HEINZ INDIA LIMITED

v.

THE STATE OF KERALA

(Civil Appeal No(s). 2338-2339 of 2010)

MAY 04, 2023

[S. RAVINDRA BHAT AND DIPANKAR DATTA, JJ.]

Kerala General Sales Tax Act, 1963 – Entry 79, 127 – Tamil Nadu General Sales Tax Act, 1959 – s. 3, Entry 20-(A) of Part C of First Schedule; Entry 1(iii) of Part-F of First Schedule – Drugs and Cosmetics Act, 1940 – s. 3(aaa), 3(b) – Whether medicated talcum powder is medicine or drug, or a cosmetic, or in terms of the statutes in question, medicated talcum powder – In the first set of appeals, the revisional authority was of the view that the order of assessment passed by the assessing authority (levying tax at 8% on 'Prickly heat powder') was prejudicial to the interest of revenue by treating it as a medicine and tax at 20% was to be applied as applicable to "Medicated talcum powder" – Kerala High Court concurred with the view adopted by the Revenue – In the second set of appeals, the Madras High Court relied on the decision of the Kerala High Court holding that medicated talcum powder includes prickly heat powder and answered the issue in favour of the Revenue and against the assessee – Before the Supreme Court, the Revenue contended that in the Kerala case, that Nycil prickly heat powder is "medicated talcum powder" since there is separate entry for medicated talcum powder (Entry 127), it has to be classified under Entry 127 of the first schedule to the KGST Act – In the Tamil Nadu case, it is contended that the exclusion of products capable of being used as cosmetics from Entry 20 in Part C, on the one hand, and the inclusion of talcum powder, in Entry 1 of Part F, as cosmetics, read with explanation to Entry 1, is decisive that the proper classification of the product is as a cosmetic – Held: The court has to, as a principle, interpret the concerned statutes, in the light of their plain words, and having regard to their internal guides or aids – In Kerala case, the use of the term "includes" after talcum powder, followed by "medicated talcum powder" in the Court's opinion can lead to only one inference, which is that the clear legislative intent was that all kinds of talcum powders, which contained medications (irrespective

of the proportion, or at any rate, not containing predominant proportions) should necessarily be treated as cosmetics, falling under Entry 127 – The clear legislative intent, of inserting a carefully worded entry, which was a "hybrid" one, i.e. describing an article that contained medicinal ingredients, as well as those used for cosmetics, and yet placing such a creature ("neither beast nor fowl" so to say) in the category of cosmetics, ruled out altogether any interpretive scope of classifying it as a medicinal preparation, or drug or medicine – In the Tamil Case, the TNGST was consciously amended to include talcum powder, whether or not medicated in the specific entry or class of entries, enumerating cosmetics – Hence, like in the Kerala case, the plain meaning of that taxation head or entry had to be given, as there was no ambiguity – Consequently, the findings recorded by the High Courts are justified.

Interpretation of Statutes – A salutary rule for fiscal legislation interpretation is that words used in the statute must be given their plain meaning and the court's function is not to give a strained and unnatural meaning to the provision.

Dismissing the appeals, the Court

HELD: 1. According to the literature made available to the court, there are medicinal ingredients in Nycil prickly powder, which is also manufactured under a Drug License. Yet, the State Legislature, in Entry 127, thought it fit to include, while dealing with cosmetics, such as shampoos, *"talcum Powder including medicated talcum powder."* There can be no two opinions that talcum powder *ipso facto* is classifiable as a cosmetic. Yet, the expression "including" used in Entry 127 has the effect of bringing in [or "pulling in"] an entirely different product, which ordinarily may not have been in the same class, i.e. medicated powder. To rule out any ambiguity, the legislature specifically referred to a sub class of medicated powders, i.e. medicated talcum powder. Such specific entries have not come up for consideration, before this court; as noticed, predominantly, the courts have ruled that in the context of broad descriptions such as cosmetics or medications, if there are medical ingredients, in a product, which is meant as a curative or prophylactic product, it would be classifiable as drugs or medicines. However, the specificity employed by the legislature in this case, rules out that possibility.

Besides, "includes" has been construed as broadening the sweep of a provision, and at the same time restricting its amplitude to the meanings ascribed in the statute. [Para 47][452-B-E]

2. 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 was that all kinds of talcum powders, which contained medications (irrespective of the proportion, or at any rate, not containing predominant proportions) should necessarily be treated as cosmetics, falling under Entry 127. The pointed phraseology in fact concludes the issue, leaving no scope for the court to interpret the Entry as including any class of goods, other than such as Nycil prickly heat powder, which is a talcum powder that is also medicated. A salutary rule for fiscal legislation interpretation is that words used in the statute must be given their plain meaning. The court's function is not to give a strained and unnatural meaning to the provision. The intention of the legislature, manifested in plain words, must be accepted. [Para 48][453-D-F]

3. In the present case, the clear legislative intent, of inserting a carefully worded entry, which was a "hybrid" one, i.e. describing an article that contained medicinal ingredients, as well as those used for cosmetics, and yet placing such a creature ("neither beast nor fowl" so to say) in the category of cosmetics, ruled out *altogether* any interpretive scope of classifying it as a medicinal preparation, or drug or medicine. Therefore, this court cannot fault the High Court for drawing the conclusion that it did. The TNGST was consciously amended to include talcum powder, whether or not medicated in the specific entry or class of entries, enumerating cosmetics. Hence, like in the Kerala case, the plain meaning of that taxation head or entry had to be given, as there was no ambiguity. Consequently, the findings recorded by the High Courts are justified. [Paras 49, 53][454-B-C; 455-F-G]

A.V. Fernandez v. State of Kerala **[1957] 1 SCR 837 – followed.**

A *Oblum Electrical Industries Pvt. Ltd., Hyderabad v Collector of Customs, Bombay* **[1997] 3 Supp SCR 68;** *Union of India (UOI) and Ors. v. Godfrey Philips India Ltd.* **[1985] 3 Supp SCR 123;** *Hamdard (Wakf) Laboratories v. Deputy Commissioner* **[2007] 5 SCR 873 – relied on.**

B

Collector of Central Excise v. CIENS Laboratories **[2013] 14 SCR 38;** *Puma Ayurvedic Herbal Pvt. Ltd. v. Collector of Central Excise* **(2006) 2 SCR 1120;** *Ponds India Ltd. v. Commissioner of Trade Tax* **[2008] 9 SCR 496;** *Muller & Phipps (India) Ltd v. Collector of Central Excise* **[2004] 2 Supp SCR 39;** *B.P.L Pharmaceuticals v. Collector of Central Excise* **[1995] 3 SCR 1235;** *Union of India v. Vicco Laboratories* **[2007] 12 SCR 534;** *Commissioner of Central Excise v. Hindustan Lever Ltd* **(2015) 10 SCC 742;** *Collector of Central Excise v. Wockhardt Life Sciences Ltd.* **(2012) 5 SCC 585;** *S. Sundaram Pillai v. V. R. Pattabiraman* **[1985] 2 SCR 643;** *Share Medical Care v. Union of India* **[2007] 3 SCR 44;** *Pappu Sweets and Biscuits v. Commr. of Trade Tax, U.P* **[1998] 2 Suppl. SCR 119;** *Collector of Excise v. M/s Parle Exports (P) Ltd.* **[1988] 3 Suppl. SCR 933;** *Union of India (UOI) & Ors. v. Leukoplast Private Limited & Ors.* **[1994] 1 SCR 343;** *Dattatraya Govind Mahajan & Ors. v. State of Maharashtra & Anr.* **[1977] 2 SCR 790;** *Mrs. Zakiya Begum & Ors v. Mrs. Shanaz Ali & Ors.* **[2010] 9 SCR 692;** *Collector of Central Excise v. Wood Crafts Products Ltd.* **(1995) 3 SCC 454 : [1995] 2 SCR 797;** *Meghdoot Gramodyog Sewa Sansthan, UP. v. Commissioner of Central Excise, Lucknow* **[2005] 4 SCC 15;** *Amrutanjan Ltd. v. Collector Central Excise* **[1996] 9 SCC 413;** *N.D.P. Namboodripad (Dead) by LRs. v. Union of India* **[2007] 3 SCR 769 – referred to.**

