

AUTHORITY FOR ADVANCE RULINGS
(CENTRAL EXCISE, CUSTOMS & SERVICE TAX)
NEW DELHI

PRESENT

Mr. Justice P. V. Reddi (Chairperson)
Mr. J.K.Batra (Member)

The 18th day of September 2009

Ruling No.AAR/Cus./03/2009

in

Application No. AAR/Cus./01/2009

Applicant	:	M/s Guthy Renker Marketing Private Limited, Level 5, Incube Business Centre, 18 Nehru Place, New Delhi-19.
Commissioners concerned	:	The Commissioner of Customs, Air Cargo Complex, Sahar, Mumbai – 400 095. The Commissioner of Customs (Import), NCH, Ballard Estate, Mumbai. The Commissioner of Customs (Import), Nhavasheva, Raigad Dist.
Present for the applicant	:	Mr. V.Lakshmi Kumaran, Advocate Mr. Puneet Bansal, Advocate Mr.Ashok Dhingra, Consultant Ms.Charanya L. Mr. Vinod Agarwal, VP(Finance) Mr.P.S. Krishnan, VP (Operations) Ms.Priya Ghai, Country Head Mr. Amos Chin, Div.Bus.Analyst
Present for the Department	:	Mr.V.K.Saxena, Jt.CDR Mr.Sumit Kumar, SDR

RULING

(By Hon'ble Chairperson)

1. The applicant states that it is an Indian subsidiary Company of a foreign holding company. Though the name of the foreign

holding company was given as Guthy Renker Corporation, USA in the original application, in the written submissions filed on behalf of the applicant on 4th August, 2009, it is stated that the applicant is a 100% subsidiary of a Mauritius-based Company known as M/s Guthy Renker India, Port Louis. It is clarified that upto 22/4/2009, it was a subsidiary of Global Synergy International, LLC (USA). On 22/4/2009, the said Company transferred the entirety of shares to Guthy-Renker India (Mauritius). A certificate from the Chartered Accountant has been enclosed with the written submissions which shows that Guthy Renker India, Mauritius holds 10,296,274 equity shares in the applicant-Company and the other shareholder - Guthy Renker Global Holdings, LLC - an USA company holds one share as a nominee of Guthy Renker India. The applicant is therefore eligible to seek advance ruling.

2. The applicant desires to enter into the business of import and sale of acne treatment products imported from USA. For this purpose, the applicant will import four products, namely, Proactiv Solution Revitalizing Toner, Proactiv Solution Renewing Cleanser, Proactiv Solution Repairing Lotion and Proactiv Solution Refining Mask in individual packs (in the form of bottles or tubes). "Proactiv" appears to be a brand name. These products will either be sold to consumers individually or packed into kits at the factory from where the kits will be sold to the consumers through the distributors'

network. The products that will be imported and commercially sold as individual items are described as Category-I products. It is clarified in the written submissions filed on 4/8/2009 that Category-I products will be labelled at the port itself. The labelling will contain a declaration that these products will be sold individually and secondly the maximum retail price (MRP) will be printed. Category-II products are those sold commercially as acne treatment kits after the import of individual items, on going through the process of labelling and packing the same into kits at the factory of the applicant's job worker by name Aero Pharma Pvt Ltd., Murbad. Category-II products will not be sold as individual items. Out of the four products, the Renewing Cleanser and the Repairing Lotion contain almost 2.5% Benzoyl Peroxide as an ingredient which according to the applicant has immense potential to cure acne. The fourth product, namely, Refining Mask contains 6% Sulphur as an ingredient which too has therapeutic value, according to the applicant. Admittedly, the first product, namely, Revitalizing Toner does not contain any active ingredient for curing the disease. However, it is used for cleansing the skin which is a step in aid for acne treatment.

2.1 The applicant has furnished a Chart showing the name of the product and its function/use. The Chart is extracted hereunder.

Serial No.	Name of the product	Function/use of the individual product
1.	Proactiv Solution Revitalizing Toner	It removes dead skin cells and excess oil to help unplug pores and prepare the skin for the last step. It does not contain active ingredients for treatment of acne. It is designed to cleanse the skin.
2.	Proactiv Solution Renewing Cleanser	It helps to exfoliate dead skin cells and penetrate the pores in the skin and subsequently heal blemishes fast. It is designed to cleanse the skin. It contains 2.5% Benzoyl Peroxide as an active ingredient.
3.	Proactiv Solution Repairing Lotion	It helps to heal blemishes and prevents new ones from forming. It contains 2.5% Benzoyl Peroxide as an active ingredient. It has a therapeutic and prophylactic effect against acne.
4.	Proactiv Solution Refining Mask	It contains 6% Sulphur as an active ingredient for treatment of Acne. It reaches deep into pores where blemishes begin. It clears up blemishes and helps reduce the appearance of pore size.

2.2 It is stated that the content of two drugs, namely benzoyl peroxide and sulphur in items of 2 to 4 is of sufficiently high level to have a primary therapeutic or prophylactic effect against acne.

3. Questions raised in the application relate to their classification under the Customs Tariff Act and the method of valuation of goods in question for the purpose of levy of additional customs duty (described as countervailing duty-CVD in the application). The following questions are formulated by the applicant for the purpose of seeking advance ruling:

- a. What is the classification of the four individual products namely Proactiv Solution Revitalizing Toner, Proactiv Solution Renewing Cleanser, Proactiv Solution Repairing Lotion and Proactiv Solution Refining Mask?
- b. Whether CVD is required to be paid at the time of import of the Category-I products on a value determined under Section 4 or Section 4A of the Central Excise Act, 1944?
- c. Whether CVD is required to be paid at the time of import of Category-II Products on a value determined under Section 4 or Section 4A of the Central Excise Act, 1944?

4. We shall now refer to the relevant Entries/tariff items in the First Schedule to the Customs Tariff Act 1975. Chapter 30 and Chapter 33 thereof are relevant for our purpose.

CHAPTER 30 Pharmaceutical products

Notes :

1. This Chapter does not cover :

XX XX XX XX XX XX

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

Tariff Item	Description of goods	Unit	Rate of duty	
			Standard	Preferential Areas
(1)	(2)	(3)	(4)	(5)
3004	Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured			

	doses (including those in the form of transdermal administration systems) or in forms or packings for retail sale			
3004 10	- Containing penicillins or derivatives thereof, with a penicillanic acid structure, or streptomycins or their derivatives :	kg.	10%	10%
xx xx xx	xx xx xx (other sub- headings are omitted)	xx xx xx	xx xx xx	xx xx xx
3004 90	- other:			
xx xx xx	xx xx xx	xx xx xx	xx xx xx	xx xx xx
3004 90 99	Other	kg.	10%	10%

4.1 Now, we shall refer to Chapter 33 on which the Revenue seeks to place reliance.

CHAPTER 33

Essential oils and resinoids; perfumery, cosmetic or toilet preparations

Notes :

xx xx xx xx xx xx xx xx xx xx

- Headings 3303 to 3307 apply, *inter alia*, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as beauty & cosmetic preparations of a kind sold by retail for such use.

