given on appreciation of documents and evidence on record and the same does not give rise to any question of law so as to warrant interference of this Court under Section 58 of the Act. Reliance is placed on the judgement of the Hon'ble Supreme Court in **Collector of Customs v. Swastic Woollens (P) Ltd.** reported in **1988 Supp SCC 796**.

j. Entry 41 excludes 7 named items, that is, medicated soap, shampoo, antiseptic cream, face cream, massage cream, eye jell and hair oil. Immediately after such exclusion, the entry says "**<u>but including</u>** …….**medicated ointments**". The said entry 41 has to be read as a whole and no part thereof can be rendered

meaningless or otiose. The entry after excluding some items, uses the conjunction “but” and then specifically includes “medicated ointments”. On plain and unambiguous language, the entry provides that irrespective of exclusions, medicated ointment is included. The expression “but” is synonymous with “except” or “nevertheless” and is by way of exception to what has gone before. It clearly indicates that what follows the said expression is an exception to that which has gone before. Consequently, on a plain reading of the entry itself, medicated ointment is specifically covered and “taken in” under the said Entry 41. This construction also follows from the normal dictionary meanings of the expression “but” which are “nevertheless, however, except, with the exception of, excepting that, yet, still” etc. Reliance is placed upon the judgement of the Constitution Bench of the Hon’ble Supreme Court in **Sardar Gurmej Singh versus Sardar Pratap Singh Kairon** reported in **AIR 1960 SC 122**.

k. Drugs and medicines may be of hundreds of types and varieties. These may also be available in various forms for external use and application. Such drugs and medicines have not been excluded from Entry 41. On the other hand, medicated ointment is specifically covered by the entry. It was never the intention in amending Entry 41 to exclude any drugs and medicines simply due to their being in the form of an ointment. The expression “medicated ointment” is not qualified and it covers all types and varieties of medicated ointments. Nothing is excluded from the scope and ambit of “medicated ointment”. If the goods are medicated ointment, these may have various medicinal properties and some of these may be antiseptic in nature but due to any such reason, these do not cease to be “medicated ointment”. No such limitation or restriction can be imposed on the expression “medicated ointment” used in Entry 41. The

entry cannot be amended or recast by the Departmental authorities.

l. Without prejudice to the aforesaid, it is submitted that in any case, the expression antiseptic cream in the said exclusion category in Entry 41 is to be read *ejusdem generis* with other excluded items such as medicated soaps or shampoo or antiseptic cream or face cream or massage cream etc. which are all primarily cosmetics and toilet preparations. The principles of *ejusdem generis* as well as *noscitur a sociis* squarely apply to the said exclusion clause which comprises different items mentioned above in which a common thread is running through all such excluded items, namely, that these are primarily cosmetics and toilet preparations. In support of this submission reliance is placed on the judgement of the Hon'ble Supreme Court in **Rohit Pulp and Paper Mills vs CCE** reported in **(1990) 3 SCC 447**.

m. The dispute in the instant case relates to classification of goods for the purposes of applying the rate of tax. It is not a case of any exemption from tax or interpretation of any exemption notification. As per the Respondent, BPAC is classifiable under Entry 41 of Schedule II whereas according to the Department it is classifiable under the residuary entry as unclassified item under Schedule V. Both the said schedules carry different rates of tax. Classification is a matter of chargeability. If the Department intends to classify the goods differently than that claimed by the Assessee, burden of proof is squarely upon the Department. In the instant case, in support of its submissions about the goods being covered by Entry 41, voluminous evidence was produced by the Respondent and nothing was controverted by the Department by producing any evidence. The Department did not produce any evidence at all and the burden of proof was not discharged by it. Reliance is placed

upon the judgments of the Hon'ble Supreme Court in **HPL Chemicals Ltd. -v- CCE** reported in **(2006) 5 SCC 208**, **State of MP -v- Marico Industries** reported in **(2016) 14 SCC 103**, **Hindustan Ferrodo -v- CCE** reported in **(1997) 2 SCC 677**, and **Union of India -v- Garware Nylons** reported in **(1996) 10 SCC 413**.

n. Notifications issued under provisions fixing rate of tax are not exemption notifications but are charging provision and this legal position is also covered by the judgement of the Hon'ble Supreme Court in **Commissioner, Trade Tax, UP -v- National Cereal** reported in **(2005) 3 SCC 366**.

o. Strictly without prejudice to the aforesaid, even assuming that two views are possible relating to classification of BPAC, since it is a matter of chargeability, the view favourable to the Assessee is to be applied. The position is however different in relation to interpretation of exemption notifications which is not the position in the present case. This principle of law was recently reiterated by the Constitution Bench of the Hon'ble Supreme Court in **Commissioner of Customs -v- Dilip Kumar & Co.** reported in **(2018) 9 SCC 1**.

p. Principles relating to classification of Ayurvedic drugs and medicines are well settled by the judgements of the Hon'ble Supreme Court. The twin tests are as to whether the commodity is known as a medicament in common parlance and as to whether the ingredients used in the product are mentioned in the authoritative Ayurvedic books. Both the said tests are satisfied in respect of BPAC. In support of common parlance test, the respondent produced a whole lot of documents and evidence including certificates and affidavits from medical shops, Ayurvedic doctors, dermatologists, hospitals and dispensaries, consumers, survey reports, clinical trial reports,

communications from Government of India, Ministry of Health and Family Welfare. The respondent also produced writings on the tube and packing of the said product clearly declaring it to be Ayurvedic medicated ointment. Therapeutic and curative properties of the goods are clear from the drug license and other materials mentioned including the certificates and affidavits of doctors and medical practitioners. All the ingredients of the product are mentioned in authoritative Ayurvedic books mentioned in the Schedule I to the Drugs Act. It is also well settled that the factors such as there being no requirement of a prescription or availability of the goods across the counter in the shops or percentage of active ingredients are not material.