G

B. Shah & Company v. State of Gujarat **(1971) 28 STC 5 (Guj) – referred to.**

H

Case Law Reference

[2006] 2 SCR 1120	**referred to**	**para 4**
[2007] 5 SCR 873	**relied on**	**para 4**
[2008] 9 SCR 496	**referred to**	**para 4**
[2004] 2 Suppl. SCR 39	**referred to**	**para 4**
[1995] 3 SCR 1235	**referred to**	**para 15**
[2007] 12 SCR 534	**referred to**	**para 16**
(2015) 10 SCC 742	**referred to**	**para 17**
(2012) 5 SCC 585	**referred to**	**para 18**
[1985] 2 SCR 643	**referred to**	**para 20**
[2007] 3 SCR 44	**referred to**	**para 21**
[1998] 2 Suppl. SCR 119	**referred to**	**para 21**
[1988] 3 Suppl. SCR 933	**referred to**	**para 21**
[2013] 14 SCR 38	**relied on**	**para 22**
[1994] 1 SCR 343	**referred to**	**para 23**
[2007] 3 SCR 769	**referred to**	**para 26**
[1977] 2 SCR 790	**referred to**	**para 28**
[2010] 9 SCR 692	**referred to**	**para 28**
[1995] 2 SCR 797	**referred to**	**para 39**
(2005) 4 SCC 15	**referred to**	**para 41**
(1996) 9 SCC 413	**referred to**	**para 41**
[2007] 3 SCR 769	**referred to**	**para 47**
[1957] 1 SCR 837	**followed**	**para 48**
[1997] 3 Suppl. SCR 68	**relied on**	**para 51**
[1985] 3 Suppl. SCR 123	**relied on**	**para 52**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2338-2339 of 2010.

A From the Judgment and Order dated 29.09.2008 of the High Court of Kerala at Ernakulam in STR No. 164 of 2007 and 172 of 2008.

With

Civil Appeal Nos. 6633 and 6635 of 2012.

B S. K. Bagaria, Sr. Adv., E. R. Kumar, D. P. Mohanty, Ms. Tanya Chaudhry, Ms. Pratyusha Priyadarshini, Kumar Ajit Singh, M/s. Parekh & Co., Ms. Charanya Lakshmikumaran, Ms. Apeksha Mehta, Ms. F. Gupta, Pranav Mundra, Advs. for the Appellant.

C Pallav Sisodia, K. Radhakrishnan, Sr. Advs., C. K. Sasi, Abdulla Naseeh V T, Ms. Meena K Poulose, Sabarish Subramanian, Vishnu Unnikrishnan, Ms. Shivani Jena, Naman Dwivedi, P. Shankar, Advs. for the Respondent.

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.

D

1. The issue which this court has to deal with had placed the courts in a prickly pickle, on several occasions- whether medicated talcum powder is medicine or drug, or a cosmetic, or in terms of the statutes in question, medicated talcum powder? The present appeals, by special leave, concern two sets of appeals: one, from the State of Kerala and E the other from the State of Tamil Nadu. The Kerala High Court, by its judgment[1] rejected the revisions filed by the appellant/assessee (hereafter "Heinz") aggrieved by the Kerela Sales Tax Appellate Tribunal's orders holding that its product "Nycil Prickly Heat Powder" was classifiable not under Entry 79 of the First Schedule to Kerala General Sales Tax Act, 1963 (hereafter "KGST Act") [as "medicine" but as *"Medicated* F *Talcum Powder"*].

2. In the second set of appeals, M/s Glaxo Smithkline Pharmaceuticals Ltd ("GSK" hereafter) is aggrieved by the judgment of the Madras High Court[2] where the court rejected its contention that the prickly heat powder was *"medicinal formulation or preparation* G *ready for use internally or externally for treatment or mitigation or prevention of diseases or disorders in human being or animals"* [under Entry 20-(A) of Part C of First Schedule to the Tamil Nadu

[1] Dated 29 September 2008 in S.T. Rev. Nos. 164/ 2007 and 172/ 2008

H [2] By judgment dated 01.03.2012, in Tax Case (Revision) Nos. 742/ 2006 and 301/ 2011

General Sales Tax Act, 1959 - hereafter "TNGST Act"] and held it to be *toilet powder* [under Entry 1(iii) of Part-F of First Schedule of the TNGST Act]. The High Court so held because the Explanation to the said entry stated that:

> *"Any of the items listed above even if medicated or as defined in Section 3 of the Drugs and Cosmetics Act, 1940 (Central Act XXIII of 1940) or manufactured on the license issued under the said Act will fall under this item."*

I

3. Heinz's appeal from the Kerala High Court is concerned with assessment years 1999-2000 and 2000-2001. For the assessment year 1999-2000, Heinz filed its annual return which was accepted by the assessing officer; the tax payable on the taxable turnover was 8%, and the treatment on the sale of Nycil prickly heat powder was accepted to be an item falling under Entry 79 of the First Schedule to KGST Act, by order dated 18-11-2005. The revisional authoritywas of the view that the order of assessment passed by the assessing authority was prejudicial to the interest of the revenue;it initiated proceedings under Section 35 of the KGST Act, proposing to set aside the assessment of the assessing authority on the premise that levy of tax at 8% on 'Prickly heat powder' by treating it as medicine by the assessing authority was prejudicial to the interest of the revenue and the rate of tax at 20% was to be applied as applicable to *"Medicated Talcum Powder"*. Heinz objected to this. However, the revisional authorityby order dated 16-2-2006 set aside the assessment order for the assessment year 1999-2000 and remanded the matter to the assessing authority to pass fresh assessment order by levying tax at 20%. Aggrieved, Heinz carried the matter before the Appellate Tribunal, whichaffirmed the revisional order and rejected its appeal.[3] The High Court, on further revision, concurred with the classification adopted by the revenue.