Tariff Item	Description of goods	Unit	Rate of
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			<u>duty</u>	<u>Standard</u>	<u>Preferential Areas</u>
3304	Beauty or make-up preparations and preparations for the care of the skin (other than medicaments)^, including sunscreen or suntan preparations; manicure or pedicure preparations				
3304 10 00	- Lip make-up preparations	Kg.	10%	-	
3304 20 00	- Eye make-up preparations	Kg.	10%	-	
3304 30 00	- Manicure or pedicure preparations	Kg.	10%	-	
	-- other:				
3304 91	-- Powders, whether or not compressed :				
3304 91 10	Face powders	Kg.	10%	-	
xx xx	xx xx xx	Xx	xx xx	xx	
3304 99	-- Other :				
3304 99 10	--- Face creams	Kg.	10%	-	
3304 99 20	---Nail polish or lacquers	Kg.	10%	-	
3304 99 30	---Moisturising lotion	Kg.	10%	-	
3304 99 40	---Sindur, bindi, kumkum	Kg.	10%	-	
3304 99 50	---Turmeric preparations	Kg.	10%	-	
3304 99 90	---Other	Kg.	10%	-	

5. Various tests and approaches have been adopted by the Supreme Court in classifying the goods under one or the other Entry

[^] emphasis supplied.

of the Tariff Schedule. It is settled law *“that the onus or burden to show that a product falls within a particular tariff Item is always on the Revenue”* (vide *Commissioner of CE vs. Sharma Chemical Works** and *Commissioner of CE vs. Zhandu Pharmaceutical Works***). In *Hindustan Ferod Ltd vs Collector of CE[^]*, it was further observed that if the Revenue leads no evidence, then the onus is not discharged. The most familiar test which is often applied in determining the classification among the two competitive Entries in a taxation Schedule is what is known as popular or commercial parlance test. It has been often emphasized that the scientific or technical meaning of the goods in the taxation Schedule should give way to the meaning ordinarily ascribed to them by those who deal with or use those goods, be it traders or consumers. In *Indian Aluminum Cables Ltd. v. UOI^{^^}* Chandrachud, CJ speaking for a three Judge Bench observed: *“This Court has consistently taken the view that, in determining the meaning or connotation of words and expressions describing an article in a Tariff Schedule, one principle which is fairly well-settled is that those words and expressions should be construed in the sense in which they are understood in the trade, by the dealer and the consumer. The reason is that it is they who are concerned with it and, it is the sense in which they understand it which constitutes the definitive index of the legislative intention.”* As the goods ‘properzi

* (2003) 154 ELT 328 at para 12

** (2006) 204 ELT 18 at para 13

[^] (1997) 89 ELT 16

^{^^} (1985) 21 ELT 3

Rods' were not marketable in the same form, it was held that commercial parlance test could not be applied.

5.1. In the case of *Dabur India Ltd.*[^] another three Judge Bench of the Supreme Court, after reviewing various authorities, summarized the principle thus:

“From the above mentioned authorities, it is clear that in classifying a product the scientific and technical meaning is not to be resorted to. The product must be classifiable according to the popular meaning attached to it by those using the product. As stated above, in this case the Appellants have shown that all the ingredients in the product are those which are mentioned in Ayurvedic Text Books. This by itself may not be sufficient but the Appellants have shown that they have a Drug Controller’s Licence for the product and they have also produced evidence by way of prescriptions of Ayurvedic Doctors, who have prescribed these for treatment of rickets. As against this, the Revenue has not made any effort and not produced any evidence that in common parlance the product is not understood as a medicament”.

5.2. In the case of *Puma Ayurvedic Herbal Pvt. Ltd. vs. Commissioner of CE, Nagpur*^{^^}, the Supreme Court referred to twin tests, the first being, whether in common parlance the item was accepted as a medicament. The second test applied was whether the ingredients used in the product were mentioned in the authoritative text books on Ayurveda (in that case, the classification of ayurvedic products came up for consideration). In *Commissioner of CE vs. Sharma Chemical works (supra)*, it was observed that *“the main criteria for determining classification is normally the use it is put to by the customers who use it.”*

5.3 We would like to point out in this context that the common or commercial usage test is not an inflexible test or a rigid formula capable of being applied in all situations. The common parlance test is applied where the goods in the market are referred to and

[^] (2005) 182 ELT 290

^{^^} (2006) 196 ELT 3

understood in a particular terminology by the traders and consumers. But the test ceases to be applicable if the products are referred to and couched in technical/scientific language or there is a definite indication in the tariff Schedule itself negating the application of this normal test. That is why, in the case of *Commissioner of CE vs. Ishan Research Lab**, the Supreme Court pointed out that the common parlance test is not “*be all and end all of the matter*”. For instance, where the primary therapeutic use or effect of the product has to be considered before classifying the same as medicament in terms of what is stated in the Entry, it would be difficult to apply common parlance test.

5.4 Certain pertinent observations made by the Supreme Court while deciding the question whether a particular product is a medicament or a cosmetic preparation may also be noticed. The mere fact that a product is sold across the counter and not under a doctor’s prescription does not by itself lead to the conclusion that it is not a medicament. Merely because the percentage of medicament in a product is small, it does not *ipso facto* mean that the product is not a medicament. The therapeutic quality of the ingredient cannot be ruled out even if the minimum prescribed percentage is deployed in the product. The labels which give the warning, precautions and directions for use are relevant. The formula may not be according to the text books, it can also be under

* (2008) 230 ELT p.7

a patented formula. These propositions are laid down in *Sharma Chemical Works (supra)*, *Puma Ayurvedic Herbal (supra)*, *Commissioner of Central Excise vs. Richardson Hindustan Ltd***, *B.P.L. Pharmaceuticals Ltd. vs. Collector of C.E.^* and other cases.

5.5. By and large, most of the skin care or toilet preparations containing some recognized medical ingredients and professing to cure or mitigate the skin diseases for which drug licenses have been obtained, were held to be medicaments notwithstanding the fact that they have cosmetic value too (for example, prickly heat powder, anti-dandruff shampoo, anti-pimple herbal powder etc.). The tests applied and the reasons that broadly weighed with the learned judges in reaching the conclusion, we have already set out supra.

6. Now, let us proceed to examine and interpret the relevant Tariff items in Chapter 30 and 33 with a view to determine the correct classification. If the product can be used for treatment of specific ailments and the ingredients used are those specified in the medical or pharmacology books, that is a strong pointer of the product being a medicament.

6.1 Coming to the crucial issue, the Revenue wants to classify the products in question under the heading 3304 occurring in Chapter 33. It reads: *“beauty or make up preparations and*

** (1989) 42 ELT p.100

^ (1995) 77 ELT 485

preparations for the care of the skin (other than medicaments)". It is not in dispute that 'revitalizing toner' which is used for cleansing the skin as a prelude to the application of other products falls under the heading 3304 (to be more specific t.i. 3304 99 90). The question, therefore, is whether 'Proactiv' Renewing Cleanser and Repairing Lotion which contain Benzoyl Peroxide to the extent of 2.5% and Refining Mask having 6% Sulphur content can be treated as medicaments. If they appropriately fall within the description of medicaments dealt with in Chapter 30, the classification under Chapter 33 cannot obviously be resorted to in view of the clear exclusionary words –"other than medicaments".

