PUBLIC ACCOUNTS COMMITTEE
(1999-2000)

FIRST REPORT

(THIRTEENTH LOK SABHA)

UNION EXCISE DUTIES - DIFFERENT CLASSIFICATION FOR SIMILAR PRODUCTS

MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

Presented to Lok Sabha on: 24.02.2000
Laid in Rajya Sabha on : 24.02.2000

L O K S A B H A S E C R E T A R I A T
N E W D E L H I
February, 2000/Magha, 1921(SAKA)

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COMPOSITION OF THE PUBLIC ACCOUNTS COMMITTEE
(1999-2000)

Shri Narayan Datt Tiwari - Chairman

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2.	Shri Devender Singh	-	Deputy Secretary
3.	Shri B.S. Dahiya	-	Assistant Director

*** Ceased to be a Member of the Committee on completion of his tenure in Rajya Sabha w.e.f. 27 January, 2000**

INTRODUCTION

I, the Chairman, Public Accounts Committee, authorised by the Committee, do present on their behalf, this First Report on Paragraph 4.3 of the Report of Comptroller & Auditor General of India for the year ended 31 March,1996, No.11 of 1997, Union Government (Revenue Receipts-Indirect Taxes – Central Excise) relating to "Union Excise Duties – Different Classification for similar products".

2. The Report of the Comptroller & Auditor General of India for the year ended 31 March, 1996 No.11 of 1997, Union Government (Revenue Receipts –Indirect Taxes – Central Excise) was laid on the Table of the House on 14 March, 1997.

3. The Committee(1998-99) took evidence of the representatives of the Ministry of Finance (Department of Revenue) on the subject at their sitting held on 26 September,1997. The Committee (1999-2000) considered and finalised this Report at their sitting held on 04 February, 2000. The minutes of the sitting form Part-II of the Report.

4. For facility of reference and convenience, the observations and recommendations of the Committee have been printed in thick type in the body of the Report and have also been reproduced in a consolidated form in Appendix-III to the Report

5. The Committee would like to express their thanks to the Public Accounts Committee (1998-99) for taking evidence on Paragraph 4.3 and obtaining information thereon.

6. The Committee would like to express their thanks to the Officers of the Ministry of Finance (Department of Revenue) for the cooperation extended by them in furnishing information and tendering evidence before the Committee.

7. The Committee place on record their appreciation of the assistance rendered to them in the matter by the Office of Comptroller & Auditor General of India.

NARAYAN DATT TIWARI,
CHAIRMAN,
PUBLIC ACCOUNTS COMMITTEE

New Delhi
18 February,2000
29 Magha , 1921 (Saka)

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NARAYAN DATT TIWARI,
CHAIRMAN, PUBLIC ACCOUNTS COMMITTEE

New Delhi
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29 Magha , 1921 (Saka)

REPORT

Introductory

The pharmaceutical products are classifiable for the purpose of levy of the Central Excise duty under Chapter 30 of the schedule to the Central Excise Tariff Act, 1985 (CETA) whereas cosmetics and preparations for the care of the skin are classifiable under Chapter 33 of the Schedule to the Act.

Audit Para

2. This Report is based on Paragraph 4.3 of the Report of C&AG of India for the year ended 31 March, 1996, No.11 of 1997, Union Government-Revenue Receipts-Indirect Taxes(Central Excise) which is annexed to this Report (Annexure-I).

3. The Audit paragraph highlights a case wherein a decision taken and implemented in pursuance of the recommendations of the Public Accounts Committee was reversed within a period of three months. The issue involved is that while some of the brands of the Prickly Heat Powder have been classified as cosmetics attracting higher rate of central excise duty, another brand was being treated as medicament with lower rate of central excise duty. The replies furnished by the Ministry reveal that lack of uniformity in the classification of similar products for the purpose of levy of central excise duty also exists in other items like Ayurvedic/Siddha medicines, herbal products etc.

4. The Committee's examination of some of the more important aspects are dealt with in the succeeding paragraphs.

5. This Report includes three issues in relation to classification of following items:-

(A) Classification of Nycil Prickly Heat Powder as Medicament;

(B) Classification of other cosmetic goods as Ayurvedic/Siddha medicines

(C) Classification of cosmetic goods as Ayurvedic Medicaments manufactured by M/s Shahnaz Ayurvedic;

(A) Classification of Nycil Prickly Heat Powder as Medicament

6. The issue of classification of prickly heat powder was examined **ad nauseum** by the Public Accounts Committee **vide** their 24th and 68th Reports (10th Lok Sabha). The Committee had recommended that the Ministry of Finance should ensure rational classification of prickly heat powder keeping in view the revenue interest of Government and also general usage of the product and that uniformity should be maintained in the classification of similar excisable

products. In their action taken replies in response to the recommendations contained in paragraph fifteen of the Action Taken Report (68th of 10th Lok Sabha), Ministry of Finance stated as under:

> "With due regard to the observations/recommendations made by the Committee, the issue of classification of Prickly Heat Powder has been carefully reexamined by the Central Board of Excise and Customs. The Board has withdrawn its earlier Circular No.1/93-CX.3 dated 17.3.1993 and issued an order under Section 37B of the Central Excise and Salt Act, 1944 classifying all prickly heat powders under heading No.33.04 of the Central Excise Tariff Act, 1985."