4. The Kerala High Court noticed the judgment of this court *Puma Ayurvedic Herbal Pvt Ltd v Collector of Central Excise*[4] *(hereafter "Puma Ayurvedic Herbal");Hamdard (Wakf) Laboratories v. Deputy Commissioner*[5] *(hereafter "Hamdard (Wakf) Laboratories")*; *Ponds*

[3]Order dated 14.11.2006 in IA No 311/2006
[4] (2006) 2 SCR 1120
[5] 2007 (5) SCR 873

A *India Ltd. v. Commissioner of Trade Tax*[6] *(hereafter "Ponds India")*; *Muller & Phipps (India) Ltd v. Collector of Central Excise*[7] *(hereafter "Muller & Phillips (India) Ltd")* and several other decisions cited by the parties. The court was of the opinion that the product was not of common use by consumers as a daily use talcum powder, but normally used for the *"specific purpose of treating prickly heat"* and its use discontinued after the ailment ceased. This meant it has ingredients containing preventive and curative effects making it effective for the treatment of ailments. The court observed that:

> *"We would definitely say that 'Nycil Powder' is not an ordinary talcum powder as understood in common or commercial parlance, but has a medicinal value and is used for treatment of prickly heat and other skin ailments. But then, under which entry we should classify the commodity in question. In our view, if not for the inclusive definition under Entry 127 of the first schedule to the KGST Act, we would not had any hesitation in classifying the commodity in question as a medicine. In our view, the legislature consciously immediately after the expression talcum powder, by employing the expression 'including' has thought it fit to include "medicated talcum powder" under Entry 127 of first schedule to the Act. In view of this inclusive definition, though the nycil powder has all the qualities and ingredients of medicines and since the same is basically a talcum powder which has preventive and curative power, the same requires to be brought under the special entry rather than the general entry."*

F 5. The High Court further held that Entry 127 of the First Schedule immediately after the expression talcum powder has used the word 'including'. The word includes/including, *"is used in interpretation clause to enlarge the meaning of the word in the statute. When such word is used in an interpretation clause, it must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include."*It was, therefore held that since Entry 127 is a specific entry in a fiscal statute, the general entry

[6] 2008 (9) SCR 496

H [7] 2004 Supp(2)SCR 39

(Entry 79) had to give way to the specific entry. The court observed that:

> *"though the Nycil Prickly Heat Powder is used for the care of the skin and not cure of the skin and though it contains a small quantity of Chlorphenesin, which has curative effect; in view of the specific entry, it has to be classified only under Entry 127 of First Schedule to the KGST Act and not under Entry 79 of the Act which speaks of medicines and drugs.*

Heinz is aggrieved by these findings.

II

6. GSK appeals against the judgment of the Madras High Court. They are in relation to two assessment years, i.e., 1993-94 and 1994-95. In both these cases, the assessing officer levied tax at the rate of 16 % under Entry 1(iii) of Part F of the First Schedule to the TNGST Act, rejecting the assessee's(which was Heinz, initially) claim to levy tax at the rate of 5 % for the first sale of Nycil prickly heat powder on the ground that it is a medicine or drug under Entry 20-A of Part C of the First Schedule to the TNGST. The Appellate Assistant Commissioner affirmed the view of the assessing officer.[8] Heinz approached the Appellate Tribunal, which accepted its plea, and held that the product was a medicine or drug, and classifiable as such.[9] The revenue's appeal to the Madras High Court succeeded. Heinz's unit was during the interregnum, taken over by GSK.

7. The High Court, by its impugned judgment, noted that the product is subject to license under the Drugs and Cosmetics Act, 1940 [hereafter "Drugs Act"]. The court also noticed the Kerala judgment and remarked that the difference between the two enactments (KSGST Act and TNGST Act) is that in the latter, itis the explanation which clarifies that any of the items *even if medicated or as defined in Section 3 of the Drugs and Cosmetics Act will fall under the Entry I(iii) of Part 'F' of the First Schedule*. The Madras High Court was of the opinion that the wording of the two enactments did not make any difference, even though one had an inclusive definition and another includes the product,through explanation. The Madras High Court, therefore held that Nycil prickly heat powder *"is a toilet powder"*though the

[8] Vide order dated 19.02.2001
[9] Vide order dated 30.08.2001 in STA No 616/99

manufacturer held a license under the Drugs Act and that such a circumstance fell within the mischief of the Explanation to Entry I (iii) to Part F of the First Schedule.

8. The impugned judgment of the Madras High Court relied on the decision of the Kerala High Court which had considered medicated talcum powder after going through the various definitions of "drug", "medicine", "cosmetic" and "talc", and ultimately holding that medicated talcum powder includes prickly heat powder. The Kerela High Court had observed that:

> *"34. The ingredients of Nycil powder are chlorphenesin B.P. one percent, zinc oxide I.P. 16 per cent, boric acid I.P. 16 per cent, starch I.P. 51 per cent, talc 100 per cent. Chlorphenesin is contained in Nycil powder to the extent of only one per cent and the other antiseptic medicinal agents are comprised to the extent of 32 per cent and the rest of the materials which go into the making of Nycil powder are composed of starch and talc. Nycil prickly heat powder contains chlorphenesin, a product specifically meant for treatment of skin disease. The inclusion of this medicine in the composition makes all the difference. It is this addition of medicine which changes its basic character. Therefore, the product in question is not merely talcum powder in view of the presence of chlorphenesin, though in a small quantity, though the base was purified talc.*

Relying upon the findings of the Kerela High Court, Madras High Court further observed that:

> *16. The Kerala High Court rejected the contention as to the theory of medicine and also after considering the basic ingredients of prickly heat powder, came to the conclusion that the base product is only a purified talc. We are also of the view that after considering the explanation to the main entry, it is only a medicated talcum powder and it certainly includes prickly heat powder also. We agree with the reasoning of the Kerala High Court and hold that the nycil prickly heat powder is not a "drug" and it is only a medicated talcum powder. We are also informed that M/s Heinz India Limited, the petitioner-assessee before the Kerala High Court, had purchased the manufacturing unit of the respondent- assessee*

before us in respect of prickly heat powder. Accordingly, we answer the issue in favor of the Revenue and against the assessee. Even though number of judgments were cited by both the counsel in support of their contentions, it is seen that the Kerala High Court has considered all those judgments in detail under the various enactments like Central Excise Act and the various State Sales Tax Act enactments. Therefore, it is not necessary to once again consider all those judgments cited by both the learned counsel, since the issue is already settled by the judgment of the Kerala High Court in the case of Heinz India Limited. Under these circumstances, we set aside the orders of the Tribunal and restore the orders of the assessing authority. The tax case revisions are allowed."

III

9. On behalf of Heinz, Mr. S.K. Bagaria, learned senior counsel, argued that "Nycil" is the trade name under which the manufacturer markets the substance known as 'Chlorphenesin'. The Nycil powder contains zinc oxide and boric acid and they form 32% of the total contents of Nycil powder. The rest of the material is starch and talc. Nycil powder is devised so as to retain skin cleanliness in order to protect it against prickly heat and infection. It also gives freshness and comfort. It consequently falls under Entry 79 of the first schedule to KGST Act.

10. Learned senior counsel relied on *B.Shah & Company v State of Gujarat*[10] *(*hereafter *"Shah & Co"),* and urged that Chlorphenesin is a potent antifungal, antibacterial and trichomonicidal substance of low toxicity. It is effective against common dermatophytes causing tinea pedis (Athelet's foot) and other dematomycoses, epidermophyton, floccosum and the various trichophyton, species such bacteria as streptococci, staphyloccocci, coliform organisms and clostridii. Nycil is effective in eliminating pruritus ani and pruritus vulvae. Pruritus ani and pruritus vulvae are frequently of bacterial or fungal origins, or the lesions may become infected with bacterial or fungi, and Nycil is effective in eliminating such organisms.