6.2 Chapter 30 prescribes the tariff for "pharmaceutical products". Heading No. 3004 speaks of medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in packings for retail sale. This item has to be read with the Chapter Note 1(d). It says that this Chapter (Ch. 30) does not cover preparations of heading 3303 to 3307, even if they have therapeutic or prophylactic properties. There is an apparent contradiction between the bracketed words – "other than medicaments" in the heading 3304 and the Note 1(d) to Chapter 30. These two provisions have to be reconciled so as to give effect to both of them. The best way to reconcile them is to retain in 3304 such of those skin care preparations whose therapeutic or

prophylactic value/effect is only subsidiary or incidental and to relegate the other skin care preparations with pharmaceutical ingredients having substantial therapeutic or prophylactic use/effect to 3004. In other words, it is not simply sufficient that the make-up or skin care preparation in some measure or in a small way or incidentally helps the control of skin disease. But, its curative or preventive value must be substantial and the product must be manufactured primarily with a view to control or cure a skin-related disease by adding suitable pharmaceutical ingredients. That is to say, if preparations for care of skin contain sufficient level of medicinal ingredient so as to offer cure for skin ailments, they stand excluded from the purview of 3304. Broadly, they may be skin care preparations; but they are used more specifically and pointedly for the treatment of skin infections or other skin ailments. They would then more appropriately fall under the heading “medicaments” in view of their therapeutic propensities.

6.3 The position is made clear in the Explanatory Notes to the HSN**. The 3rd para of the notes titled ‘General’ under Chapter 33 says; “products of headings 33.03 to 33.07 remain in these headings *whether or not they contain subsidiary pharmaceutical or disinfectant constituents, or are held out as having subsidiary therapeutic or prophylactic value** (see Note 1(d) to Chapter 30).” It

** Harmonized System of Nomenclature

* emphasis supplied

is further stated that “*this Chapter (33) does not cover medicinal preparations having a subsidiary use as perfumery, cosmetic or toilet preparations*”. Further, in the explanatory note to Part A of 33.04 – “Beauty or make-up preparations and preparations for the care of the skin, including sun screen and sun tan preparations”, it is stated thus :

This part covers :

- (1) xx xx xx
- (2) xx xx xx
- (3) *Other beauty or make-up preparations and preparations for the care of the skin (other than medicaments), such as: face powders (whether or not compressed), baby powders (including talcum powder, not mixed, not perfumed, put up for retail sale), other powders and grease paints, beauty creams, cold creams, make-up creams, cleansing creams, skin foods (including those containing bees ‘royal jelly’) and skin tonics or body lotions; petroleum jelly, put up in packings of a kind sold by retail for the care of the skin; barrier creams to give protection against skin irritants; anti-acne preparations (other than soaps of heading 34.01) which are designed primarily to cleanse the skin and which do not contain sufficiently high levels of active ingredients to be regarded as having a primary therapeutic or prophylactic effect against acne..... (emphasis supplied).*

6.4 The relevant items under the Customs Tariff Act correspond to the internationally evolved Harmonized Commodity Description

and Coding System (also referred to as Harmonised System of Nomenclature HSN). In the absence of anything contrary in the provisions of the Customs Tariff Act including the Chapter Notes thereto, the clarification or explanation given in HSN furnishes the key for interpreting and understanding the tariff item. It was observed in *Collector of Central Excise, Shillong vs. Woodcraft Products Ltd.**

“It is significant, as expressly stated, in the Statement of Objects and Reasons, that the Central Excise Tariffs are based on the HSN and the internationally accepted nomenclature was taken into account to “reduce disputes on account of tariff classification”. Accordingly, for resolving any dispute relating to tariff classification, a safe guide is the internationally accepted nomenclature emerging from the HSN. This being the expressly acknowledged basis of the structure of Central Excise Tariff in the Act and the tariff classification made therein, in case of any doubt the HSN is a safe guide for ascertaining the true meaning of any expression used in the Act. The ISI Glossary of Terms has a different purpose and, therefore, the specific purpose of tariff classification for which the internationally accepted nomenclature in HSN has been adopted, for enacting the Central Excise Tariff Act, 1985, must be preferred, in case of any difference between the meaning of the expression given in the HSN and the meaning of that term given in the Glossary of Terms of the ISI.”

This proposition was reiterated by the Supreme Court in the cases of *Collector of Customs, Bombay vs. Business Forms Ltd.*[^] and *Muller & Phipps (India) Ltd. vs. Collector of Central Excise, Bombay*** . In *Business Forms* case, it was observed that HSN Explanatory notes are not only of persuasive value, but are entitled

* (1995) 77 ELT 23

[^] (2002) 142 ELT 18 (SC)

** (2004) 167 ELT 374

to “far greater consideration” in classifying goods under the Central Excise and Customs Tariff.

6.5 Note 1(d) to Chapter 30 was considered by the Supreme Court in *Puma Ayurvedic Herbal (P) Ltd.* case (supra). It was observed thus at paragraph 26:

“Thus preparations falling in Chapter 33 even if they have therapeutic or prophylactic properties will not fall under Chapter 30 which deals with pharmaceutical products. The reason for this appears to be that even cosmetics may have something to improve skin or other parts of the body where they are used. In that sense they may have some therapeutic value, yet they remain cosmetic.”

The distinction between primary and subsidiary therapeutic use was highlighted at paragraph 24 of the judgment in *Puma Ayurvedic* case. While stating that “a subsidiary curative or prophylactic use will not convert a cosmetic into medicament”, the example of a bald man treating his baldness by the use of Ayurvedic Product was given. *“The curative use of the product is primary in that example and not subsidiary. The subsidiary result is improvement in appearance”*, it was observed. Then, it was clarified that the products which fall under Heading 3304 are primarily beauty or make up preparations. *“They may incidentally help in protection against skin irritants. They may also help as a skin tonic, yet they are cosmetics because skin protection is subsidiary benefit”*.

7. Thus, in considering the question whether the goods which fall broadly within the description of skin care products are to be

classified as medicaments, the test that has to be applied is whether they are intended primarily for use in the treatment of skin disorders or diseases and whether the ingredients therein have sufficient but not minimal therapeutic value. If the potential of a product as a medicament to cure the skin ailments is not clear or is not established, then, it cannot be placed under Chapter 30 as 'medicament'.

7.1 Considering the matter in the above perspective, we have to see whether the three products, namely, Repairing Lotion and Renewing Cleanser which contain Benzoyl Peroxide and the Refining Mask which contains Sulphur can be classified as medicaments.

7.2 The applicant has placed before us the samples of the "Proactiv Solution" products proposed to be imported and sold by them. The bottles of "Renewing Cleanser" and "Repairing Lotion" bear the inscription "Benzoyl Peroxide Acne Treatment" while the package of "Refining Mask" bears the inscription "Sulphur Acne Treatment". Detailed information about each of the aforesaid three products has been provided on the labels under the title "Drug Facts" wherein apart from indicating the active ingredient (Benzoyl Peroxide or Sulphur) and purpose (Acne treatment), the directions for use and warnings have also been specified. On all the three products, precautions to be taken if any other topical acne

medication is being used, have been specified. Instructions on the first product, namely “Revitalizing Toner” do not carry the heading “Drug Facts”. All the four products also bear the inscription “combination therapy” on the label.