7. However, in a subsequent revised action taken note, the Ministry of Finance stated:

> "The classification of prickly heat powders has been re-examined by the Central Board of Excise and Customs in the light of the opinion given by the Harmonized System Committee of Customs Co-operation Council, Brussels and also the fact that the Gujarat and Andhra Pradesh High Courts in their various judgements have held `Nycil' as a drug. The Central Board of Excise and Customs vide Order No.38/14/94-CX dated 28.12.94 have decided not to change the classification given by the Harmonized System Committee of Customs Co-operation Council, Brussels which had observed that `Nycil' shall be classifiable under Heading 30.04 of the CETA, 1985 (No.5 of 1986). The other two products viz. `Shower to Shower' and `Johnson & Johnson' have been decided to be remained classifiable under Heading 33.04 of the CETA, 1985. The Board **vide** Order No.41/3/95-CX dated 3.8.95 has amended Circular No.1/93-CX.3 dated 17.3.93 and Order No.38/14/94-CX dated 28.12.94 to the effect that `Nycil' would be classified under heading No.30.03 instead of 33.04 of the Central Excise Tariff."

8. The matter regarding different classification for similar products figured again in the report (No.11 of 1997) of C&AG. The PAC again selected the subject for examination. The Committee desired to know the circumstances under which the instructions dated 19 September, 1994 were withdrawn and one brand of powder was classified under chapter 30 as medicament. The Ministry of Finance stated that on receipt of a representation dated 26 October, 1994 which listed the following points, Nycil brand of prickly heat powder was treated as medicament **vide** Ministry's order dated 28 December, 1994:

i) The product "Nycil Prickly Heat Powder" was held to be a drug by the Drug Controller of India as far back as 19th November, 1986.

ii) The Board under Circular dated 19th September, 1994 has held that Nycil Powder cannot fall under Chapter 30 as Medicament.

iii) The decision of the Board is not based on logical or technical grounds. Nycil Power was all along being sold and marketed under drug licence. In view of the above fact, the decision of the Board classifying Nycil under Chapter 30 may be restored.

9. The Committee asked during evidence held on 26 September, 1997 as to what were the circumstances which led to reversal of the earlier classifications. In reply, the Secretary (Revenue) elaborated as follows:

> "After the issue of the order classifying them under the heading 33.04, the Ministry of Finance had received representations saying that the classification of "Nycil" under the heading 33.04 was an erroneous classification and was in disregard to the technical opinion which had been given to the Ministry of Finance on a reference made by the Ministry of Finance to the CCC in Brussels according to which in accordance with the Harmonised System of classification, they felt that since Nycil contained a bacterial property and as an antibiotic element of one per cent of chlorophensen had been used, it would be appropriate to have this classification under 30.04."

10. The Committee enquired about the reasons for the second reference to the Harmonised Systems Committee(HSC). The Secretary (Revenue) stated that the second reference was made to HSC regarding classification of Nycil Prickly Heat Powder on the basis of a representation. Asked to supply a copy of the representation, the Ministry of Finance in a subsequent reply stated that no such representation was received.

11. The Committee observed that (HSC) is a Committee of the Customs Corporation Council, Brussels established under the International Convention on the harmonised Committee restrictions system and India is a signatory to this Convention. This Committee is composed of the representatives from each of the contracting parties.

12. Asked whether we have Indian representative in the HSC, the Secretary (Revenue) stated during evidence:

> "Whenever an issue comes up we send two officers to represent."

13. The Committee enquired whether the Indian representative was present at the meeting when the issue relating to classification of Nycil Prickly Heat Powder was considered at the meeting(s) of HSC? The Ministry of Finance in a written reply stated that nobody from the Central Board of Excise and Customs attended the meeting of HSC held in October 1992 which considered the issue of classification of Nycil and other brands of prickly heat powder.

14. According to Audit paragraph, the difference between duty collected under Chapter 30 and the notional duty under heading 33.04 (Cosmetics) worked out to Rs.69.08 crores for the period from October 1987 to September 1994 in two Commissionerates. The Committee enquired whether as a result of classification of one brand as medicament under chapter 30, the consequent notional loss of revenue likely to be suffered by Government was calculated? The Ministry in a note indicated that the Government had incurred a notional loss of Rs.55.35 crores consequent upon classification of "Nycil" prickly heat powder as medicament under Chapter 30 till 1995-96. It is, however, seen from the written reply and oral deposition that the revenue implications arising out of reclassification of Nycil powder as medicament were not considered while reexamining the matter and issuing the order dated 28 December 1994.