q. The goods have always been marketed by the respondent as medicament and by emphasising the medicinal properties. On each tube and pack, the goods are described as "Ayurvedic medicine - ointment", and their healing, curative and prophylactic properties and details of the ailments for which it can be used are mentioned. It is clearly declared that it is "a preventive, curative and healing Ayurvedic ointment" for various diseases and ailments, as mentioned on the tube. Voluminous evidence was produced in support of the submission that in common parlance, BPAC is treated, regarded and dealt with as a medicament.

r. As per the respondent, tax cannot be levied by the revisionist merely on the basis of the suggestive aspect of the picture found in the label. Reliance has been placed on the judgement of the Bombay High Court in the case of **M/s Blue Star -v- UOI** reported in **1980 (6) ELT 280**, where it was held that it is not on the basis of what the petitioner advertises to attract customers that its liability to pay duty under a particular tariff item be fastened. The same can only be set on the facts and the

circumstances, and determination on the basis of those facts and circumstances as disclosed by the records.

s. The proposition that specific entry will prevail over general entry is not in dispute. However, no such issue arises in the instant case. In the instant case, there is no competition between a specific entry and a general entry. On the other hand, even though the goods are covered by Entry 41 by specific inclusion, the Revenue seeks to classify the goods under residual entry in Schedule V of the Act. Thus, the issue is that when there is a specific entry covering the goods, whether the residual entry can at all be invoked and the legal position in this regard is well settled by the judgements of the Hon'ble Supreme Court.

t. In light of the aforesaid, the instant revision petition needs to be dismissed by this Court.

ANALYSIS AND CONCLUSION

6. I have heard the learned counsel appearing for the parties and perused the materials on record.

7. First and foremost, the issue lies at the centre of the instant dispute is with regard to the statutory interpretation of Entry 41 to Schedule II of the Act.

8. Entry 41, as effective from October 11, 2012, reads as follows:

> *"Drugs and Medicines* ***excluding*** *medicated soap, shampoo,* ***antiseptic cream,*** *face cream, massage cream, eye jel and hair oil* ***but including*** *vaccines, syringes and dressings,* ***medicated ointments****, light liquid paraffin of IP grade; Chooran; sugar pills for medicinal use in homeopathy; human blood components; C.A.P.D. Fluid; Cyclosporin."*

9. In the case of ***Sardar Gurmej Singh (supra)***, the Hon'ble Supreme Court shed light on the importance of interpreting legislative provisions as a whole, ensuring that both inclusive and exclusive clauses are harmonised. This aspect in particular is indispensable when it comes to understanding

Entry 41, where the conjunction "but" introduces an exception, which specifically includes medicated ointments regardless of the exclusion of other similar products. Relevant paragraphs are extracted below:

> *"5. It is an elementary rule that construction of a section is to be made of all the parts together and not of one part only by itself, and that phrases are to be construed according to the rules of grammar. So construed the meaning of the clause is fairly clear. The genus is the "revenue officer", and the "including" and "excluding" clauses connected by the conjunction "but" show that the village accountants are included in the group of revenue officers, but the other village officers are excluded therefrom. If X includes A but excludes B, it may simply mean that X takes in A but ejects B. It is not necessary in this case to consider whether the inclusive definition enlarges the meaning of the words "revenue officers", or makes them explicit and clear viz. that the enumerated officers are within the fold of "revenue officers"; for in either construction the village accountants would be revenue officers. But we cannot accept the argument that what is excluded was not part of that from which it is excluded, and that lambardars were not revenue officers and yet had to be excluded by way of abundant caution. If so, it follows that the village officers, who included lambardars, were excluded from the group of revenue officers, with the result that they are freed from the disqualification imposed by the provisions of the said clause."*

10. The Supreme Court in ***Sardar Gurmej Singh (supra)*** further stated that the use of the conjunction "but" serves as an important tool to ensure certain items remain within the regulatory framework despite general exclusions. In the instant case, Entry 41 delineates the scope of products classified under drugs and medicines, specifically excluding certain items such as medicated soap, shampoo, antiseptic cream, face cream, massage cream, eye gel, and hair oil. However, it explicitly includes "medicated ointments", among other items like vaccines, syringes, and dressings. A careful construction of Entry 41 showcases a deliberate legislative intent to classify products based on their medicinal properties and usage, establishing that specific therapeutic items are included for beneficial tax treatment. The clear separation of excluded and included items brings out the distinct nature and purpose of the products, with "medicated ointments" being recognised for their essential therapeutic roles.

11. It is important to understand that the conjunction “but” has been used in Entry 41 not only because of a mere linguistic choice but because it is a vital factor with regard to delineating inclusions and exclusions within the same legislative framework. The term “but” is used to place forward an exception to the preceding exclusions, implying that although several items have been excluded, medicated ointments are specifically included here. This construction in particular makes it evident that the exclusion of antiseptic creams does not unintentionally exclude products with similar applications but different compositions and therapeutic intents, such as medicated ointments.