Copies of registration certificate and the licence issued authorizing the import of the products in question by the Licensing Authority (Drugs Controller, DGHS, Govt. of India) have been filed.

7.3 In the leading pharmacology books and Articles authored by qualified specialists, Benzoyl peroxide is recognized to be a drug useful for acne treatment. In Martindale’s *Complete Drug Referencer, 34th Edition (2005)*, under the heading “Dermatological Drugs and Sun screens”, the following passages relating to Benzoyl peroxide are relevant:

Uses and Administration

“Benzoyl peroxide has mild keratolytic properties. Its antimicrobial action is probably due to its oxidizing effect and activity has been reported against Staphylococcus epidemidis and Propionibacterium acnes. It is used mainly in the treatment of acne in topical preparations usually containing 2.5 to 10 per cent, sometimes with other antimicrobials. It has been used similarly in the treatment of fungal skin infections, such as tinea pedis although other drugs are usually preferred.”

XX XX XX XX

“Acne. Benzoyl peroxide applied topically in concentrations of upto 10 per cent is probably the most widely used first-line drug in the management of mild acne.”

In the same book, ‘acne’ is stated to be *“a disorder of the pilosebaceous follicle; common features include increased sebum production, follicular keratinisation, colonization by Propionibacterium acnes, and localized inflammation. Mild acne is characterized by open or closed comedones (blackheads and whiteheads), some of the latter developing into inflamed lesions such as papules and pustules. In moderate acne, the papules and pustules are more widespread, and there may be mild scarring. Severe acne is characterized by the presence of nodular abscesses or cysts in addition to widespread pustules and papules, and may lead to extensive scarring.”*

7.4 In *Modern Pharmacology (Second Edition)* edited by Charles R. Craig & Robert E. Stitzel, while stating that anti-biotics including tetracycline is found to be useful in the management of acne, it is observed thus, under the heading ‘Keratolytics’:

“Drugs that have been used as peeling agents (keratolytics) (Fig.74-6) include salicylic acid, benzoyl peroxide, resorcinol, sulfur, and tretinoin (vitamin A acid). The anti-bacterial effects of some of these agents (e.g., benzoyl peroxide) most likely contribute to their effectiveness in acne.

These agents, in general, find limited use in inflammatory pustulopapular acne but, when used judiciously, may prevent the progression of noninflammatory acne.”

“Benzoyl peroxide and tretinoin are gaining preference over the older sulfur-containing and salicylic acid-resorcinol formations. A large variety of over-the-counter preparations contain one or more keratolytic agents.”

7.5 The applicant has filed alongwith the application relevant extracts from the CFR/Federal Register published by Food & Drug Administration of the Department of Health and Human Services of USA. The first one appears under the title: “Topical Acne Drug Products for over-the-counter Human Use” and it is a “Tentative Final Monograph”. Sub-part (D) deals with “Topical Acne Drug Products”. Under the sub-heading “Acne active ingredients”, it is stated, thus:

The active ingredients of the product consist of any of the following when labelled according to 333.350.

- (a) Benzoyl peroxide 2.5 to 10 percent
- (b) Resorcinal 2% when combined in accordance with 333.320(a)
- (c) Resorcinal monoacetate 3% when contain in accordance 333.320(b)
- (d) Salicylic acid 0.5% to 2%
- (e) Sulphur 3 to 10 percent
- (f) Sulphur 3 to 8 percent combined in accordance with 333.320.

In the final Monograph which was issued in 1991, among the acne active ingredients, Benzoyl peroxide was not shown, apparently for the reason that there were conflicting reports about occurrence of

cancer due to its usage. In the Preface to the Final Monograph, it is stated that “this final rule does not include final agency action on the OTC¹ topical acne active ingredient Benzoyl peroxide”. Under the sub-heading “Labelling of acne drug products”, it is stated that the labelling of the product contains the established name of the drug, if any and identifies the product as an ‘acne medication’, ‘acne treatment’ with dosage forms. Then, in 1995, the Food & Drugs Administration, USA, published another Monogram containing the ‘proposed rule’, under the heading “Topical Drug Products containing Benzoyl peroxide; Required labeling”. The opening para says: *“FDA is proposing additional labeling (warning and directions) for all topically applied acne treatment drug products containing Benzoyl peroxide”*. The Warning advises consumers *“to avoid unnecessary sun exposure and use of sun screen when using Benzoyl peroxide product to treat acne”*. Then, after referring to the views of the Committee and the comments received from other sources, it was observed:

“The agency agrees that marketing of benzoyl peroxide should continue while the ongoing studies are being completed. The agency agrees that information should be provided to consumers and that no warning statement concerning cancer should be included in the labeling of benzoyl peroxide drug products because currently available data are inconclusive.”

¹ Over-the-counter

Xx xx xx xx xx
Benzoyl peroxide is a widely used and effective ingredient in the topical treatment of acne. As noted above, the Committee recommended unanimously that benzoyl peroxide should remain available as an OTC drug product while the additional studies to answer the unresolved safety questions are being conducted. When those studies are completed, the monograph or nonmonograph status of benzoyl peroxide will be resolved.”

8. The material adverted to above throw ample light on the therapeutic or medicative effect of benzoyl peroxide (2.5% and above) in the treatment of acne. Benzoyl peroxide is undoubtedly recognized as a ‘keratolytic’ having anti-bacterial effect. With such active ingredient present in the two products (Renewing Cleanser and Repairing lotion), it cannot be said that their therapeutic propensities are minimal or subsidiary. No doubt, the applicant has not furnished material to clarify the latest view of the F&D Administration in USA. However, it is fairly clear that the products containing Benzoyl peroxide are sold across the counter for treatment of acne and has therapeutic value though certain safety related aspects are open to debate. The fact that products containing Benzoyl peroxide of 2.5% are allowed to be manufactured in USA and the manufacturers are permitted to exhibit the label ‘acne treatment’ would go to show that Benzoyl peroxide is

still recognized as a useful drug for the treatment of mild acne in USA. In India, as already noted, the Central Drug Standard Control Organization of the Ministry of Health, Govt. of India, has recognized Benzoyl peroxide as a drug and the licensing authority permitted the import of 'Proactiv Solution Repairing Lotion' and 'Proactiv Solution Renewing Cleanser' with Benzoyl peroxide (less than 2.5 per cent) as active ingredient. One more point deserves notice. The Indian Standard (I.S.4707-2) published by Bureau of Indian Standards, gives a list of substances "which must not form part of the composition of cosmetic products." Benzoyl peroxide is one among them. The Indian Standard is thus suggestive of the fact that skin care preparations consisting of Benzoyl peroxide as an active ingredient are not to be treated and certified as cosmetic and toilet preparations.

8.1 We may also refer to the definition of 'drug' in Drugs & Cosmetics Act, 1940. It includes "all medicines for internal or external use by human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals". In view of the therapeutic potential of the products in question in controlling 'acne', the products conform to the inclusive definition of drug in Section 3(b) of Drugs and Cosmetics Act.