15. The Committee desired to know the details of show cause notices issued at all levels in different Commissionerates against incorrect classification of Nycil Prickly heat powder as medicament during the period October 1987 to September 1994 and the total Central Excise Duty involved therein. The Ministry of Finance (Department of Revenue) in a note furnished after evidence stated that six show cause notices were issued in Mumbai-II Commissionerate and six were issued in Vadodara Zone involving a Central Excise Duty of Rs.156.6 lakhs and 3177.1 lakhs respectively.

16. On being asked the details of the show cause notices decided from 19 September 1994 to 28 December 1994, the Ministry of Finance stated in a note furnished after evidence that during the period from 19.9.1994 to 28.12.1994, none of the show cause notices had been decided.

17. In reply to a query of the Committee regarding the details of the differential duty involved in respect of the clearances made during the period 28 December, 1994 till date classifying prickly heat powder as cosmetic and not as medicament, the Ministry in a note furnished after evidence stated that the differential duty involved during the period 28 December 1994 till date was Rs.8.65 crores in Vadodara Zone alone.

18. The Committee desired to know the quantum of notional loss in respect of the clearances made from October 1987 to 18 September 1994. The Ministry in a post evidence reply stated that the notional loss involved in respect of the clearances of Nycil Prickly Heat Powder during the period from October 1987 to 18 September, 1994 was Rs.39.8 crore. (Rs.2.5 crores in Mumbai II and Rs.37.3 crore in Vadodara Zone).

The Role of Ministry/Board

19. On perusal of the photocopy of file No.103/3/94-CX-3 furnished by the Ministry of Finance (Department of Revenue) it is seen that on receipt of a representation dated 26 October, 1994 the Secretary (Revenue) directed on 9 November1994 the then Member (CX) to re-examine the issue in respect of Nycil Prickly Heat Powder. The Member (CX) recorded in the file on 10 November, 1994 as follows:

> "Please put up a comprehensive note explaining:
>
> (i) The international body had first opined that Nycil would be treated as a cosmetic and upon being asked to reconsider, decided otherwise;
>
> (ii) the grounds on which PAC feel that the product should be treated as a "Cosmetic";
>
> (iii) my agreement that chlorophensin being accepted as a pharmaceutically active agent should not make any difference on the same agreement is true for boric acid. Yet boric acid is present in all. ----- We cannot apply different standards for similar products. The CCC have not spelt out why the presence of Chlorophensin will make a world of difference."

20. In his comprehensive note dated 16.11.1994 the Deputy Secretary (CX) noted that **vide** the Circular No.59/59/94-CX dated 19.9.1994, the earlier Circular dated 17.3.1993 classifying Nycil as 'medicament" was withdrawn for the following reasons:-

> "The Board, keeping in view the specific use, technical specifications in the Tariff heading 30.04 and 33.04 Chapter notes, HSN explanatory notes, the end use, the understanding of the product by the consumers, discussions with the Drug Controller of India and other relevant factors, decided that the product prickly heat powder, would merit classification under 33.04 whether or not it contains subsidiary pharmaceutical or antiseptic constituents, or it is held out as having subsidiary curative or prophylactic value and accordingly issued the Section 37B Order dated 19.9.1994."

21. The reasoning advanced by the Deputy Secretary (CX-3) was endorsed by the Member (CX) on 29.11.1994. The Committee note that the Secretary(R) in his note dated 1.12.1994 appended to the preceding note of DS (CX) and Member (CX) made out a case for "review" of classification of "Nycil" which was concurred in by the Finance Minister on 8 December, 1994. The Committee observed that on receipt of the aforesaid note the Member (CX) put up a draft order reversing the decision of 19.9.1994 and restoring the status quo ante with the observation that Secretary(R) may kindly see the draft order before issue with the result Nycil was classified as "Medicament" for the purpose of charge of excise duty.

22. The Committee desired to know the reasons for the change in the stand taken by the Member (CX) when there was no material change in the facts and no new issue was involved. The Ministry of Finance in a note furnished after evidence stated as follows:

> "The file does not speak about the reasons for the change in the stand taken by the then Member (CX). However, Member (CX) on 29.11.1994 in F.No.103/3/94-CX.3 has concurred with the detailed note of DS(CX.3) where-in it has been observed that there seems to be no room for amending the order under Section 37-B issued dated 19.9.1994." But when Secretary (Revenue) gave further directions under his notes dated 8.12.1994 and 14.12.1994, the Board Order dated 19.09.1994 was amended."

23. The Committee enquired as to what prompted the then Member (CX) to put up draft orders to Secretary (Revenue) when the explicit orders of the Finance Minister were only to review the earlier decision of the Board? The Ministry of Finance in a note furnished after evidence stated that the file was silent on the point.