11. In *Shah & Co* (supra)*,* it was held thatNycilas powder or ointment is recommended for the treatment of prickly heat and *dhobie*

[10] (1971) 28 STC 5 (Guj)

A itch and active skin protection during ringworms and other fungicidal infections. It was submitted that Nycil powder is suitable for the initial treatment of acute mycotic infection since it is an absorbant, in addition to exercising its fungicidal action. It was argued that the ingredients of Nycil powder are Chlorphenesin B.P. 1%; Zinc Oxide I.P. 16%; Boric Acid 16% Starch I.P. 51% and Talc. Thus, about one-third (33%) of its ingredients are medicinal products.It was pointed out that the face of the container, in which the product is sold, contains the following description:

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> *"Nycil contains chlorphenesin the antibacterial and antifungal agent. It actively prevents prickly heat and protects the skin from sores, dhobie itch, and athlete's foot."*

C

12. It was argued that under Section 3(b) of the Drugs Act, "drug"is defined as *"including all medicines used for internal or external use of human beings or animals intended to be used for mitigation or prevention of any disease or disorder"*. "Cosmetics" under Section 3(aaa) of the said Act means, *"any article intended to be sprinkled or sprayed or introduced or otherwise applied to a human body for cleansing, beautifying, promoting attractiveness or altering the appearance*", which also includes any article intended for use as a component of cosmetic. To bring or classify an article under Entry 79 of the First Schedule, the article must be a medicinal formulation or preparation which is ready for use either internally or externally for treatment or mitigation or prevention of diseases or disorders in human beings or animals. "Treatment" relates to diseases or disorders. Though medicinal formulations or preparation,can be used internally or externally, unless such use is by way of treatment of a disease or disorder in human beings or animals, it cannot be brought under the category of medicine. Clearly, in this case, Nycil powder is used to treat several dermatological conditions, including prickly heat. In fact, there is no medical treatment for that condition other than the use of Nycil.

D

E

F

13. It was argued that having regard to the above circumstances, Nycil prickly heat powder, which is used only to absorb sweat and moisture from the body and to keep away rashes in human beings, should be considered to be either a "drug" or "medicine"-in view of the composition, it is nothing but a medicinal preparation used as such and for the purpose for which talcum powder is used.

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14. Learned senior counsel urged this court to follow the decision in *Puma Ayurvedic Herbal* (supra) where the assessee's claim that its various products, including herbal powders, were medicaments, was considered. The court adopted a twin test to consider whether any item is a drug, or medicament, or cosmetic. The first is whether, the item is *commonly understood as a medicament* i.e. the common parlance test. If a product falls in the category of medicament it will not be an item of common use. A user will use it only for treating a particular ailment and will stop its use after the ailment is cured. The approach of the consumer is crucial. The second is, whether the ingredients are described in the medical literature, as necessary for healing.

15. Learned senior counsel submitted that in *B.P.L Pharmaceuticals v. Collector of Central Excise*[11] (hereafter "*B.P.L Pharmaceuticals Ltd.*"),"Selsun Shampoo" was under consideration for purposes of Central Excise classification. The manufacturers claimed that the shampoo was a medicated one, meant to treat dandruff, a scalp disease. This court took note of the preparation, label, literature, character, common and commercial parlance and held the product was classifiable as a medicament, asit was not an ordinary shampoo of common use but was meant to cure a particular scalp or hair disease.After the cure, it was not meant to be used in the ordinary course. *Muller & Phipps (India) Ltd* (supra) was next relied on to urge that similar to this case, *"Johnson Prickly Heat Powder"* was held to be a medicament as it was "*not an ordinary talcum powder but a powder to be used to get rid of the problem of prickly heat"*.

16. In *Ponds India* (supra), the court had to consider whether white or yellow petroleum jelly (non-perfumed) sold as "Vaseline" was a "drug" or a "cosmetic". It was urged that the court took note of the fact that the assessee was a licensee under the Drugs Act and that cosmetics within the meaning of the provisions were not covered in the Schedule to the exemption notification. It was pointed out that this court had held that while interpreting an entry in a taxing statute, the court's role is to consider the effect of the law, upon considering it from different angles. Different tests are laid down for the interpretation of an entry in a taxing statute namely dictionary meaning, technical meaning, users point of view, popular meaning etc. While the purpose of a statute i.e. of

[11] (1995)3 SCR 1235

collection of tax is important, yet that itself would not mean that an assessee would be made to pay tax although he is not liable therefor, or to pay a higher rate of tax when he is liable to pay at a lower rate. The court held that Vaseline was a drug, in that case. Learned senior counsel also relied on *Union of India v Vicco Laboratories*[12] where the claim was that '*ViccoVajrudanti'* and *'ViccoTermeric'* (dental powder and turmeric powder) were 'ayurvedic medicines'. The issue had been decided by the Supreme Court in favour of the assessee, initially, which was sought to be re-opened. The court held that to be impermissible, as the goods had been declared as drugs.

17. Learned senior counsel relied heavily on *Commissioner of Central Excise v Hindustan Lever Ltd*[13] *(hereafter "Hindustan Lever")* and urged that merely because a particular product is substantially for the care of skin and simply because it contains subsidiary pharmaceutical or antiseptic constituents or is having subsidiary curative or prophylactic value, it would not become medicament and would still qualify as the product for the care of the skin. It was stressed that the onus is on the revenue that the classification sought by it (if it claims the product not to be a drug or medication, but a cosmetic), to discharge it with proof.

18. It was urged, lastly by relying on *Collector of Central Excise v Wockhardt Life Sciences Ltd*[14]*.,* (hereafter "Wockhardt Life Sciences Ltd") that the *"common parlance test" or the "commercial usage test"* is most appropriate. Learned counsel relied on the following observations:

> *"33. There is no fixed test for classification of a taxable commodity. This is probably the reason why the 'common parlance test' or the 'commercial usage test' are the most common (see A. Nagaraju Bros. v. State of A.P. [1994 Supp (3) SCC 122]). Whether a particular article will fall within a particular tariff heading or not has to be decided on the basis of the tangible material or evidence to determine how such an article is understood in 'common parlance' or in 'commercial world' or in 'trade circle' or in its popular sense meaning. It is they who are concerned with it and it is the*

[12] 2007 (12) SCR 534
[13] 2015 (10) SCC 742
[14] (2012) 5 SCC 585

sense in which they understand it that constitutes the definitive index of the legislative intention, when the statute was enacted.

19. The submissions of learned senior counsel, in *Heinz* were substantially adopted on behalf of GSK, in the Tamil Nadu case. In addition, Ms. CharanyaLaxmikumaran, learned counsel urged that the statute in TGST Act is different, because in the Entry, relied on by the revenue, is dependant *solely* on the Explanation [to Entry I (iii) of Part F of the First Schedule]. However, the product, by its description, purpose, and application of the common parlance test, squarely fell within Entry 20A of Part C of the First Schedule, which were medical preparations, to be used internally or meant for external use or application *"for treatment of diseases or disorders"*. It was underlined that the exclusion from this entry was *of products capable of use as creams, hair oils, tooth pastes,tooth powders, cosmetics, toilet articles, soaps and shampoos.* Learned counsel submitted that the specific mention of one class of powders, i.e. tooth powder, and use of "cosmetic" with other expressions, clarifying that if the use of the product was only or predominantly as cosmetic, would it not fall under Entry 20A. It was submitted that having regard to the literature and the essential purpose of Nycil powder, it did not fit the description as a cosmetic [which is excluded], even if the Explanation to Entry I (iii) of Part F were taken into account. Thus, it has to be treated as a medicine.

20. Learned counsel relied on *S. Sundaram Pillai v V. R. Pattabiraman*[15] and urged that the Explanation, to Entry I (iii) has to be considered in the context of the established rule that while a proviso excepts something out of the enactment which would otherwise be within its purview yet, if the text, context or purpose so require a different rule may apply. Likewise, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. All that the explanation did was to say that if the exclusion of cosmetic articles from Entry 20 *per se* did not result in its falling within the Entry relating to cosmetics, i.e. Entry I of Part F. It continued to be essentially a medicine, for prickly heat.