9. The learned departmental representative has made a feeble attempt to counter the effect of the above material by contending that in the instant case, the contents of the Benzoyl peroxide should necessarily be less than 2.5 per cent in view of the restriction placed by the Drugs licensing authority and therefore, its therapeutic value is doubtful. The label emanating from the manufacturer shows the percentage of active ingredient i.e. Benzoyl peroxide as 2.5 per cent. Even if it is slightly less than 2.5%, that minimal difference does not justify the plea that it should be taken out of the category of medicament on the premise that it has no therapeutic effect.

10. Then, in the additional written submissions filed after the hearing was concluded, the Revenue sought to place strong reliance on the report of the Chemical Examiner Gr.II of the New Custom House Laboratory, Mumbai. The report contains a repetitive comment against each item that *“the active ingredients mentioned in the container do not have primary therapeutic and prophylactic function and hence the goods (u/r) may be considered beauty or make up preparations for care of skin”*. One more sentence found in the report is : *“Cleansing, toning and moisturizing etc. are all skin care preparations primarily meant to cleanse the skin”*. We are unable to place reliance on this report. A bald statement and a cursory observation above quoted unsupported by

any factual data or reasoning does not lend much credibility. The opinion goes against the preponderance of material in the form of authoritative medical books and the Drug Control authority's view. It is noteworthy that the report does not even contain an analysis of the composition of the product. The Chemical Examiner's report is directed more towards the classification of product rather than scientific analysis and explanation. In this context, we may quote the observations in paragraph 9 of the Judgment of the Supreme Court in *Puma Ayurvedic case (supra)*:

"We may note here that the Chief Chemist had opined about the classification of these products under the Chapter 33 i.e. "Cosmetic", but the opinion of the Chief Chemist on the question of classification has no relevance. We agree with the Collector (Appeals) that the opinion of the Chief Chemist has no relevance for determining classification of the products. The role of the Chief Chemist is only to supply the analytical data. On the other hand the opinion of the Directorate of Ayurved, Maharashtra referred to above is of great relevance."

This report does not therefore come to the aid of the Revenue in discharging the burden which lies on it to bring the product under a classification that casts higher tax burden on the importer.

11. Coming to the 4th product – Proactive Refining Mask, it contains 6 per cent sulfur as an active ingredient and it is so mentioned on the USA label under the caption 'Drug Facts', it is further stated: "medicated rich mask is formulated with Sulfur – a proven acne fighting ingredient reaches deep into the pores". On

the Canada label, it is printed “medicinal ingredient: Sulfur 6%, for management of uncomplicated acne.” In the tentative as well as in the final Monographs, issued by the Food & Drug Administration of USA. Sulphur – 3 to 10 per cent is specified as “acne active ingredient”. In the Book on Modern Pharmacology (referred to Supra) sulfur among other Drugs is referred to as a skin peeling agent (keratolytic) used in the treatment of acne. In *Dorland’s Illustrated Medical Dictionary (28th Edition)*, it is stated that sulfur is used in diseases of the skin. The license for import issued by the competent authority of the Government of India also covers Refining Mask. Thus, it cannot be denied that Refining Mask containing 6 per cent sulfur has its primary use in the treatment of acne in mild form. In the report of the Chemical Examiner, it is stated that “the preparation is meant to manage the acne blemishes and is intended to promote the attractiveness and to alter the appearance”. Then, without indicating any basis for the opinion, it is stated in the report that “the active medicinal ingredient – Sulphur 6% does not have primary therapeutic and prophylactic function”. We find it difficult to accept this bald statement which goes contrary to the opinion of various authorities adverted to above. The fact that it clears up blemishes caused by acne does not lead to the inference that it is not a medicament having primary therapeutic effect. The fact that the removal of blemishes incidentally improves the appearance of a

person is really irrelevant. We have, therefore, no hesitation in rejecting the observations of the Chemical Examiner.

12. Even if there is some doubt on the therapeutic value of the products containing Benzoyl peroxide and Sulphur, that doubt pales into insignificance if the common or commercial parlance test is applied. It is not reasonably possible to hold that a product which professes to be a cure for acne, indicated as such on the packings which contain information regarding chemical composition as well as warnings, would still be regarded by consumers as cosmetic or skin care product rather than as medicament. The customers and traders in all likelihood regard them as medicinal products rather than as cosmetic preparations.

13. In the result, **Question No.1** is answered as follows:

We agree with the applicant's classification of the four products. Excepting revitalizing toner which is classifiable admittedly under heading 3304, residual sub heading 3304 99 and tariff item 3304 99 90, the other three products are classifiable under heading 3004, residual sub heading 3004 90 and the tariff item 3004 90 99 of the Customs Tariff Act.

14. **Question No.2**

The additional duty under Section 3(1) of the Customs Tariff Act is liable to be paid at the time of import of the Category I products on the value based on the maximum retail sale price declared on the package in view of the proviso to Section 3(2) of the Customs Tariff Act and the applicant will be entitled for 35% abatement in terms of the said proviso read with Notification No.49/2008-CE dated 24/12/2008 issued under Section 4A(2) of the Central Excise Act. We may mention that on this point, there is no dispute. It is the specific case of the applicant that it is bound under law to declare and print MRP on the package of each imported article belonging to Category I. Therefore, there is no difficulty in holding that the retail price based valuation has to be adopted.

15. **Question No.3**

- Category II products are those which are not meant to be sold individually in the form of bottles or tubes that are imported, but after clearance from the port, they will be packed in a kit containing three or four products and thereafter they will be sold in the form of kit with MRP printed on it. At the time of clearing the kits from the factory premises, the applicant would pay Central excise duty on the MRP based value of the entire kit. The applicant has stated that a specific declaration will be made at the port itself that the products will not be sold individually but will be sold as part of the kit. Learned counsel for the applicant has contended that category II

products imported by the applicant are not intended for retail sale as the products will not be sold individually but only as part of the kit and secondly by reason of Rule 2-A of the Standards of Weights & Measures (Packaged Commodities) Rules, 1977, they get excluded from Chapter II of the Rules, the applicant being an “industrial consumer” of the individual products. In view of the non-applicability of Chapter II of PC Rules, as well as the Drugs (Prices Control) Order, there is no obligation to comply with the rule which makes it mandatory to print the MRP on the individual products (that will go into the kit). It is, therefore, contended that the applicant is required to pay additional duty on the individual products imported based on the transaction value as per sub-section (2) of S.3 of Customs Tariff Act read with Section 14 of the Customs Act, 1962 and not based on the MRP.

15.1. In order to appreciate the contentious issue, it would be appropriate to refer to the relevant statutory provisions.

Section 3 of the Customs Tariff Act (hereafter referred to as Tariff Act) provides for the levy of additional duty on the imported articles equal to the excise duty for the time being leviable on a like article if produced or manufactured in India. The section further enjoins that if such excise duty on a like article is leviable at any percentage of its value, the additional duty to which the imported article shall be so liable, shall be calculated at that percentage of the

value of imported article. Then, sub-section (2) of Section 3 lays down the manner in which the additional duty on an imported article under sub-sections (1) and (3) shall be calculated. It lays down that where the additional duty is leviable at any percentage of its value, the value of the imported article shall, notwithstanding anything contained in section 14 of the Customs Act be the aggregate of (i) value of the imported article determined under sub-section (1) of section 14 of the Customs Act, or the tariff value of such article fixed under sub-section (2) of Section 14, as the case may be and (ii) any duty of customs chargeable under Section 12 of Customs Act. The Explanation to Section 3(1) explains inter alia what the excise duty would be in case the like article is not manufactured in India.