24. The Ministry of Finance in reply to a related question of the Committee stated categorically that the decisions of the HSC are not binding on Indian Government and that they were only recommendatory in nature. In this context, the Committee wanted to know as to how the Secretary (Revenue) came to the conclusion that CBEC cannot change the classification given by the HSC, particularly when the HSC had itself revised its earlier recommendations on a re-reference from the Board. The Ministry stated in a note that the Secretary (Revenue) had expressed his doubt whether the CBEC can change the classification given by the HSC.

25. The Committee observed that the decision to reclassify Nycil was stated to have been taken mainly on the basis of the views given by HSC, CCC, Brussels in October 1992. They desired the Ministry to justify the argument in view of the fact that the observations of the HSC were already on record and duly considered while classifying the prickly heat powder as cosmetics before issuing the order dated 19 September 1994. The Ministry of Finance in a note stated :

> "The Harmonised System Committee's opinion on the classification of Nycil Prickly Heat Powder was received in October, 1992. This opinion was accepted by the Board while issuing Circular No.1/93 dated 17.3.1993 whereunder Nycil Prickly Heat Powder was classified as medicament under Chapter 30.However, the Board had to review its decision in view of the persistent stand of the PAC regarding rational classification of all Prickly Heat Powders. On the basis of Chief Chemist's as well as Drug Controller's opinion, the classification of all the three Prickly Heat Powders was ordered to be made under Chapter 33 as preparation for care of skin. Obviously, Harmonised systems Committee's opinion was ignored and Chief Chemist and Drug Controller's opinion were kept in mind while issuing the orders dated 19.9.1994."

26. The Communication, **ibid,** added further that later on receipt of representation dated 26.10.1994 requesting to reexamine the classification of the product in view of the fact the same was based on the expert opinion of HSC and that it could not be changed when there was no change in the composition of the product (Nycil Prickly Powder), the classification was changed.

27. The Secretary (Revenue) summed up the position during evidence as follows:

> "It is true that the opinion of the Council was available to the Ministry of Finance even when it had issued earlier notification classifying it differently. On reconsideration of the matter based on representation which it received and considering that as the technical opinion of this International Council is generally accepted by all countries, it was felt that it would be appropriate to review the earlier decision and to change the classification to the classification of 30.04."

28. In reply to a query of the Committee as to why was the fact that the Board had already considered the opinion of HSC (given in 1992) while accepting the recommendations of PAC not brought to the notice of the Finance Minister, the Ministry of Finance in a note stated as follows:

> "It may kindly be noted that the then Deputy Secretary (CX.3), in his note has discussed the recommendations of PAC as well as of Harmonised System Committee. The then Secretary (Revenue), in his note dated 1.12.1994 submitted to Finance Minister, had drawn Finance Minister's attention to the aforesaid note of Deputy Secretary (CX.3). The then Secretary (Revenue), in his note dated 1.12.1994, has also mentioned that CBEC had before them the recommendations of the PAC and that of the HSC."

29. The Committee enquired as to why the revenue implications were not brought out in the note, the Ministry of Finance stated.

> "From the relevant notes on the file it appears that the revenue implications in changing the classification of Nycil Prickly Heat Powder from Chapter 33 to Chapter 30 were not examined. However, it may be mentioned that in deciding the classification of excisable products under the Central Excise Tariff Act 1985, the correct classification of the product was more important rather than its revenue implications."

30. Asked as to why the views of the Chief Chemist dated 20 July, 1994 and the Drug Controller dated 6 September 1994 not brought to the notice of the Finance Minister, the Ministry of Finance in a note inter-alia stated :

> "Kind attention is invited to DS(CX.3)'s note dated 16.11.1994 (F.No.103/3/94-CX.3). In Para 16, 18 and 19 of the notes, the then Deputy Secretary has duly discussed the views of Chief Chemist as well as Drug Controller's opinion. This note was submitted to the Secretary (Revenue/Finance Minister **vide** the then Member (Central Excise) Note dated 29.11.1994".

31. The Committee observed from the scrutiny of the record made available that the final note put up by Secretary(R) to Finance Minister on 1 December, 1994, obtained the orders of FM for review of the earlier decision of the Board by side tracking/ignoring the views of Deputy Secretary & Member (CX) who had opined that in view of the detailed reasons and thorough examination of the subject in the context of the recommendations of the PAC (24 & 68 Reports, 10th Lok Sabha), there was no room for review.

32. On Scrutiny of the photocopy of the Ministry's file No.103/3/94-CX-3, it was observed that in his note dated 14 December 1994 the Secretary (Revenue) besides desiring that the Board should review the case also gave indications in the note itself for reclassifying the product as medicament in the light of the revised recommendation made by the HSC. It is seen that instead of placing the matter before the full Board for review, the Member (CX) discussed the issue with the Secretary(Revenue) directly and put up the draft orders for approval. On being asked to explain, the Ministry of Finance in a note stated:

> "In terms of Office Order No.164/63 dated 4th August, 1993 issued from Ministry's F.No.50/40/91-Ad.II dealing with the distribution of business amongst the Members of the Board the work relating to Tariff Classification was to be considered by Member(CX). In view of the above it appears that the same was not placed before Board."