12. The term “but” has played an important role in legislative language wherein it has introduced exceptions and elucidated the scope of regulatory provisions. “But”, in Entry 41, is parallel with terms like “expect”, “nevertheless”, and “however,” which indicate an exception to the list of exclusions preceding the same. This usage is in consonance with standard dictionary meanings and legal interpretations, assuring that what follows the conjunction has been intentionally included despite previous exclusions. Accordingly, the inclusion of medicated ointments is a deliberate and clear legislative choice, ensuring these products are not inadvertently excluded due to their therapeutic importance. The Tribunal’s reading of Entry 41 is in tandem with this interpretation, thereby recognising the specific inclusion of medicated ointments as a critical aspect of the entry, providing them with the appropriate tax treatment and regulatory recognition. The Tribunal, in the impugned judgement, held that BPAC’s composition and medicinal properties merit its inclusion under medicated ointments.

13. Reference can also be made to the principle of noscitur a sociis. This principle suggests that the meaning of a word is known from the accompanying words, implying that the context provided by surrounding terms can clarify ambiguous expressions. In Entry 41, the inclusion of items like medicated soaps, shampoos, face creams, and massage creams, all of which are cosmetics and toilet preparations, provides a clear context for interpreting “antiseptic cream.” This interpretation ensures consistency and

avoids any arbitrary or inconsistent classification that might arise from interpreting "antiseptic cream" in isolation.

14. The principle of *noscitur a sociis* in the context of taxing statutes was explained by the Hon'ble Supreme Court in ***Rohit Pulp (supra)***. Relevant paragraphs are extracted below:

> ***"12.*** *The principle of statutory interpretation by which a generic word receives a limited interpretation by reason of its context is well established. In the context with which we are concerned, we can legitimately draw upon the "noscitur a sociis" principle. This expression simply means that "the meaning of a word is to be judged by the company it keeps." Gajendragadkar, J. explained the scope of the rule in State of Bombay v. Hosptial Mazdoor Sabha [(1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251] in the following words: (SCR pp. 873-74)*
>
> > *"This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in "Words and Phrases" (Vol. XIV, p. 207): "Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim ejusdem generis". In fact the latter maxim "is only an illustration or specific application of the broader maxim noscitur a sociis". The argument is that certain essential features of attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider. We are not impressed by this argument. It must be borne in mind that noscitur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the*

> *meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service."*
>
> *This principle has been applied in a number of contexts in judicial decisions where the court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used. The cases are too numerous to need discussion here. It should be sufficient to refer to one of them by way of illustration. In Rainbow Steels Ltd. v. CST [(1981) 2 SCC 141 : 1981 SCC (Tax) 90] this Court had to understand the meaning of the word 'old' in the context of an entry in a taxing traffic which read thus:*
>
> > *"Old, discarded, unserviceable or obsolete machinery, stores or vehicles including waste products....."*
> >
> > *Though the tariff item started with the use of the wide word 'old', the court came to the conclusion that "in order to fall within the expression 'old machinery' occurring in the entry, the machinery must be old machinery in the sense that it has become non-functional or non-usable". In other words, not the mere age of the machinery, which would be relevant in the wider sense, but the condition of the machinery analogous to that indicated by the words following it, was considered relevant for the purposes of the statute."*

15. By reading "antiseptic cream" in similar lines with other excluded items like medicated soaps, shampoos, face creams, and massage creams, it is obvious that these items share a common characteristic as cosmetics and toilet preparations. Taking into consideration on the above rules of interpretation, specifically in relation to taxing statutes, I am of the view that even though antiseptic creams are excluded from Entry 41, medicated ointments would be included due to the use of the word "but". The word "but" is a clear indication that the legislature intended to include, as an exception, medical ointment, even though certain medicated ointments may be categorised as antiseptic creams. If a product is more than just an antiseptic cream and qualifies as a medicated ointment, it will be included in Entry 41.

16. The issue that now requires to be answered is whether BPAC is to be classified as a medicated ointment or not. The Tribunal, in all its wisdom, after examining relevant evidence and the difference between antiseptic creams and medicated ointments, came to the conclusion that BPAC falls under the ambit of 'medicated ointment', which would qualify it for claiming the benefit of exclusion under Entry 41. The relevant portion is extracted below:

> *"From the above description it is evident that on the basis of 'base' and 'vehicle', cream and ointments are two separate things. According to the available material, oil quantity is more than water in ointment, whereas oil is less than water in cream. This is why cream easily spreads on skin and skin easily absorbs cream, whereas ointment is greasy and sticky and hard to spread on skin. Ointment is not absorbed by skin easily. In the license, issued to the appellant, the disputed product Boroplus antiseptic cream is placed in the category of ointment. If we look at ingredients of the product mentioned in the drug license, it shows that oil is more than water in the disputed product.*
>
> ***
>
> *Therefore, from the above evidence and material it is established that Boroplus antiseptic cream manufactured by appellant firm is an 'Ointment'. Since it has already been established that the disputed product contains medicinal properties; hence, it falls in the category of "medicated ointment" and is included in the SI. No. 41 of Schedule 2 Part A and tax with additional tax @ 5% is payable on it."*

17. It is clear from a perusal of the Tribunal's order that its findings were based on a meticulous examination of evidence presented before it, particularly focusing on the difference between antiseptic creams and medicated ointments. The differences between antiseptic creams and medicated ointments as highlighted by the Tribunal are discussed below:

> *a. Relying on Remington Part 5, Pharmaceutical Manufacturing Page 176 and British Pharmacopoeia 2012 Vol. – 3, The Tribunal outlined ointments are semisolid preparations for external application to the body and that therapeutically ointments function as protective and emollients for the skin but are used primarily as vehicles or basis for the topical application of medical substances.*