The proviso to sub-section (2) is important. It lays down:

“Provided that in case of an article imported into India, -

- (a) in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such article; and*
- (b) where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or*

description of articles to which the imported article belongs, is the goods specified by notification in the Official Gazette under sub-section (1) of section 4A of the Central Excise Act, 1944 (1 of 1944),

the value of the imported article shall be deemed to be the retail sale price declared on the imported article less such amount of abatement, if any, from such retail sale price as the Central Government may, by notification in the Official Gazette, allow in respect of such like article under sub-section (2) of section 4A of the Central Excise Act.”

15.2. As the additional duty of customs (loosely termed as CVD) is co-related to the excise duty leviable on a like article produced or manufactured in India, it would be appropriate to make a reference to the relevant provisions of Central Excise Act (hereafter referred to as C.E.Act). Section 3 is the charging section which ordains that “there shall be levied and collected in such a manner as may be prescribed (a) a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods.....which are produced or manufactured in India and at the rates set-forth in the First Schedule to the Central Excise Tariff Act, 1985”. The mode of valuation of excisable goods is dealt with under two sections i.e. section 4 and section 4A of the said

Act. Section 4-A deals with “Valuation of excisable goods with reference to retail sale price”. It says :

4A: (1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.

(2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official gazette.

Explanation I. - For the purposes of this section, “retail sale price” means the maximum price at which the excisable goods in packaged form may be sold to the ultimate consumer and includes all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards

advertisement, delivery, packing, forwarding and the like and the price is the sole consideration for such sale:

Provided that in case the provisions of the Act, rules or other law as referred to in sub-section (1) require to declare on the package, the retail sale price excluding any taxes, local or otherwise, the retail sale price shall be construed accordingly.”

15.3. In accordance with section 4A, the Central Government issued notification No. 49/2008-CE(N.T) dated 24.12.2008. The Notification, in short, specifies the goods falling under the appropriate Chapter or heading or tariff item of the First Schedule to Central Excise Tariff Act as the goods to which the provisions of sub-section (2) of section 4A shall apply and allows abatement at the specified percentage of retail sale price. In the case of goods falling under Chapter 30 as well as goods falling under headings 3304 etc., the rate of abatement is specified as 35 per cent. As far as medicaments falling under Chapter 30 are concerned, the Explanation in Sl. No. 30 of the notification says that *“for the purposes of this entry, “retail sale price” means the retail price displayed by the manufacturer under the provisions of the Drugs (Price Control) Order, 1995,”*

Thus, the proviso to S. 3(2) of Customs Tariff Act corresponds to S.4A of C.E. Act and the same scheme of valuation and abatement is spelt out by these provisions.

15.4. As noted earlier, the proviso to Section 3(2) of the Tariff Act is the crucial provision relevant to the present controversy. If the *proviso* is excluded, then the additional duty is leviable in terms of the main sub-section (2). In such a case, the transaction value as contemplated by Section 14 *plus* the basic customs duty has to be adopted for determining the additional duty. The question, therefore, is whether the proviso to Section 3(2) is attracted in the instant case. If the proviso applies, the retail sale price declared on the imported article *less* the amount of abatement notified will be the basis of valuation of that article. The *proviso* to Section 3(2) has two limbs. Both of them lay down the conditions for the application of the proviso by virtue of which the retail sale price criterion has to be adopted for the purpose of valuation. Under the first limb, there must be a statutory obligation to declare on the package the retail sale price of the article. That obligation may flow either under the provisions of the Standards of Weights and Measures Act (for short 'SW&M' Act) and the Rules made thereunder OR under any other law for the time being in force. In considering the import of the expression 'any other law', the law which needs to be referred to is the Drugs (Prices Control) Order, 1995 (for DPCO). Therefore, if either under the provisions of the SW&M Act or the Drugs (Price Control) Order, there is an obligation to print the retail sale price on the package, the first clause of the *proviso* i.e., clause (a) is

satisfied. The second condition for attracting the proviso is that enacted in clause (b) of the *proviso*. There must be a notification in terms of sub-section (1) of Section 4A of the C.E. Act covering the like article manufactured in India or if it is not manufactured in India, the notification should cover the articles of the same class or description to which the imported article belongs. These two conditions in clauses (a) & (b) are cumulative.

15.5. There is no doubt that the first limb of clause (b) of the proviso is satisfied in the present case for the reason that the notification under Section 4A(1) of the CE Act covers preparations for the care of the skin as also medicaments other than those used in ayurvedic, unani etc. systems. The second limb of cl. (b) relates to abatement. The notification specifies the percentage of abatement. But, the percentage of abatement in the case of medicaments is related to retail sale price that has to be exhibited under DPCO. The discussion that follows on the applicability of cl. (a) of the proviso to Section 3(2) will make it clear that even the second limb of cl.(b) of the proviso becomes applicable here.

15.6 Now, the question is whether clause (a) of the proviso to Section 3(2) of the Tariff Act is attracted in respect of the three products classified as medicaments. This issue leads us primarily to the examination of the provisions of Drugs (Prices Control) Order

promulgated by the Central Govt. Only in the event of DPCO provisions relating to retail price not being applicable, a reference to the relevant rules in Standards of Weights & Measures (Packaged Commodities) Rules may be necessary. The reason is that Rule 34 of the Packaged Commodities Rules makes it explicit that the packages containing scheduled and non-scheduled formulations covered under the DPCO, 1995 are outside the purview of those rules. Moreover, the abatement on medicaments has to be worked out with reference to the retail price to be displayed under the DPCO, but not under any other law.

16. We shall, therefore, address the question whether DPCO obligates the applicant to declare on the label of container of the imported article the retail price thereof. Cl.(1)(4) of the Order says that it *“shall also be applicable on imported medicines with effect from 1.3.2007”*. Under the DPCO, the Govt. is empowered to fix retail price of scheduled formulations. But, the imported medicaments/ formulations in respect of which the ruling has been sought are not specified in the Schedule. If at all, they are non-scheduled formulations as defined in cl.2(v) of DPCO. Therefore the relevant provision which has to be considered is cl.15. It bears the heading – **“Display of prices of non-Scheduled formulations and price list thereof”**. Cl.15 of the DPCO in so far as it is relevant is extracted hereunder:

“(1) Every manufacturer, importer or distributor of a non-Scheduled formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation ‘with the words “maximum retail price or max retail price or MRP” preceding it and “inclusive of all taxes” succeeding it and the words “Not Under Price Control” on a green strip:

PROVIDED that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of the main pack rounded off to the nearest paisa.

(2) Every manufacturer or importer shall issue a price list and supplementary price list, if required, of the non-Scheduled formulations in Form V to the dealers, State Drugs Controllers and the Government indicating changes, from time to time.”