33. It is seen further from the perusal of the Ministry's file that the Member (CX) in his note dated 16 December, 1994 had stated that on the basis of the opinion of HSC, the Board amended its earlier order dated 19 September 1994. The Committee desired to know whether the Board had actually amended the earlier order? The Ministry of Finance in a note stated that no Board meeting was held on classification of the impugned product.

34. From the note of the Commissioner(CX) dated 28 December 1994 it transpires that the file relating to the classification of Nycil Powder was recalled urgently for issue of order reclassifying Nycil as medicament. Asked about the urgency to issue the order when the concerned officer was not available, the Ministry of Finance in a note stated that the file was silent in that regard.

35. During oral evidence, the Committee asked the Secretary(R) whether any review was done in the Board meeting as per the orders of Finance Minister and as per the procedure prescribed in the Ministry of Finance, Handbook of Parliamentary Procedure (3rd ed. 1988 P.34 para 2.2.33). In reply, the representatives of the Ministry stated that "Review" suggested "change" and that review meant going to another decision. When their attention was drawn to the recommendations of PAC contained in its 155 Report (7th Lok Sabha) to the effect that it should not be left to a Member to set aside an order of the full Board particularly where such orders have adverse impact on revenue which was accepted by the Board at their meeting held on 28.10.1983. The Chairman, CBEC eventually conceded:

> "Probably, technically there may be some procedural irregularity."

36. It is observed that the Board issued instructions under file No.103/5/96-CX-3 dated 11 August 1997 directing all concerned that the assessment in respect of Nycil Prickly Heat Powder should be made provisional under rule 9B of the Central Excise Rules with immediate effect. The Committee enquired about the precise background leading to the issue of the said instructions. The Ministry of Finance in a note stated:

> "The Hon'ble CEGAT in their Order No.618 to 621/96-C dated 26.9.1996 passed in the case of M/s. Muller and Phipps India Ltd. decided that Prickly Heat Powder manufactured by Johnsons & Johnsons was more appropriately classifiable as cosmetics under Chapter 33. The classification of Nycil Prickly Heat Powder was also required to be re-examined in the light of the CEGAT's aforesaid decision. The operation of the Board's order dated 28.12.1994 and 3.8.1995 relating to classification of Nycil Prickly Heat Powder was therefore, considered to be kept in abeyance till a final view is to be taken in the matter. Pending such final decision, it was decided to make assessments in respect of Nycil Prickly Heat Powder provisionally under Rule 9B of the Central Excise Rules in order to safeguard the revenue. In this regard the Board issued instructions **vide** circular F.No.103/5/96-CX-3 dated 11.8.1997."

37. It is worthwhile to mark that the Secretary (Revenue) in his note dated 14 December 1994 had referred to the decision of the Gujarat and Andhra Pradesh High Courts classifying "Nycil" as a drug. The Committee enquired whether the decision of the High Court in these cases referred to by the then Secretary (Revenue) was examined by the CBEC while considering the matter? The Ministry of Finance in a note **inter-alia** stated:

> "There is no indication on F.No.103/3/94-CX.3 that the Board examined the judgements of the Hon'ble High Courts of Gujarat and Andhra Pradesh as referred to in Secretary (Revenues)'s note dated 14.12.1994."

38. On being asked whether these judgements were relevant particularly in the context of the new Central Excise Tariff which had come into force after the pronouncement of those judgements, the Ministry of Finance stated in a note:

> "Both the judgements of Hon'ble High Courts of Gujarat and Hyderabad in case of B. Shah & Co., Surat Vs State of Gujarat dated 30th November, 1970 and M/s. Koduri Satyanarayana & Co. Vs State of A.P. are in the context of Sales Tax Act. The judgement of Hon'ble Gujarat High Court dealt with Nycil medicated Powder whereas judgement of Hon'ble High Court of Andhra Pradesh dealt with "Johnsons' Prickly Heat Powder.
>
> The above decisions of the High Courts were in the context of Sales Tax Act whereas these judgements are not applicable in the context of Central Excise Act, 1944 as parameters of levy and collection under the two Acts are different. This view has been held by the Hon'ble Tribunal in para 29 in its final order No.618-621/1996-C passed in the case of M/s. Muller & Phipps (I) Ltd."