21. Next, *Share Medical Care v Union of India*[16] was relied upon, to urge that if two interpretations are possible, that favouring the assessee should be adopted. *Pappu Sweets and Biscuits v. Commr. Of*

[15] [1985] 2 SCR 643
[16] 2007 (3) SCR 44

Trade Tax, U.P[17] *(hereafter "Pappu Sweets and Biscuits")* and *Collector of Excise v. M/s Parle Exports (P) Ltd*[18] were cited for the argument that the words used in the provision, imposing taxes or granting exemption should be understood in the same way for which they are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them.

IV

22. Mr. Pallav Sisodia, learned senior counsel appearing on behalf of the State of Kerala, urged that the correct test to be applied is whether the product is *capable of use* as a medication. He relied on *Collector of Central Excise v CIENS Laboratories*[19] *(hereafter "CIENS Laboratories")* to say that this court had elaborately considered all relevant factors, and devised the following test:

> *"19. Thus, the following guiding principles emerge from the above discussion. 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. 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. Thirdly, prior to adjudicating upon whether a product is a medicament or not, 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."*

[17] 1998 (Suppl)(2) SCR 119
[18] 1988 (Suppl)(3) SCR 933
[19] 2013 (14) SCR 38

23. It was submitted that the expression "medicated" has great significance, because it implies that a substance is filled with, or covered in medicine, or medication. Learned counsel relied on the judgment of this court, in *Union of India (UOI) &Ors v Leukoplast Private Limited &Ors*[20] where the assessee's contention that a surgical pad medicated with Nitrofurozone was not a *patent or proprietary medicine,* was rejected. The court noted that the addition of a small quantity of Nitrofurozone after rendering the pad sterile, made it a medicine.

24. It was submitted that the intention of the legislature was to ensure that the article fell within the cosmetic class of products while classifying it. Therefore, the expression "medicated" was used, in conjunction with "talcum powder". When consciously the law classified the goods and grouped them together as part of one entry, the court has to give effect to their plain intendment. Thus, the inclusion of "talcum powder" and "medicated talcum powder" under the same entry, i.e. Entry 127 was by design, to ensure that the product was not classified elsewhere. It was submitted that mere use of "powder" or "talcum powder" would not have covered Nycil powder as a cosmetic, because it had certain ingredients that could be preventive and curative. However, pre-fixing "medicated" to "talcum powder" rendered the issue, beyond debate.

25. It was submitted that products which are sold over the counter are sometimes hybrid in nature, such as lozenges, cough drops, which double up both as curative of certain ailments, as well as sweets or eatables. Likewise, Nycil powder has dual use: it can be used as a cosmetic,but has a medicinal use as well. However, the statute in this case, clearly requires its classification as a cosmetic, along with others, in view of the specific and unambiguous use of the term "medicated talcum powder".

26. Learned counsel for the revenue relied on *Hamdard (Wakf) Laboratories* (supra) and *N.D.P. Namboodripad (Dead) by LRs. v. Union of India*[21] and submitted that when an interpretation clause uses the word "includes", it is meant to be extensive. The term 'and includes' is intended to rope in items which would not be part of the meaning, but for the definition the words 'includes' thus, means 'comprises' or 'consists of'.

[20] 1994 (1) SCR 343
[21] 2007 (3) SCR 769

27. Mr. K. Radhakrishna, learned senior counsel appearing for the revenue, in the Tamil Nadu case, contended that the history of the legislation is a decisive factor to be taken into account, while determining the proper classification of a product. It was pointed out that two factors are important: one, that the entry (entry 20, Part C of the First Schedule which deals with "medicines") was amended in 1994. Before amendment (on 01.04.1994), the entry clearly stated that preparations or formulations that were *"capable of being used as creams, hair oils, tooth pastes, tooth powders, cosmetics, toilet articles, soaps and shampoos"* were to be "excluded". For the same period, cosmetics (described as scents, hair oils etc, and falling in Entry 1 of Part F of the First Schedule) included *talcum powder.* Two, the placement of talcum powder, with lipsticks, lip salve, nail polish, nail varnishes, nail brushes, toilet powders, baby powders, talcum powders, powder pads, etc. clearly established that all manner of talcum powder fell within the entry, i.e. Entry 1(iii). After amendment, with effect from 01.04.1994, the matter was placed beyond any controversy, by the explanation, which was *added.* The explanation specifically stated that items "listed above" *"even if medicated or as defined in Section 3"*(of the Drugs Act)*"or manufactured on the license issued under the said Act will fall under this item".* The explanation clearly brought within the fold of Entry 1, Part F medicated talcum powder, regardless that the license to manufacture it, was under the Drugs Act.

28. Learned senior counsel highlighted that the Madras High Court, in the impugned judgment, had considered the meaning of the expressions "drug" and "cosmetic" under the Drugs Act, and also taken note of the dictionary meanings of those terms. Learned senior counsel relied on *Dattatraya Govind Mahajan &Ors v. State of Maharashtra &Anr*[22] and *Mrs. Zakiya Begum &Ors v. Mrs. Shanaz Ali &Ors*[23] and urged that though a provision may be termed as an explanation, the court must construe it according to its plain language, to give effect to legislative intent. Learned senior counsel's submission was that the impugned judgment correctly inferred and found that the product, Nycil prickly heat powder, on the plain terms of the statute, was a cosmetic, especially in view of the Explanation which particularly referred to whether the product "is medicated" or not, and irrespective of whether it is under a license issued under the Drugs Act.

[22]1977 (2) SCR 790

[23]2010 (9) SCR 692

V

The Provisions: KGST Act

29. In terms of Section 5 (c) of the KGST Act, goods specified in the First Schedule, were subject to sale at first point. The revenue alleged that Nycil prickly heat powder, the article in question is subject to levy as a cosmetic. Heinz, on the other hand, contended that it is a drug, or medication.

30. Entry 79 of the First schedule to the KGST Act reads as under:

> *"Medicines and Drugs including allopathic, ayurvedic, homeopathic, siddha and unani preparations and glucose IP."*

31. Entry 127 of the First Schedule to the KGST Act reads thus:

> *"Shampoo, Talcum Powder including medicated talcum powder, Sandalwood Oil, Ramacham Oil, Cinnamon Oil, other perfurmeries and cosmetics not falling under any other entry in this Schedule".*

The Provisions: TNGST Act

32. In terms of Section 3 of the TNGST Act, *every dealer [other than the dealer, casual trader or agent of a non- resident dealer referred to in clause (ii)*], whose total turnover for a year exceeds ₹ 3 lakhs is subjected to sales tax levy.

33. GSK, the assessee, contends that the product, Nycil prickly heat powder is a medication or drug, classifiable under Entry 20 of Part C, which reads as follows:

> *"Part C of the First Schedule.*
>
> *"Entry 20(A)*
>
> *(A) Medicines conforming to the following description:*
>
> *Any medicinal formulation or preparation ready for use internally or externally for treatment or mitigation or prevention of diseases or disorders in human being or animals (excluding products capable of being used as creams, hair oils, tooth pastes, tooth powders, cosmetics, toilet articles, soaps and shampoos), but including*

A *(i) Allopathic medicine.*

(ii) Other medicines and drugs including ayurvedic, homeopathic, siddha and unani preparations.