‘Retail price’ means the retail price of a drug arrived at or fixed in accordance with the provisions of this Order and includes a ceiling price [vide cl.2(s)]. **“Maximum retail price”** is defined to mean the retail price arrived at or fixed in accordance with the DPCO and includes a ceiling price at

which the drug may be sold to the ultimate consumer and where such price is mentioned on the pack, the words “Maximum or Max. retail price inclusive of all taxes” shall be printed on the pack {vide cl.2(mm)}. The other important definition to be noticed is that of “non-Scheduled formulation”. “**Non-Scheduled formulation**” means a formulation not containing any bulk drug specified in the First Schedule. Cl.2 (h) defines “**formulation**”. It means “*a medicine processed out of, or containing one or more bulk drug or drugs with or without the use of any pharmaceutical aids, for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals, but shall not include (iii) any substance to which the provisions of Drugs and Cosmetics Act, 1940 do not apply;*”.

16.1 Obviously, the imported medicaments are not substances that stand excluded by Drugs and Cosmetics Act. In the instant case, Benzoyl Peroxide or Sulphur are used as ingredients in a formulation as defined by cl.2(h). Are they bulk drugs? “Bulk drug” is defined in cl.2(a). Bulk drug means any pharmaceutical, chemical, biological or plant product including its salts, esters, stereo-isomers and derivatives, conforming to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics Act, 1940 (23 of 1940), and which is used as such or as

an ingredient in any formulation. The first part of definition is undoubtedly satisfied. The question then is, does it conform to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics Act? The Second Schedule to the Drugs and Cosmetics Act sets out the standards to be complied with by imported drugs and drugs manufactured for sale etc. The “patent or proprietary medicines” (other than Homeopathic medicines) is the first item in the Schedule. The definition of patent or proprietary medicine is given in Section 3(h) of the Drugs and Cosmetics Act. In relation to any system of medicine other than Ayurvedic, Siddha or Unani Tibb systems, the said expression is defined to mean “a drug which has a remedy or prescription presented in a form ready for internal or external administration of human beings....and which is not included in the addition of the Indian pharmacopoeia or any other pharmacopoeia authorized in this behalf by the Central Govt.” As already discussed, the products in question are drugs and they are regarded as such by the concerned statutory authorities. Moreover, these drugs or medicaments, undisputedly, are not covered by the Indian or other pharmacopoeia authorized by the Central Govt. The standards thereof are set out in the second column of the Schedule. In relation to item 1 i.e., patent/proprietary medicines, the standard to be complied with is stated to be:

“the formula or list of ingredients displayed in the prescribed manner on the label or container and such other standards as may be prescribed.”

16.2 The first part of the above standard laid down in the Second Schedule is squarely applicable to the present case. It is not in dispute that the list of ingredients are displayed and required to be displayed on the label or container and if that be so, the first part of the standard in the Second Schedule is satisfied. This proposition is not seriously disputed by both sides. The next point to be addressed is whether these patented or proprietary medicines have to comply with any other prescribed standard. That leads us to the consideration of Rule 124-B of the Drugs and Cosmetics Rules. The said Rule lays down the standards for all patent or proprietary medicines as per Schedule V, without prejudice to the standards laid down in the Second Schedule to the Act. Now, we come to Schedule V which speaks of standards for patent or proprietary medicines. Having gone through the entire set of standards incorporated in Schedule V, we find that none of them have any application to the patent or proprietary medicines with which we are concerned. Even if it is assumed that the general requirements referred to in para 4.1 applies, it cannot be said that the imported medicinal products are lacking in such general requirements such as colour consistency, clarity, stability, freedom from contamination with foreign matter. In fact, it is nobody's case that there is

infringement of any of the standards laid down in Schedule V. As already stated, almost all those standards are not applicable to the type of patent or proprietary medicaments which the applicant imports. We are therefore of the view that the imported products (other than Toner) answer the description of 'bulk drugs'. The fact that the drugs in question are not included in the Indian or other official pharmacopoeia is of no consequence as far as these drugs are concerned.

16.3 Thus, by this process of analysis of various provisions, we reach the conclusion that the medicinal substances containing Benzoyl Peroxide and Sulphur which are being imported have to be treated as non-Scheduled formulations and therefore cl.15 of DPCO is attracted. However, in order to exclude the application of cl.15, the learned counsel for the applicant has advanced an argument that the non-Scheduled formulation imported is not "intended for sale"². It is contended that the drug imported is not intended to be sold as it is but it is intended for the manufacture of kit containing the three or four products, as the case may be, and what is sold ultimately is that larger kit. It is submitted that the definition of 'manufacture' in Section 2(l) of DPCO is wide enough to cover any process for packing, labelling or adapting any drug with a view to its sale and distribution and therefore the imported articles (non-

² An expression that finds place in Cl. 15(1) of DPCO.

Scheduled formulations) are intended for manufacture but not sale. We do not think that the contention, though plausible, deserves acceptance. The fact that each product imported, be it in bottles or tubes, is not sold individually is, in our view, not material. Even if they are all placed in larger container before being marketed, it does not mean that the imported commodities/packages are not meant to be sold. Whether they are sold separately or in the company of other allied products, each one of them is meant to be sold. They do not lose their identity and become different articles merely because all the four are packed in one kit. Their individual identity is not lost on account of such composite/secondary packing. It is an admitted fact that the names and quantities of all individual products are specified on the larger container or kit. In our view, each one of the products imported ought to be legitimately treated as articles intended for sale irrespective of the fact that the products are meant to be sold together but not individually. The eventual contract of sale would extend to all the contents in the kit and the kit cannot disguise their distinct identity.

16.4 The recourse to the definition of 'manufacture', in our view, is inappropriate. The opening part of cl.15 of DPCO refers to (a) manufacturer, (b) importer and (c) distributor. The context requires that the definition 'manufacture' should be applied in relation to manufacturer. It cannot be aligned to the expression 'importer'.

Therefore, irrespective of whether the drugs imported ultimately undergo a process of manufacture by way of repacking and labeling, they are still intended for sale. We repeat that the articles ultimately sold after such repacking will not be different articles.

16.5 We are, therefore, of the view that cl.15 of the DPCO comes into play and by virtue of that provision the maximum retail price has to be displayed on the label of the container of the formulation and the 'minimum pack' thereof. If so, the retail price based valuation has to be adopted under the proviso to Section 3(2) of the Customs Tariff Act and moreover, the applicant – importer will be entitled to abatement as per the notification issued under Section 4A of the C. E.Act.

17. Apart from the proviso to Section 3(2), let us examine the applicant's contention on the anvil of sub-section (1) to Section 3 of Custom Tariff Act. Any article imported into India shall be liable to additional duty equal to excise duty leviable if a like article is manufactured in India. Therefore, if the article imported i.e., the individual product has been manufactured in India, what would be the Central excise duty payable? The valuation and rate should be with reference to the like article manufactured in India, but not on the basis of subsequent action of further 'manufacture' of a kit as in the instant case. It is at the point of time of import that the obligation

or otherwise of displaying the MRP on the imported article/package has to be judged both for the purposes of Section 3(1) and the proviso to S.3(2) of Customs Tariff Act. The factum of printing MRP on the kit and paying Central excise duty thereon on the basis of such MRP has no bearing on the point at issue. The argument of the applicant's counsel cannot therefore be sustained.