The views of Chief Chemist and Drug Controller

39. The Audit paragraph reveals that the Chief Chemist and the Drug controller had opined in July 1994/September, 1994 that the particular brand of prickly heat powder merited classification as cosmetic. The Committee enquired about the considerations due to which the Ministry did not accept the opinion of the Chief Chemist and the Drug Controller about classification. The Ministry of Finance in a note **inter-alia** stated:

> "under the Drug and Cosmetics Act, 1940, the product Nycil has all along been classified as a drug. Only for the purposes of the Central Excise Law, the Drug Controller has said that it is possible to treat prickly heat powder as Cosmetic. The Chief Chemist also in his U.O. note dated 20.7.1994 has not given any categorical finding that Nycil Powder is not a drug."

40. To a question of the Committee whether the Chief Chemist had suggested in July 1994 for re-reference to the Harmonised System Committee/Sub Committee regarding the classification of the brand of prickly heat powder in question as medicament since their recommendations were not specific on several points. The Ministry of Finance replied in affirmative but when asked to indicate whether the Ministry of Finance had considered the said suggestion, the Ministry in a note stated:

> "In view of the unanimous opinion of the Harmonised System Committee, it appears the Ministry did not consider the above suggestion of the Chief Chemist."

41. The following opinion of the Chief Chemist of GOI was read out to the representatives of the Ministry during evidence:

"Products making therapeutic claims of affecting physiological functions of human beings do not necessarily cease to be cosmetics. Cosmetics may include such drugs which may be used for their cosmetic effect. In the case of antiperspirants, the physiological effect of these preparations make them as drugs, but the purpose of their use makes them as cosmetics.

In view of the above, I am of the opinion that the matter lying with the sample of the product giving complete details should again be referred to the Customs Cooperation Council with the request that it may be referred to the Harmonised Systems Committee or to the Scientific sub-Committee to examine whether the pharmaceutical substances or the products are therapeutic or prophylactic dosages and to elaborate the scope of the term "subsidiary" occurring in Note 2 of Chapter 33 and whether or not the phraseology includes products that contain subsidiary pharmaceutical or antiseptic constituents."

42. The Secretary (Revenue) deposed:

"We have not made any further reference to the council."

43. Asked further during evidence whether there is any medical evidence to show that this Nycil prickly heat powder has been recommended by medical practitioners for any germicidal activity on the skin or as anti fungal or anti bacterial medicine, the Secretary(R) remarked:

"The Department does take note of it."

Need for rational classification of similar exciseable products

44. The Committee drew the attention of the M/o Finance towards the frequent revisions made in classification of excisable items from Chapter 33 to chapter 30 of the Central Excise Tariff since 1991 and asked to explain the grounds for frequent revisions and the names of the assessees who stood benefited by such revisions. The M/o Finance in a note stated:

"In view of CERA objection regarding classification of Shower to Shower Prickly Heat Powder, the Board obtained the opinion of the Drug Controller of the India vide DGHS U.O. No. X.11048/4/91-D dated 29.7.91 and a copy thereof was sent to CCE, Mumbai-III to defend the CERA objection. Subsequently, as desired by the PAC, the Board took up the matter with CCN, Brussels regarding classification of prickly heat powders namely, Nycil, Johnson and Shower to Shower.

The Board **vide** telex dated 3.2.92 requested all the CCEs to keep the classification of prickly heat powder pending till further directions from the Board. The Board **vide** Circular No. 1/93-CX.3 dated 17.3.93 based on CCN opinion classified the Prickly Heat Powders as under:-

Johnson & Johnson	:	Ch.33.04
Shower to Shower	:	Ch.33.04

Nycil	:	Ch.30.04

2. Subsequently, based on the Recommendations of PAC, in their comments on Para No.98 of the Vetted Action Taken Notes, Board re-examined the matter in consultation with Chief Chemist & Drug Controller of India and issued order under Sec. 37-B dated 19.9.94 classifying Prickly Heat Powders as under:-

Johnson & Johnson	:	Ch.33.04
Shower to Shower	:	Ch.33.04
Nycil	:	Ch.33.04

3. Thereafter, on a representation dated 26.10.1994 it was classified under Chapter 30 of CETA and its classification was based on the expert opinion of the Harmonised Systems Committee and it cannot be changed when there is no change in the contents of Product.

As per directions of the Secretary (Revenue) Board re-examined the matter and issued Section 37-B order dated 28.12.94 restoring the classification of NYCIL Prickly Heat Powder prior to 19.9.94. In terms of Board`s 37-B order dated 28.12.94, the classification of the Prickly Heat Powders was as under:-

Johnson & Johnson	:	Ch.33.04
Shower to Shower	:	Ch.33.04
Nycil	:	Ch.30.04

4. The issue of classification of Prickly Heat Powder manufactured under the brand names of `Johnson and `Phipps processed Talc', was under dispute before CEGAT. The Tribunal **vide** its judgement dated 26.9.96 held that the products are rightly classifiable under heading 33.04 as "preparations for the care of skin."