(iii) Medicinal mixtures or compounds, the components of which have not already suffered tax.

B

(iv) Surgical dressing which expression shall include adhesive plasters, adhesive plaster dressing, gypsona plaster of paris and bandages, velroc pop bandages, elastro crape bandages, gauze, wadding gauze, lint and cotton wool poultices and similar articles impregnated or coated with pharmaceutical substances put up in forms or packing for surgical purposes which have been sterilized and conform to the accepted standards of the medical profession.

C

(v) Pharmaceutical and surgical products of plastic and rubber including gloves, aprons and caps."

D

Cosmetics fall in Entry 1 of Part F of First Schedule:

"Part F

1 (i) Scents and perfumes in any forms excluding doop and agarbathis but including aragaja, javvadu and punugu.

E

(ii) Hair oils, hair creams, hair dyes, hair darkeners, hair tonics, brilliantines, pomades and vaselines and all hair applicants other than shampoos mentioned in item 4 of the Sixth Schedule.

F

(iii) Lipsticks, lip-salve, nail polishes, nail varnishes, nail brushes, beauty boxes, face powders, toilet powders, baby powders, talcum powders, powder compacts, powder pads and puffs, toilet sets made of all materials (with or without contents) toilet sponges, scent spray, depilatories, blemish removers, eye liners all sorts, eye shadow, eyebrow pencils, eyelash brushes, eau de cologne, solid colognes, lavender water, snows, face creams, all purpose creams, cold creams, cleaning creams, make-up creams, beauty creams, beauty milk, cleaning milk, hair foods, skin tonics, complexion rouge, nail cutters, sanitary towels and napkins, astringent lotions, pre-shave and aftershave lotions and creams, moisturisers of all sorts and personal (body) deodorant."

G

H

By amendment to the TNGST Act, in 1994, the following explanation was added, below Item I (iii), Part F, of the First Schedule:

"Explanation- Any of the items listed above even if medicated or as defined in section 3 of the Drugs and Cosmetics Act, 1940 (Central Act XXIII of 1940) or manufactured on the licence issued under the said Act will fall under this item."

VI

34. The assessees contends that the product is sold under the trade name Nycil powder.They market the substance known as '*Chlorphenesin*'. Nycil powder contains zinc oxide and boric acid. They constitute 32% of the total contents of Nycil.The rest is starch and talc. Nycilpowder, it is said, is designed to keep the skin clean and offer protection against prickly heat and infection besides giving comfort and freshness. Therefore, it would fall under Entry 79 of the First Schedule to the KGST Act. The nature, composition and property of Nycilpowder, was set out by the Gujarat High Court in the case of *Shah & Co*(supra):

"Nycil Powder has the following features and attributes:

(1) Chlorphenesin, being a medical substance was introduced as a result of original work in the British Drug House Research Laboratories. "Nycil" is the trade name under which the British Drug House product of chlorphenesin is manufactured and marketed.

(2) Chlorphenesin is a potent antifungal, antibacterial and trichomonicidal substance of low toxicity. Organisms against which it is effective include the common dermatophytes causing tinea pedis (Athelct's foot) and other dematomycoses, epidermophyton, floccosum and the various trichophyton species such bacteria as streptococci, staphyloccocci, coliform organisms and clostridii. Nycil is effective in eliminating pruritus ani and pruritus vulvae. Pruritus ani and pruritus vulvae are frequently of bacterial or fungal origins, or the lesions may become infected with bacterial or fungi, and Nycil is effective in eliminating such organisms.

(3) Nycil in the form of powder or ointment is recommended for the treatment of prickly heat and dhobie itch and active skin protection during ringworms and other fungicidal

A *infections. Nycil powder is particularly suitable for the initial treatment of acute mycotic infection as it absorbs in addition to exercising its fungicidal action.*

(4) The ingredients of Nycial powder are as under:

B

(i) Chlorphenesin B.P.	*1%*
(ii) Zinc Oxide I.P	*16%*
(iii) Boric Acid	*16%*
(iv) Starch I.P.	*51%*
(v) Talc	*100%*

C *The above composition of Nycil powder shows that it contains medicinal articles to the extent of 33 per cent.*

(5) On the sample bottle of Nycil powder, produced before the lower au thorities, on its one side the following was found printed: "nycil for Prickly Head and Active Skin Protection". On the other side, the following was found to have been printed: "Nycil contains chlorphenesin the antibacterial and antifungal agent. It actively prevents prickly heat and protects the skin from sores, dhobie itch, and athlete's foot." The formula of Nycil powder is also printed on the container. The Tribunal has made the following pertinent observations as regards the container of the Nycil powder:

D

E

> *"It will be noticed that the article is not called medicated or talcum powder or powder. No name is given except 'Nycil' which as stated above is only a trade name of the different products manufactured by British Drug House. The article manufactured is packed in a long and round container of plastic. It has a separate cover of plastic. The contents are also covered by a small plastic cover which contains spaces for making holes. The powder is white in colour and perfumed and in general appearance is not different from the white talcum or such other powders."*

F

G

(6) The medical substances used as ingredients in the manufacture of Nycil powder are Indian Pharmaceutical or British Pharmaceutical articles for the use of which licence is necessary. Licence is also necessary under the Indian Drugs

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Control Act for manufacturing, stocking or selling Nycil powder and the licence has accordingly been issued. The Government of India, Ministry of Finance, has held and directed that Nycil powder should be assessed to duty as "P. and P. Medicines" under item No. 14E of the Central Excise Tariff."

35. The revenue contends- in the Kerala case, that Nycil prickly heat powder is "medicated talcum powder" since there is a separate entry for *medicated talcum powder* (Entry 127). It, therefore,has to be classified under Entry 127 of the First Schedule to the KGST Act. In the Tamil Nadu case, it is contended that the *exclusion of products capable of being used as cosmetics* from Entry 20 in Part C, on the one hand, and the inclusion of talcum powder, in Entry 1 of Part F, as cosmetics, read with the explanation to Entry 1, is decisive that the proper classification of the product is as a cosmetic.

36. In *Hindustan Lever* (supra) the product, Vaseline Intensive Care Heel Guard, was held to be a medicament under Chapter 30 of Central Excise Tariff Act, 1985 ("CETA") (Item 3003.10, as a patent or proprietary medicine).The court took note of the definition of medicament (Note 2(i) to Chapter 30) which were goods *"other than foods or beverages such as diabetic, or fortified foods or beverages"* not falling in Chapter heading 30.03 or 30.04 comprising of two or more constituents for *"therapeutic or prophylactic uses"* or "*unmixed products*" suitable for such uses. The court also noticed that *"patent or proprietary medicaments"* were drug or medicinal preparations in any form to prevent, or treat ailments which bears a name on the container a name *"note specified in a monograph"* in a pharmacopoeia, formulator or other publications or whose brand name is registered as a medicine. The court took note of a number of previous judgments, especially *CIENS Laboratories* (supra),*Muller and Phipps (India) Ltd* (supra); *Puma Ayurvedic Herbal* (supra) and *B.P.L Pharmaceuticals* (supra) and, after considering that the product in question was developed specially to treat fungal infection, having antifungal properties, held it to be classifiable as medicinal, meant for therapeutic use, to treat cracked heels.