> *The Tribunal further highlighted that ointments are formulated to provide preparations that are immiscible, miscible or emulsifiable with the skin secretion. Furthermore, Hydrophobic ointments and water-emulsifying ointment are intended to be applied to the skin or certain mucous membranes for emollient protective, therapeutic or prophylactic purposes where a degree of occlusion is desired. Contrary to the same, The Tribunal highlighted relying on British Pharmacopoeia 2012 – 23 that creams are intended to be applied to the skin or certain mucous membranes for protective, therapeutic or prophylactic purposes especially where and occlusive effect is not necessary unlike ointments.*
>
> *b. Relying on International Journal for Pharmaceutics, the Tribunal highlighted that a topical dose from the dermatological application which contains greater than 50% hydrocarbons, waxes, PEG as the vehicle and less than 20% water and volatiles is an ointment. On the other hand, an application which contains either less than 50% hydrocarbons waxes, PRG or more than 20% water on and volatiles is cream.*
>
> *c. Further, based on the information contained on the website of a famous American pharma company Walgreens, the Tribunal pointed out that a cream is preparation of a medication for topical use on the skin with a water base whereas an ointment is a preparation of medication for topical use that contains oil base. It was also highlighted that ointments have a higher concentration of oil compared to cream."*

18. As far as BPAC is concerned, the Tribunal placed reliance on the expert opinion of Shri. Loknath Pramanik who had served as Additional Director, Drugs Control, Government of West Bengal and the Member of Pharmacy Council of India and was on the date of Tribunal's judgment a technical consultant in regulatory matter of drugs and cosmetics:

> *"Thus, I would like to conclude that BPHSAC having >50% oil contains and <20% water content is an ointment with approx. 67% oil ingredients and 10% water content and balance active ingredients and excipients. Moreover, BPHSAC is occlusive in nature which is the property of an ointment. The drug license of the product is also granted under the category of ointment. The word "Ointment" is also clearly written on the level of the product."*

19. BPAC has been marketed primarily as an antiseptic cream, emphasising its role in preventing and treating minor skin infections. However, if one were to take a closer look at its composition, it would reveal

that the same contains multiple active ingredients typically found in medicated ointments. The key ingredients consist of neem, tulsi, and aloe vera. These possess various antimicrobial, anti-inflammatory, and healing properties, which are often leveraged in medicated treatments for various skin conditions. Not only are these ingredients antiseptic, but also therapeutic, thereby effectively addressing a broad spectrum of skin issues, including dryness, rashes, and minor burns. The presence of these medicinal components suggests that BPAC offers more than just antiseptic action; it provides a multi-faceted approach to skincare, aligning it more closely with the properties of medicated ointments.

20. Antiseptic creams, in general, are limited to preventing infections in minor cuts and scrapes. However, BPAC is advertised for a wide range of applications, including the treatment of dry skin, cracked heels, minor burns, and even as a daily moisturiser. This broad spectrum of uses is characteristic of medicated ointments, which are designed to treat specific skin conditions with therapeutic benefits. BPAC's ability to soothe, heal, and protect the skin from various ailments indicates its formulation is intended for more than just antiseptic purposes. By providing hydration, reducing inflammation, and promoting healing, BPAC functions similarly to medicated ointments that deal with chronic skin issues and overall skin health.

21. The Respondent successfully demonstrated before the authorities that BPAC is fundamentally a medicated ointment. This conclusion was reached through detailed evidence that relied upon the composition, properties, and therapeutic benefits of BPAC. The evidence presented included ingredient analysis, the proportion of oil versus water, and the medicinal properties of its components like neem, tulsi, and aloe vera. These ingredients are known for their antimicrobial, anti-inflammatory, and healing properties, thus establishing BPAC as a product with multiple therapeutic uses beyond mere antiseptic functions. This left no room for doubt about BPAC's classification as a medicated ointment, which is essential for its appropriate tax treatment under Entry 41.

22. The onus was on the Revenue to disprove the Respondent's claim and establish that BPAC is solely an antiseptic cream. To meet this burden, the Revisionist needed to provide compelling evidence that BPAC's primary and exclusive function was antiseptic in nature. This required a detailed analysis and presentation of the product's composition and therapeutic effects, demonstrating that any additional benefits were either negligible or ancillary to its antiseptic properties. However, the Revisionist failed to provide such evidence. The absence of contrary evidence from the Revisionist means that the Tribunal's findings, based on the Respondent's robust evidence, stand unchallenged and are not perverse. This failure underscores the critical importance of meeting the burden of proof in legal and regulatory disputes.

23. The Revenue's inability to produce evidence that exclusively supports BPAC's classification as an antiseptic cream significantly weakens its argument. In regulatory and tax disputes, the party challenging the existing classification must provide substantial evidence to support its claims. The Revenue's failure to do so in this case leaves the Respondent's evidence unrefuted and the Tribunal's findings intact.

24. In **Dilip Kumar (supra)**, the Hon'ble Supreme Court highlighted the distinction between provisions relating to chargeability and exemption. The Hon'ble Supreme Court further espoused that even if two views are possible in interpreting a charging section, the one favouring the Assessee needs to be adopted. Relevant paragraphs are extracted below:

> *"14. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in Surendra Cotton Oil Mills case [Collector of Customs & Central Excise v. Surendra Cotton Oil Mills & Fertilizers Co., (2001) 1 SCC 578] , in the matter of interpretation of charging section of a taxation statute, strict rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the Assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore*

[See: Sun Export Corpn. v. Collector of Customs, (1997) 6 SCC 564; CCE v. Abhi Chemicals and Pharmaceuticals (P) Ltd., (2005) 3 SCC 541; CCE v. Parle Exports (P) Ltd., (1989) 1 SCC 345 : 1989 SCC (Tax) 84; Commr. of Customs v. Konkan Synthetic Fibres, (2012) 6 SCC 339; Collector of Customs v. Swastic Woollens (P) Ltd., 1988 Supp SCC 796 : 1989 SCC (Tax) 67; Commr. of Customs v. Reliance Petroleum Ltd., (2008) 7 SCC 220.].