Keeping in view the CEGAT judgement, the Board **vide** Circular dated 11th August, 1997 directed all the CCEs to keep Board's Orders dated 28.12.94 and 3.8.95 in abeyance and assess Nycil provisionally under Rule 9B of Central Excise Rules till further orders.

5. Keeping in view the judgement of Hon'ble Supreme Court in the case of M/s. Shree Baidyanath Ayurved Bhawan Ltd. and the judgement of CEGAT in the case of M/s. Muller & Phipps Ltd., the Board amended its earlier Section 37-B classifying Nycil Prickly Heat Powder under Tariff Heading 33.04. Subsequently by another Section 37-B order dated 20.11.97, the Board issued directions that all Prickly Heat Powder having subsidiary curative or prohylactic value shall be classified under Tariff Heading No. 33.04."

45. As regards the assessees, who stood benefited by revision in classification of prickly heat powder since 1991, the Ministry of Finance stated:

"The following are the assessees who were benefited from revision of classification of Prickly Heat Powder from Chapter 33 to Chapter 30 of CETA 1985:"

S.No.	Name of the Assessee	Products
1.	M/s. Johnson & Jonnson Ltd. Mulund, Mumbai	Prickly Heat Powder (Shower to Shower)
2.	M/s. Ponds (India) Ltd. Pondicherry	Prickly Heat Powder
3.	M/s. Glaxo (I) Ltd., Thane, Mumbai	Prickly Heat Powder (Nycil)
4.	M/s. Monisha Pharma Plast Pvt Ltd. GIDC, Umbergaon, Surat	Prickly Heat Powder" (Nycil)

46. In reply to a query of the Committee as to which were the other brand of prickly powders being manufactured (other than Shower to Shower, Johnsons and Nycil) throughout the country and how were these classified, the Ministry of Finance furnished the following information:

Sl. No.	Brands of Prickly Heat Powder	Manufactured by	Classification	Remarks
1.	2.	3.	4.	5.
1.	"BORO CALENDULA" Prickly Heat Powder	M/s. Homeo Impex India (P) Ltd., Patna	Ch.33	
2.	"NEEM TULSI" & "NEEM TULSI SANDAL"	M/s.Puna Ayurvedic Herbal (P) Ltd., Nagpur	30003.30 Upto 22.7.96 & thereafter under 3003.39	A.C. had approved the classification under 3304.00 as cosmetics. But CCE (Appeal) has set aside A.C.'s. Classification. The product is accordingly classified under 3003.30 chargeable to "nil" rate of duty upto 28.3.1994 and thereafter @ 10% Ad. Val. in terms of Notfn. No.75/94 dated 29.3.94 (upto 22.7.96)

				and from 23.7.96 @ 10% as per Tariff rate under Tariff heading No.3003.39. CCE(AO's order-in-appeal has been appealed against in CEGAT. However, protective demands have been raised below: **Year** — **Amt. Demanded** 1991-92 — 8,72,259/- 1992-93 — 2,36,775/- 1993-94 — 4,46,289/- 1994-95 — 2,81,783/- 1995-96 — 14,113/- 1996-97 — 10,091/-
3.	"BOROQUEEN"	M/s. Mehta Chem., Industries, Rajkot	33.04	
4.	"SANSHEEL"	M/s. Amsar Pvt. Ltd., Indore	3003.30	Following SCNs have been Issued: SCN — Amount i)SCN dated 3.1.96 covering period from 4/95 to 9/95 — Rs.84/- ii)SCN dated 4.10.96 for the period from 1/96 to 3/96 — Rs.570/- iii)SCN dated 7.5.97 for the period from 10/96 to 12/90 — -NIL- NB: Nil – clearance during intervening periods and subsequent periods upto June, 1997.

5.	"PONDS"	M/s. Ponds (India) Ch.30 Ltd., Trichy	Unit has stopped production and clearances since July, 1994."

47. From the Audit Paragraph under examination and the reply of the Ministry of Finance it is seen that despite consistent recommendations and admonitions by the Public Accounts Committee, the various brands of Prickly Heat Powder continued to be classified differently for the purpose of levy of Central Excise Duty. The Committee asked the Ministry to explain this persistent trend involving lack of uniformity in the classification of similar excisable products and what steps do they propose to enforce rational classification of the products. The Ministry of Finance in a note stated:

> "In respect of other brands of Prickly Heat Powder being manufactured by various industries (other than Shower to Shower, Johnsons & Johnsons and Nycil) it has been reported that except "Neem Tulsi", "Sansheel" and "Ponds" all other brands of Prickly Heat Powder are being classified as cosmetics under Chapter 33. In respect of "neem Tulsi" the department's appeal is reportedly pending in the CEGAT. However, protective demands are being raised from time to time to safeguard the revenue. In respect of "Sansheel" also show cause notices have been issued against the manufacturer. However, the manufacturer of Ponds Prickly Heat Powder has reportedly stopped its production and clearance since July, 1994.
>
> Regarding steps taken to enforce rational classification of the product, CBEC has already issued Section 37-B Order No.50/4/97-CX. dated 5.11.1997 and Section 37-B Order No.51/5/97/CX. dated 20.11.1997."