37. In *CIENS Laboratories*(supra) too, the proper classification of a moisturising cream – whether it was a drug, a medicament, under Chapter 30, CETA, or a beauty or skin care product under Chapter 34

A was involved. The court concluded that having regard to the product's ingredients, it was not a mere skin care product, but meant to treat skin complaints like *"fissure feet, dry scaly skin conditions, ichthyosis etc"*, and that it had therapeutic or prophylactic values. The court had followed *B.P.L Laboratories* (supra).

B 38. The context of *B.P.L. Laboratories* (supra) was again whether the Selenium Sulphide lotion was a medicament under Chapter 30 CETA (sub heading 3003.19) or a cosmetic (Chapter 33, sub heading 3305.90). The court rejected the revenue's contentions, holding that the article was a medicament used to treat Seborrheic dermatitis (dandruff); manufactured under drug license, the drug controller had held its C ingredient, i.e., Selenium Sulphide to be in therapeutic concentration and that it was included as a drug in the National Formulatory, USA.The court resolved the issue of interpretation, having regard to the Chapter Notes and General Rules of Interpretation, as well as the language of the specific entries in question. Other factors, such as that it was D manufactured under a drug licence; the Food and Drugs Administration had certified it as a drug; that the Drug Controller had categorically opined that Selenium Sulphide present in Selsun was in a therapeutic concentration; that the brand name "Selsun" was derived from the name of the drug Selenium Sulfide, all weighed into the conclusion recorded by the court.

E 39. In *Muller & Phipps (India) Ltd* (supra),the dispute was with respect to prickly heat powder sold under the brand "Johnson's Prickly Heat Powder" – whether it was medicament covered under Chapter 30 CETA, or beauty and skin care item.This Court noted the previous ruling in *B.P.L. Pharmaceuticals Ltd.* (supra) and after noting the ingredients F of the product as well as the Harmonised System of Nomenclature (HSN) concluded that as to the manner in which the goods had been treated earlier - as medicament on the basis of commercial parlance and understanding, - it had to be classified as such. This court also noticed the judgment in *Collector of Central Excise v. Wood Crafts Products Ltd.*[24] and held that Central Excise Tariffs are based on internationally G accepted nomenclature in HSN; consequently, disputes relating to classification had to, as far as possible, accord with the nomenclatures in HSN.

H [24] (1995) 3 SCC 454

40. The decisions relied on have substantially been on the basis of classification under the CETA. Central Excise classifications are elaborate; the General notes, and Chapter notes, together with the exclusions, [and further explanations] are developed interpretive tools. Plus, this court has striven, to the extent possible, to interpret such entries, in line with HSN classification. In the present case, the distinguishing feature of both the KGST Act and TGST Act, is that neither have general or chapter notes. This sets the statutes apart from decisions based on CETA, to a large extent. The court has to, as a principle, interpret the concerned statutes, in the light of their plain words, and having regard to their internal guides or aids.

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

> (i) When a product contains pharmaceutical ingredients with therapeutic/ prophylactic or curative properties, the proportion of the ingredients is not decisive. The curative attributes of the ingredients render it a medicament and not a cosmetic. (*CIENS Laboratories*)
>
> (ii) A product can be sold without a prescription from a medical practitioner. Yet it does not lead to the conclusion that the sale of over-the-counter products are cosmetics. Several products are sold over-the-counter and are yet, medicaments.(*CIENS Laboratories*)
>
> (iii) Before adjudicating whether a product is a medicament or not, courts have to consider what the people who use the product understand it to be. If a product's primary function is "care" and not "cure", it is not a medicament. Cosmetic products are used in enhancing or improving a person's appearance or beauty, whereas medicinal products are used to treat or cure some medical condition. A product that is used mainly in curing or treating ailments or diseases and contains curative ingredients even in small quantities, is to be branded as a medicament. (*CIENS Laboratories*)

A (iv) Products cannot be classified as cosmetics solely on the basis oftheir outward packing. (*Meghdoot Gramodyog Sewa Sansthan, UP. v. Commissioner of Central Excise, Lucknow*[25])

(v) Mixing medical ingredients with other products, or preservatives, does not alter its character as a medicament (*Amrutanjan Ltd. v.* B *Collector Central Excise*[26])

(vi) That a license under the Drugs Act is necessary is not a determinative or decisive factor always.

42. The formulation of the tests, in all the above decisions was specific to the products involved and the rival or competing revenue C entries (and in some cases, exemption notifications).

43. In *CIENS Laboratories* (supra), the product was a cream prescribed by dermatologiststotreat dry skin conditions and was also available in pharmaceutical shops in the market and not primarily intended for the protection of the skin. Its pharmaceutical ingredients showed D that it was used for prophylactic and therapeutic purposes. The court noted that Heading 33.04 of CETA (dealing with beauty or make-up preparations and preparations for skin care) specifically excluded medicaments and medicinal preparations used to treat certain complaints, meant to be under Heading 30.03 (medicaments) or 30.04 (products containing pharmaceutical substances used for the medical, surgical, dental E or veterinary purpose). This court held that the product is a medicament classifiable under Heading 30.03 (medicament) and not a cosmetic preparation.

44. In *Wockhardt Life Sciences Ltd* (supra) the products were an *"Iodine Cleansing Solution USP"* and *"Wokadine Surgical* F *Scrub"*. This court rejected the revenue's argument that they were cosmetics, and held that products, comprising two or more constituents which were compounded together either for therapeutic or prophylactic uses, were"Medicaments". The products in question were primarily used for the external treatment of human-beings for the purpose of prevention G of disease. The court said that *Medicaments are products which can be used either for therapeutic or prophylactic usage*. As the productswerebasically and primarily used for prophylactic uses, their

[25][2005] 4 SCC 15

H [26][1996] 9 SCC 413

classification was proper under chapter sub-heading 3402.90 and, the classification under chapter sub-heading 3003 was not correct.

45. In *Pappu Sweets and Biscuits* (supra), the issue was whether "toffees" were "sweetmeats" in the context of an exemption notification. The court ruled that having regard to the object of the notification and the application of the common parlance test, the term "sweetmeats" had to be seen in the context, as confections available in sweetmeat shops and that toffees were not products to be found in such premises, as they were produced on an industrial scale.In*Puma Ayurvedic Herbal,*several products were considered, of which neem facial pack (Neemal), anti-pimple herbal powder (Pimplex), herbal facial pack (Herbaucare), herbal remedy for facial blemishes, hair tonic powder (Sukeshi), anti-dandruff oil (Dandika), shishurakshantelandneem tulsiwere held to be medicinal whereas other products were cosmetic.In*Muller & Phipps (India) Ltd* (supra), the product was Johnson's prickly heat powder. The revenue contended that it was a cosmetic falling under Chapter 33, CETA; the assessee contended that it was a drug or medication, under Chapter 30. This court went by the official opinion of the drug administration (*"when throughout the meaning given to products in question not only by the department itself but also by other departments like Drug Controller and the Central Sales Tax authorities is that the product in question is a medicinal preparation should be accepted"*). Also, the HSN classification was largely influential in the outcome of the case.

46. In *Ponds India Ltd.*(supra), the question was whether petroleum jelly, under the brand "Vaseline" was held to be a drug, as it was used for various skin disorders, and not a cosmetic, as contended by the state. This court noted the previous litigation history and ruled that the consistent classification of the same product, for a number of years, was as a drug, and not a cosmetic, and the revenue's conduct in trying to change the classification without any reason, was unjustified.