***

24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution ["265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature."

25. In ***National Cereal (supra)***, the Hon'ble Supreme Court held that onus to proof chargeability under a different provision lies with the Revenue. Relevant paragraph is extracted below:

"12. The notifications by which the rate of tax has been fixed in respect of foodgrains makes it clear that the definition of foodgrains in the notifications is wider than that in Section 14 of the Central Sales Tax Act, 1956. It must be remembered that the notifications are not exception notifications but contain charging provisions. As such the onus to prove that the malted barley does not fall within foodgrains or cereals was on the Revenue. They have failed to discharge the onus. Both the Tribunal and the High Court have concurrently found that malted barley is a foodgrain or cereal for the purposes of the three notifications for reasons that cannot be discarded as perverse. We therefore see no reason to interfere with their conclusion."

26. In ***Marico Industries (supra)***, the Hon'ble Supreme Court held that the burden of proof shifts on the Revenue to show a particular item is

taxable in the manner claimed by them. Relevant paragraph is extracted below:

> *"25. The stand of the Assessee before the authorities was that it is not a chemical. It is not sold or used for that purpose. It is a starch manufactured by using Tapioca roots. The Revenue, per contra, without any material brought on record, put it in the category of a chemical. In Union of India v. Garware Nylons Ltd. [Union of India v. Garware Nylons Ltd., (1996) 10 SCC 413] it has been held that the burden of proof is on the Taxing Authorities to show that the particular case or item in question is taxable in the manner claimed by them. Elucidating further, the Court has held that there should be material to enter appropriate finding in that regard and the material may be either oral or documents and it is for the Taxing Authority to lay evidence in that behalf even before the first adjudicating authority. Revive instant starch is used while washing the clothes. In common parlance it is not regarded and treated as a chemical or a bleaching powder. If the very substance or product would have a chemical composition, then only it would make the said substance a chemical within the meaning of Entry 55. Needless to say, the purpose and use are to be taken note of. Common parlance test has to be applied. If the Revenue desired to establish it as a chemical, it was obligatory on its part to adduce the evidence. As is manifest, no evidence has been brought on record by the Revenue that it is a chemical. Therefore, it can safely be concluded that it is not a chemical."*

27. The above three Supreme Court judgements clearly laid down the principle that there is a stark difference between chargeability and exemption. It is to be noted that in the event of chargeability, the interpretation favouring the Assessee needs to be adopted, while in the case of exemption, the position is the opposite.

28. The Supreme Court, in **National Cereal's case (supra)**, has clearly held that the onus to prove the chargeability of a particular item in a provision other than the provision chosen by the Assessee falls squarely on the revenue. In our present case, the revenue's argument that the inclusion of medicated ointment as a drug and cosmetic under Entry 41 of Schedule 11 of the Act is an exemption is completely misplaced. It is to be noted that whether BPAC falls within Entry 41 is in relation to chargeability in a particular schedule and not that of an exemption. It is trite law that an item

would be classified as a residuary item only when it does not fall in any other classification. In the present case, using tools of interpretation, the Tribunal has categorically held that BPAC would fall within Entry 41 of Schedule II. The burden of proof was upon the revenue to indicate that the said classification made by the Tribunal was absolutely incorrect and without any basis in law.

29. The failure of the Revenue to produce any evidence to support its claim of reclassification is crucial and to be noted. In legal and administrative proceedings, the burden of proof is a fundamental principle that ensures fairness. When the Revenue seeks to reclassify goods, it must provide evidence that substantiates its position. This evidence might include expert opinions, industry standards, or specific legislative provisions that justify the reclassification. Here, the Department's inability to produce any evidence suggests either a lack of basis for their claim or a failure in their administrative processes. Thereby, the Department's claim for reclassification lacks credibility and cannot be upheld.

30. The judgments relied upon by the Revenue do not advance its case in any manner. The judgment in ***Balaji Agency (supra)*** is notably outdated and pertained to a dealer where the decision was primarily based on the lack of evidence presented by the dealer. This is a critical point, as the absence of substantive evidence in ***Balaji Agency (supra)*** significantly undermines its applicability as a precedent for the instant case involving BPAC, wherein adequate evidence has been produced by the Respondent. Furthermore, the legal landscape concerning the classification of medicaments has evolved considerably since 1994, with several landmark judgments by the Hon'ble Supreme Court providing greater clarity and detailed guidelines on such classifications. These advancements in legal interpretation and the development of relevant jurisprudence were not available to this Court during the Balaji Agency case, rendering its findings irrelevant in the current context. The Tribunal's comprehensive review of the evidence regarding BPAC's composition, therapeutic properties, and intended use starkly contrasts with the scenario in the Balaji Agency, where the absence of

evidence was a decisive factor. Therefore, relying on Balaji Agency to argue for BPAC's reclassification disregards the significant differences in the evidentiary records and the evolution of legal standards pertaining to the classification of medicinal products.