18. There is one more point to be discussed in relation to the product 'Revitalizing Toner' which is admittedly classifiable under the heading 3304 as make up or skin care preparation. DPCO has no application to that product. The question to be examined is whether the obligation to exhibit the MRP on the package or label arises by virtue of the Packaged Commodities Rules (PC Rules) framed under Standards of Weights and Measures Act. Let us notice those Rules in Chapter II of PC Rules. Rule 1(3) says that the Rules apply to commodities in the packaged form which are or intended to be sold, distributed or displayed for sale/distribution. The other relevant Rules are extracted below:

2A. Applicability of the Chapter. - The provisions of this Chapter shall not apply to,-

- (a) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up to 50 kg; and

- (b) packaged commodities meant for industrial consumers or institutional consumers.

Explanation.- For the purpose of this rule, -

- (a) **Institutional consumer.** - Means those consumers who buy packaged commodities directly from the manufacturers/packers for service industry like transportation [including airways, railways], hotel or any other similar service industry.
- (b) **Industrial consumer.** - Means those consumers who buy packaged commodities directly from the manufacturers/packers for using the product in their industry for production, etc.

3. Chapter to apply to packages intended for retail sale. -The provisions of this Chapter shall apply to packages intended for retail sale and the expression “package”, wherever it occurs in this Chapter shall be construed accordingly.

“**Retail sale**”, in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer; [vide R2(q)]

Rule 6 which bears the heading “**Declaration to be made on every package**” lays down that :

6(1) Every package shall bear thereon or on a label securely affixed thereto, a definite, plain and conspicuous declaration, made in accordance with the provisions of this Chapter as to,

- (a) xx xx xx xx
- (b) xx xx xx xx
- (c) xx xx xx xx
- (d) xx xx xx xx
- (f) the retail sale price of the package

“Retail sale price” is defined thus in Rule 2 (r) means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on the package, there shall be printed on the packages the words Maximum or max. retail price.....inclusive of all taxes [or in the form MRP Rs.....inclusive of all taxes.

Explanation. - For the purpose of the clause “maximum price” in relation to any commodity in packaged form shall include all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be;

18.1 The learned counsel for the applicant relies on Rules 2-A and 3 to contend that Revitalizing toner to be packed in a composite kit and not sold individually cannot be brought within the sweep of PC Rules. In other words, it is contended that there is no obligation to

print or exhibit the MRP on the product, having regard to these two crucial Rules.

18.2 The contention that the package containing the Revitalizing toner imported by the applicant is not intended for sale or retail sale cannot be accepted. The reasons given by us at paragraph 16.3 repelling a similar argument based on the language of cl.15 of the Drugs (Prices Control) Order will equally hold good in refuting this contention. We have expressed the view that each one of the products imported ought to be treated as articles intended for sale irrespective of the fact that they are meant to be sold together but not individually. Further, the definition of 'retail sale' in Rule 2(q) is also satisfied in the instant case for the reason that the products – all placed in a kit, reach the consumers through the distributors or retail sales agencies set up by the applicant.

18.3 The learned counsel for the applicant then invoked Rule 2A of the PC Rules in his bid to substantiate the argument that the PC Rules cannot be made applicable to the so-called Category II product. It is contended that the applicant is an 'industrial consumer' of the imported articles as they are used by the applicant for 'production' and therefore Chapter II of PC Rules is excluded. In this context, the expression 'production is sought to be equated to 'deemed manufacture' under Section 2(f) of the Central Excise Act. We find it difficult to appreciate how the applicant can claim itself to

be an industrial consumer within the meaning of clause (b) of the Explanation to Rule 2A. The imported products/package commodities are not meant to be used in any industry of the applicant with the object of producing some other goods. They are not in the nature of raw materials or consumables or other inputs used in an industry for manufacturing purposes. Neither the plain language of the definition of 'industrial consumer' nor the objective of providing exemption supports the interpretation sought to be placed by the applicant. It would be wholly inappropriate to take resort to a special and enlarged definition of 'manufacture' under the Central Excise Act. The word 'production' occurring in the definition of 'industrial consumer' cannot, by any norm of interpretation, be equated to 'manufacture' as defined in Section 2(f) of Central Excise Act for the purposes of that Act. The words "for using the product in their industry for production" have to be understood in their normal, ordinary sense but not by reference to the definition in the nature of fiction in some other unrelated enactment. It would be opposed to commonsense and plain meaning to hold that by placing the packaged articles in a larger container known as kit, the applicant uses them in its industry and that it results in production of something else. We find no warrant to import the artificial definition of manufacture in the Central Excise Act in interpreting clause (b) of the Explanation to Rule 2A of PC Rules. It must be noted that the

proviso to Section 3(2) of the Customs Tariff Act which is modeled on the same lines as Section 4A of the Central Excise Act borrows the scheme of retail pricing from the SW&M Act and Rules but, it is not *vice-versa*. The SW&M Act or the Rules framed thereunder are not inspired by the provisions of the Central Excise Act. They do not purport to borrow the pattern and scheme of Central Excise Act. Thus, viewed from any angle, we are of the view that the applicant cannot be treated as an 'industrial consumer' within the meaning of the definition contained in clause (b) of the Explanation to Rule 2A of the PC Rules. Rule 2A cannot come to the aid of the applicant in extricating itself from the obligation to declare and print the maximum retail price on the product known as 'revitalizing toner' falling under 3304. Therefore, the maximum retail price which the applicant is statutorily bound to declare and affix on the package of the said product will be the basis of valuation even though it is to be placed in a kit subsequent to import. That is the plain effect of the proviso to Section 3(2) of the Customs Tariff Act. Even if viewed from the angle of Section 4A of the Central Excise Act, the same conclusion will follow.

19. Therefore, the answer to the third question is the same as the answer to the second question. The applicant's contention that the transaction value has to be adopted in relation to the so-called

Category II products for the purpose of levying additional duty of customs cannot be accepted.

20. It is needless to state that the products imported during the pendency of this application and hereafter imported will have to be assessed to duty by the concerned Customs authorities in accordance with this ruling.

Accordingly, the ruling is given and pronounced on this the 18th day of September, 2009.

Sd/-
(J. K. Batra)
Member

Sd/-
(P.V. Reddi)
Chairperson

Registered /A D

F. No. AAR/Cus/01/2009

22nd Seot., 2009

(A) This copy is certified to be a true copy of the Ruling and is sent to :-

1. M/s Guthy Renker Marketing Private Limited, Level 5, Incube Business Centre, 18 Nehru Place, New Delhi-19.
2. The Commissioner of Customs ,Air Cargo Complex, Sahar, Andheri (East),Mumbai – 400 099.
3. The Commissioner of Customs (Import), New Custom House, Ballard Estate, Mumbai – 400 001.
4. The Commissioner of Customs (Import), Jawaharlal Nehru Custom House, Nhavasheva, Tal: Uran, Dist. Raigad, Maharashtra – 400 707.
5. Mr.V.K.Saxena, Jt.CDR, Customs, Excise & Service Tax Appellate Tribunal, West Block-2, R.K.Puram, New Delhi-66.
6. Member (Customs), Central Board of Excise & Customs, North Block, New Delhi.
7. Individual Folders of Chairman/Members
8. Guard File

Sd/-
(R.K.Meena)
Additional Commissioner