47. In all the cases cited, the contest, by and large was whether the product was a cosmetic, or a drug, under Chapters 30 and 33, CETA. The phraseology of the articles grouped together, in one chapter differs from the phraseology of the other chapters, in that statute. Moreover, to avoid ambiguity, General Rules of Interpretation, besides chapter notes have been prescribed. The court went by those rules, and also adopted the common parlance test. A noteworthy feature is that the court had no

A occasion to consider an entry which was as specific as *"medicated Talcum Powder"*. Undeniably, talcum powder is made from talc[27], which is a "*common silicate material that is distinguished from almost all other minerals by its extreme softness"* According to the literature made available to the court, there are medicinal ingredients in Nycil prickly powder, which is also manufactured under a Drug License. Yet, the State Legislature, in Entry 127, thought it fit to include, while dealing with cosmetics, such as shampoos, *"talcum Powder including medicated talcum powder."* There can be no two opinions that talcum powder *ipso facto* is classifiable as a cosmetic. Yet, the expression "including" used in Entry 127 has the effect of bringing in [or "pulling in"] an entirely different product, which ordinarily may not have been in the same class, i.e. medicated powder. To rule out any ambiguity, the legislature specifically referred to a sub class of medicated powders, i.e. medicated talcum powder. Such specific entries have not come up for consideration, before this court; as noticed, predominantly, the courts have ruled that in the context of broad descriptions such as cosmetics or medications, if there are medical ingredients, in a product, which is meant as a curative or prophylactic product, it would be classifiable as drugs or medicines. However, the specificity employed by the legislature in this case, rules out that possibility. Besides, "includes" has been construed as broadening the sweep of a provision, and at the same time restricting its amplitude to the meanings ascribed in the statute. This proposition was enunciated in *Hamdard (Wakf) Laboratories* (supra), where it was held that:

> *"34. When an interpretation clause uses the word "includes", it is prima facie extensive. When it uses the word "means and includes", it will afford an exhaustive explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression."*

The court, in *Hamdard (Wakf) Laboratories* relied on *N.D.P. Namboodripad (Dead) by LRs. v. Union of India &Ors.*[28]:

> *"15. The word "includes" has different meanings in different contexts. Standard dictionaries assign more than one meaning to the word "include". Webster's Dictionary defines the word "include" as synonymous with "comprise" or "contain".*

[27] https://www.britannica.com/science/talc(last accessed on 02 May 2023 at 9.30 PM)

[28] 2007 (3) SCR769

Illustrated Oxford Dictionary defines the word "include" as: (i) comprise or reckon in as a part of a whole; (ii) treat or regard as so included. Collins Dictionary of English Language defines the word "includes" as: (i) to have as contents or part of the contents; be made up of or contain; (ii) to add as part of something else; put in as part of a set, group or a category; (iii) to contain as a secondary or minor ingredient or element. It is no doubt true that generally when the word "include" is used in a definition clause, it is used as a word of enlargement, that is to make the definition extensive and not restrictive. But the word "includes" is also used to connote a specific meaning, that is, as "means and includes" or "comprises" or "consists of."

48. 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 was that all kinds of talcum powders, which contained medications (irrespective of the proportion, or at any rate, not containing predominant proportions) should necessarily be treated as cosmetics, falling under Entry 127. The pointed phraseology in fact concludes the issue, leaving no scope for the court to interpret the Entry as including any class of goods, other than such as Nycil prickly heat powder, which is a talcum powder that is also medicated. A salutary rule for fiscal legislation interpretation is that words used in the statute must be given their plain meaning. The court's function is not to give a strained and unnatural meaning to the provision. The intention of the legislature, manifested in plain words, must be accepted. In the decision of *A.V. Fernandez v. State of Kerala*[29], the Constitution Bench stated the principle of strict interpretation in construing a taxing statute, in the following manner:

"[..] In construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case of not covered within the four corners of the provisions of the taxing statue, no tax can be imposed by inference or by analogy or by trying

[29] 1957 (1) SCR 837

A *to probe into the intentions of the Legislature and by considering what was the substance of the matter.[..]"*

49. In the present case, the clear legislative intent, of inserting a carefully worded entry, which was a "hybrid" one, i.e. describing an article that contained medicinal ingredients, as well as those used for B cosmetics, and yet placing such a creature ("neither beast nor fowl" so to say) in the category of cosmetics, ruled out *altogether* any interpretive scope of classifying it as a medicinal preparation, or drug or medicine. Therefore, this court cannot fault the High Court for drawing the conclusion that it did.

C 50. Turning next to the Tamil Nadu case, the legislative history of the entry is telling. Talcum powder, lipsticks, lip salve, nail polish, nail varnishes, nail brushes, *toilet powders*, baby powders, talcum powders, powder pads, etc. clearly showed that all manner of talcum powder fell within Entry, i.e. Item 1. After the amendment, with effect from 01.04.1994, the explanation was *added.* The explanation specifically D stated that items "listed above" *"even if medicated or as defined in Section 3"*(of the Drugs Act)*"or manufactured on the license issued under the said Act will fall under this item".* The explanation included, in Item 1, Part F medicated talcum powder, regardless that the license to manufacture it, was under the Drugs Act. The pointed reference to E *toilet powders*, baby powders, talcum powders, powder pads, along with the additional words *"even if medicated"* again, like in the Kerala case, is decisive.

51. In a decision of this court, *Oblum Electrical Industries Pvt. Ltd., Hyderabad v Collector of Customs, Bombay*[30] the function of an F explanation was stated to be thus:

"It is a well settled principle of statutory construction that the Explanation must be read so as to harmonise with and clear up any ambiguity in the main provision."

52. In *Union of India (UOI) and Ors. vs. Godfrey Philips India* G *Ltd.*[31] this court had to deal with an explanation that expanded the meaning of "packing". The court observed that explanations are also used to widen terms:

[30]1997 Supp (3) SCR 68

H [31]1985Supp (3) SCR123

"[..] The Explanation to Section 4(4)(d)(i) provides an exclusive definition of the term "packing" and it includes not only outer packing but also what may be called inner packing. Ordinarily bobbin, pirl, spool, reel and warp beam on which yarn is wound would not be regarded as packing of such yarn, but they are brought within the definition of "packing" by the Explanation. The Explanation thus extends the meaning of the word "packing" to cover items which would not ordinarily be regarded as forming part of packing. The Explanation then proceeds to say that "packing" means wrapper, container or any other thing in which the excisable goods are wrapped or contained. It is apparent from the wide language of the Explanation that every kind of container in which it can be said that the excisable goods are contained would be "packing" within the meaning of the Explanation and this would necessarily include a fortiori corrugated fibre board containers in which the cigarettes are contained. When Bombay Tyre International case was argued before us, it was at one stage sought to be contended, though rather faintly, that it is only the immediate packing in which the excisable goods are contained, that is primary packing alone, which would be liable to be regarded as "packing" within the meaning of the Explanation. But this argument was given up when it was pointed out that even secondary packing would be within the terms of the Explanation, because such secondary packing would also constitute a wrapper or a container in which the excisable goods are wrapped or contained. [..]"

53. In the present case, the TNGST was consciously amended to include talcum powder, whether or not medicated in the specific entry or class of entries, enumerating cosmetics. Hence, like in the Kerala case, the plain meaning of that taxation head or entry had to be given, as there was no ambiguity. Consequently, the findings recorded by the High Courts are justified.

54. For these reasons, this court is of the view that both sets of appeals have to fail. They are dismissed, but in the circumstances, without order on costs.

Ankit Gyan Appeals dismissed.