31. Similarly, the judgment in ***Paras Pharmaceuticals (supra)*** does not advance the Revenue's case also. Firstly, the judgment did not pertain to BPAC, and the specific facts and products involved in Paras Pharmaceuticals were distinct from those concerning BPAC. The relevance of legal precedents hinges on the similarity of facts and the specific legal issues addressed. In ***Paras Pharmaceuticals (supra)***, the decision was again influenced by a lack of evidence, a fact explicitly noted in the last two paragraphs of the judgment. This critical detail emphasises the limited applicability of Paras Pharmaceuticals as a precedent for the current dispute over BPAC's classification, where the Tribunal made its determination based on a well-documented evidentiary record presented by the Respondent.

32. In the judgements of **M.T. Khan -v- Govt. of A.P.** reported in **(2004) 2 SCC 267**, **Union of India -v- Hansoli Devi** reported in **(2002) 7 SCC 273**, **State of Gujarat -v- Patel Ramjibhai Danabhai** reported in **(1979) 3 SCC 347**, **Quebec Railway**, **Light**, **Heat and Power Company Limited -v- Vandry** reported in **1920 SCC OnLine PC 10** and **Balram Kumawat -v- Union of India** reported in **(2003) 7 SCC 628**, the facts stated therein are very different from those present in this case. The overarching rationale behind the judgments relied upon by the revisionist is to respect and implement the clear and unambiguous language of legislative texts, reflecting the intent of the lawmakers. The golden rule of literal interpretation serves as a foundational principle, ensuring that the judiciary does not overstep its role by reinterpreting or rewriting laws based on subjective perceptions of justice. It is also important to acknowledge the need for purposive interpretation in circumstances where a literal reading would thwart the legislative intent or lead to unreasonable outcomes. However, we are not joining issues with the same for these judgments do not help the revisionist and only reiterate the general principles.

33. In the judgements of **Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) -v- Indian Young Lawyers Assn.** reported in **(2020) 2 SCC 1**, **Spencer & Co. Ltd. -v- Vishwadarshan Distributors (P) Ltd.** reported in **(1995) 1 SCC 259** and **State of Karnataka -v- State of T.N.** reported in **(2016) 10 SCC 617**, the facts stated therein are very different from those present in this case. The main justification behind the judgments relied upon by the revisionist is that the Tribunal is bound by Article 144 of the Constitution of India and while applying the twin test it has to consider the authoritative text relating to Ayurvedic Drug or Ayurvedic proprietary medicine. The extensive scope of Article 144 of the Indian Constitution has been reiterated in the aforementioned judgements. Further, they have clarified that "authorities" encompass both judicial and non-judicial bodies, affecting any entity with power over citizens. Ultimately, an emphasis has been laid on the Supreme Court's role as the definitive constitutional interpreter, whose orders must be upheld by all authorities, reinforcing the rule of law. One need not join issue with the principles in the above judgements. However, it is to be noted that these principles do not in any manner assist the revisionist in deciding the present case, as the legal interpretation required in the present case is distinct and has been dealt with by me in the preceding paragraphs.

34. The Revenue's argument that the Respondent itself markets BPAC as an 'antiseptic cream' is not a sound argument. Marketing or advertising of a product, while influential in shaping consumer perceptions and driving sales, cannot and should not determine the classification of a product for taxing purposes. Taxation laws and regulations have been designed to categorise products based on their intrinsic properties, intended use, and the benefits they provide rather than the promotional strategies employed by manufacturers. Advertising, by nature, is aimed at emphasising certain attributes of a product to attract consumers, which may include both factual information and marketing hyperbole. Thereby, relying on advertising alone to classify a product would lead to inconsistent and potentially misleading tax categorisations, as marketing strategies can vary widely between

companies and over time. To put forth an example, a product marketed as a beauty cream might have significant medicinal properties that qualify it as a medicament. However, if its classification were to be done solely on the marketing strategies, its true nature and intended therapeutic use could be overlooked. The detailed descriptions on the packaging, which highlight BPAC's healing, curative, and prophylactic properties, are important to consider because they provide concrete information about the product's intended use and medicinal value. These details go on to establish BPAC as a medicated ointment because they offer a factual basis for its classification, independent of any advertising claims.

35. The principle that marketing or advertising cannot dictate tax classification has been laid down in several cases that place objective assessment over subjective interpretation. In the case of **M/s Blue Star -v- UOI (supra)**, the Bombay High Court was considering the classification of "walk-in coolers". The department had, in that case, classified the product to the detriment of the assessee. The Bench therein held that it is not on the basis of what the petitioner advertises to attract customers that its liability to pay duty under a particular tariff item be fastened. The Court stated that the same can only be set on the facts and the circumstances and determination on the basis of those facts and circumstances as disclosed by the records. The relevant paragraph is extracted below:

> *"...In any event, what the petitioner may advertise by way of attracting customers can be no criterion for adjudicating upon the issue whether our duty is payable under a particular tariff item. In other words, payment of duty under a particular tariff item must depend upon the facts of the case and not on the advertisement gimmick of the advertiser. Thus, it is not on the basis of what the petitioner advertises to attract customers, can its liability to pay duty under a particular tariff item be fastened but on the facts and circumstances actually existing and on a determination whether on the basis of those facts and circumstances as disclosed by the record the case would fall within the provisions of Tariff Item No. 29A(1) or not..."*

36. Similarly, the Custom, Excise and Gold Tribunal, Mumbai, in the case of **Hindustan Unilever Ltd. -v- Collector of Central Excise**, reported in **2000 (121) ELT 451** stated that advertisements are merely the

manufacturer's tools for selling their products. The relevant paragraph is extracted as follows:

> *"....Advertising is a potent weapon in the manufacturer's armoury. In the present days of consumerism, a wit has defined advertising as a craft of selling product (1) which is not worth buying (2) which the consumer does not want and (3) which he cannot afford to buy..."*

37. Tax authorities and judicial bodies are tasked with ensuring that classifications reflect the true nature and function of products to maintain fairness and consistency in taxation. This approach prevents companies from manipulating tax liabilities through strategic advertising and ensures that products are taxed based on their actual use and benefits. In the case of BPAC, the extensive evidence provided by the respondent, which details the product's medicinal properties and its recognition as a therapeutic ointment in common parlance, sets its usage as a medicated ointment on stone. This is substantiated by the legal requirement that mandates products to be classified on the basis of their intrinsic characteristics and, thereby, removes any possibility of undue influence being used in marketing or advertising tactics whatsoever.

38. In the case of **The State of Andhra Pradesh and Others -v- M/s Himani Limited and Others (TRC 166/2004)**, the Bench comprising of Hon'ble P. Sam Koshy and Hon'ble N. Tukaramji, JJ., dealt with a case wherein the petitioner had filed eleven tax revision cases, against the common order passed by the Sales Tax Appellate Tribunal, Hyderabad (STAT). The entire dispute primarily revolved around six products being manufactured and marketed by the two sister companies, namely M/s Himani Limited and M/s Emami Limited. The products in question were Navaratan Oil, Gold Turmeric Ayurvedic Cream, Nirog Dant Power Lal, Boroplus Antiseptic Cream, Boroplus Prickly Heat Powder, and Sonachandi Chavanprash. The issue that was put forth before the High Court of Telangana was whether the products would fall under Entry 36 or Entry 37 of the Central Goods and Services Tax Act and Telangana Goods and Services Tax Act. If the products were to fall under the classification of

cosmetics, then they would become leviable for GST at a rate of 20%. Otherwise, if the products were to be treated as drugs within Entry 37, then they would be leviable of duty at the rate of only 10%. Here, too, the Court had to deal with whether or not BPAC was to be considered a cosmetic or a medicated ointment. The Court, in its judgement, stated that the cream cannot be brought under the ambit of being a cosmetic simply because it can only be used for its medicinal value and is not otherwise capable of being used as a cosmetic or toiletry product. It is not a medicated good either because those, too, serve a purpose beyond their intended medicinal uses. The Court further added that BPAC is "preventive in nature and has curative and healing ayurvedic ointment", which is prescribed for several skin disorders. Thereby, the Court held that there was no reason that warranted their interference and upheld the judgement of the Sales Tax Appellate Tribunal, Hyderabad, dated March 31, 2004.

39. It is well settled that the Tribunal is the last fact-finding body and that this Court, in revision, would not go into an enquiry with regard to the factual aspects that have been decided by the Tribunal. In the exercise of revisional jurisdiction, the High Court has a limited mandate. The scope of revisional jurisdictional, is primarily focused on questions of law, jurisdictional errors, or procedural irregularities. The High Court, in a revision petition, must refrain from engaging in a de novo inquiry into factual matters already adjudicated upon by the Tribunal unless compelling grounds warranting such intervention are made.

40. The limited revisional jurisdiction under the Act is confined to only the questions of law and not the questions of fact. Section 58 of the Act has been extracted below:

> ***"58. <u>Revision by High Court in special cases</u>****.—(1) Any person aggrieved by an order made under sub-section (7) or sub-section (8) of Section 57, other than an order under sub-section (4) of that section summarily disposing of the appeal, may, within ninety days from the date of service of such order, apply to the High Court for revision of such order on the ground that the case involves any question of law.*

(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the case, and it shall be competent for the High Court to formulate the question of law or to allow any other question of law to be raised.

(3) Where an application under this section is pending, the High Court may, on an application in this behalf, stay recovery of any disputed amount of tax, fee or penalty payable, or refund of any amount due under the order sought to be revised:

Provided that no order for stay or recovery of such disputed amount shall remain in force for more than thirty days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.

(4) The High Court shall, after hearing the parties to revision, decide the question, of law involved therein, and where as a result of such decision, the amount of tax, fee or penalty is required to be determined afresh, the High Court may send a copy of the decision to the Tribunal for fresh determination of the amount, and the Tribunal shall thereupon pass such orders as are necessary to dispose of the case in conformity with the said decision.

(5) All applications for revision of orders passed under Section 57 in appeals arising out of the same cause of action in respect of an assessment year shall be heard and decided together:

Provided that where any one or more of such applications have been heard and decided earlier, if the High Court, while hearing the remaining applications, considers that the earlier decision may be a legal impediment in giving relief in such remaining applications, it may recall such earlier decision and may thereafter proceed to hear and decide all the applications together.

(6) The provisions of Section 5 of the Limitation Act, 1963, shall mutatis mutandis, apply to every application, for revision under this section.

Explanation.—For the purpose of this section, the expression "any person" includes the Commissioner and the State Government."

41. A Constitution Bench of the Supreme Court in ***Hindustan Petroleum Corporation Limited -v- Dilbahar Singh***, reported in **(2014) 9 SCC 78**, expounded on the scope of revisional jurisdiction. Relevant paragraphs have been extracted below:

"31. We are in full agreement with the view expressed in Sri Raja Lakshmi Dyeing Works [Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259] that where both expressions "appeal" and "revision" are employed in a statute, obviously, the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression "appeal". The use of two expressions "appeal" and "revision" when used in one statute conferring appellate power and revisional power, we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a rehearing while it is not so in the case of revisional jurisdiction when the same statute provides the remedy by way of an "appeal" and so also of a "revision". If that were so, the revisional power would become coextensive with that of the trial court or the subordinate tribunal which is never the case. The classic statement in Dattonpant [Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, (1975) 2 SCC 246] that revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the Code but, at the same time, it is not wide enough to make the High Court a second court of first appeal, commends to us and we approve the same. We are of the view that in the garb of revisional jurisdiction under the above three rent control statutes, the High Court is not conferred a status of second court of first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent.

32. Insofar as the three-Judge Bench decision of this Court in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] is concerned, it rightly observes that revisional power is subject to well-known limitations inherent in all the revisional jurisdictions and the matter essentially turns on the language of the statute investing the jurisdiction. We do not think that there can ever be objection to the above statement. The controversy centres round the following observation in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] , "... that jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also…." It is suggested that by observing so, the three-Judge Bench in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] has enabled the High Court to interfere with the findings of fact by reappreciating the evidence. We do not think that the three-Judge Bench has gone to that extent in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] . The observation in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] that as the expression used conferring revisional jurisdiction is "legality and propriety", the High Court has wider jurisdiction obviously means that the power of revision vested in the High Court in the

> *statute is wider than the power conferred on it under Section 115 of the Code of Civil Procedure; it is not confined to the jurisdictional error alone. However, in dealing with the findings of fact, the examination of findings of fact by the High Court is limited to satisfy itself that the decision is "according to law". This is expressly stated in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] . Whether or not a finding of fact recorded by the subordinate court/tribunal is according to law, is required to be seen on the touchstone whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence or overlooking and ignoring the material evidence altogether or suffers from perversity or any such illegality or such finding has resulted in gross miscarriage of justice. Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] does not lay down as a proposition of law that the revisional power of the High Court under the Rent Control Act is as wide as that of the appellate court or the appellate authority or such power is coextensive with that of the appellate authority or that the concluded finding of fact recorded by the original authority or the appellate authority can be interfered with by the High Court by reappreciating evidence because Revisional Court/authority is not in agreement with the finding of fact recorded by the court/authority below. Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a different finding contrary to the finding recorded by the court/authority below. Rather, it emphasises that while examining the correctness of findings of fact, the Revisional Court is not the second court of first appeal. Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] does not cross the limits of Revisional Court as explained in Dattonpant [Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, (1975) 2 SCC 246] ."*
>
> *(Emphasis added)*

42. There is a presumption of finality attached to judgments and orders passed by Appellate Authorities and the High Courts should not lightly disturb such judgments unless there are compelling reasons to do so. Revisional jurisdiction is not intended to be a mechanism for relitigating cases or reopening settled matters. High Courts cannot ordinarily interfere with factual findings arrived at by lower courts or tribunals unless such findings are perverse, based on no evidence, or suffer from a manifest error of law. Revisional jurisdiction does not empower High Courts to reevaluate

factual evidence or substitute their own findings for those of the lower courts or tribunals. Revisional jurisdiction is aimed at correcting jurisdictional errors and excesses of law.

43. The concept of perversity in legal contexts refers to a situation where a decision or finding is so unreasonable or contrary to the evidence that no reasonable person could have arrived at it. When dealing with administrative and judicial reviews, including tax and regulatory matters, perversity is a crucial ground upon which decisions can be challenged or revised. However, for perversity to be successfully invoked, certain legal thresholds and evidentiary standards must be met. Here, the Revenue has not articulated any specific grounds of perversity in its pleadings or submissions. Perversity would require demonstrating that the Tribunal's findings were not based on a rational assessment of the evidence or that they ignored relevant legal principles or material facts. Neither was any evidence produced by the Department before the assessing officer, Commissioner, Commercial Tax and the Tribunal nor was any evidence produced before this Court to controvert the evidence produced by the respondents. Simply disagreeing with the Tribunal's decision without substantiating such disagreement with concrete evidence or legal arguments does not meet the threshold for invoking perversity.

44. As a last-ditch effort, the Revenue had argued to remand the matter back to the Tribunal by placing reliance on the judgment in **Cadbury India (supra)**. The judgement in **Cadbury India (supra)** was delivered in a scenario where adequate evidence was not led by the Assessee before the relevant tribunal. This context is highly important when making an attempt to understand why the decision in **Cadbury India (supra)** does not support the Revenue's case in the instant matter. In **Cadbury India (supra)**, the lack of sufficient evidence presented by the Assessee necessitated further examination and led to the remanding of the case. The tribunal needed a more comprehensive evidentiary basis to make an informed decision about the classification of the goods in question. Consequently, the High Court's decision to remand the matter was appropriate in that context, aiming to

ensure that all relevant facts and evidence were adequately considered. In the instant case, however, the Tribunal's decision was not made in a vacuum but was grounded in substantial and persuasive evidence that supported the classification of BPAC as a medicated ointment. The Respondent had established beyond doubt that BPAC is a medicated ointment, and no contrary evidence was presented by the Revisionist to challenge this classification effectively. The principles of judicial efficiency and finality also argue against remanding a matter when the evidence has been thoroughly considered and no new facts have emerged to challenge the established findings.

45. In light of the aforesaid, I find no reason to interfere with the findings of the Tribunal, and accordingly, the instant revision petitions are dismissed. The questions of law framed in all the revision petitions are answered in favour of the assessee and against the Revenue. There shall be no order as to the costs.

06.08.2024
Kuldeep

(Shekhar B. Saraf, J.)