B. <u>Classification of Other Cosmetic goods as Ayurvedic/Sidha medicines</u>

48. Para 1.02(4)(iii)(a)(b) of the Report of C&AG of India for the year ended March 1995 (No.4 of 1996) pointed out cases of misclassification of Herbal hair oil, Ayurvedic hair Oil, perfumed hair oil and prickly heat powder as Ayurvedic/sidha medicine instead of as cosmetics. Asked about their response to the Audit observations, the Ministry of Finance in a note **<u>inter-alia</u>** stated:

> " In respect of hair oils, Audit's contention is that these products being a formulation for use on hair, for arresting hair fall and to tone up scalp and hair are more appropriately classifiable under heading No.33.05 and not as "proprietary Ayurvedic medicine",
>
> Similarly, for prickly heat powder Audit's contention is that it is a preparation for the care of the skin and is classifiable under heading No.33.04 even if it contains subsidiary pharmaceutical or antiseptic constituents or is held out as having subsidiary curative or prophylactic value.

Department's contention that the product (Ayurvedic/Herbal hair oil) being made from time tested Indian herbs and having curative value is classifiable as an Ayurvedic formulation, is not acceptable to the Audit."

In the aforesaid para, the Audit has pointed out instances of misclassification of products manufactured by the assessees in Cochin, Patna, Chennai, and Calcutta-II Central Excise Commissionerates. The details regarding the assessees, their products and short levy pointed out and Ministry's response thereto are given in the following chart.

INSTANCES OF MIS-CLASSIFICATION IN RESPECT OF HERBAL HAIR OIL/PRICKLY HEAT POWDER AS POINTED OUT IN AUDIT PARA NO. 1.02 (4) (iii) (a) & (b) OF C&AG'S REPORT ENDED ON 31.3.95

Sl. No.	Commissio-Nerate	Name of Manufacturer	Name of Product	Tariff Classi-Fication Claimed by The facturer	Rate of Duty Claimed	Tariff Classi-Fication As per Audit	Rate of Duty Applicable As per Audit	Short levy Pointed out By the audit	
1.	Cochin	M/s. Arshik Herbal Remedies(I) Ltd. Trivandrum	Anoop Herbal Hair Oil	3003.30	"Nil" upto 28.2.94 & 210% from 1.3.94 onwards	3305.90	50% Adv.	Short levy of Rs.162.15 lakhs from 1.4.93 to 1.3.95	Classification is still being done under Sub. Heading No.3003.30 as Sidha medicine. However, demand-cum-SCNs being issued to safeguard the revenue
2.	Patna	Homeo Impex (I) Pvt. Ltd.	BOROCALANDULA Prickly Heat Powder	3003	(i)	3304.00	70% for 93-94 & 50% for 94-95	Shorty levy of Rs.36.80 lakhs	Audit objection is admitted. Demand-cum SCN are being adjudicated
		M/s. Banphool Ayurved Bhyawan(P) Ltd., Patna	Banphool Cool Ayurvedic Hair Oil	3003.30	"Nil" upto 28.2.94 and 10% from 1.3.94 onwards	3305.10	30%	Short Levy of Rs.63.24 lakhs during 1993-94 lakhs during 1993-94 and 1994-95	Audit objection is admitted. Department's appeal against approval of C/L as P or P medicine under Sub. Heading 3003.30 is pending before CCE(A)
3.	Cal.II	M/s. Sharma Chemical (Sister Unit)	-do-	3003.30	-do-	3305.10	30%	Audit's objection is admitted. AC's order No.57/DKN/92 dated 15.12.92 classifying Banphool Oil under 3003.30 has been appealed against before CCE (Appeal).	
4.	Chennai	M/s.Tamil Nadu Medicinal Plant Farms & Herbal Medicine Corpn.	Perfumed Hair Oil	3003.30	10%	3305.10	30%	Short levy of Rs.8.94 lakhs during the period from 1.4.92 to 28.2.94.	Classification is still being made under 3003.30 as Sidha medicine. However demand-cu-SCNs are being issued to safeguard the revenue.

49. Asked whether the above irregularities were still persisting, the Ministry of Finance in a note stated:

Sl. No.	Commissionerate	Product	Presently being classified	Efforts if any made to safeguard revenue
1.	Cochin	Anoop Ayurvedic/ Herbal Hair oil	Under sub-heading No. 3003.30 as Sidha medicine	Show Cause notices are being issued from time to time
2.	Chennai	TAMPCO Herbal Hair Tonic	Under Sub-heading No.3003.30 as Sidha medicine	-do-
3.	Patna a)	Banphool Ayurvedic Oil	Under Sub-heading No.3305.10 as Cosmetic	No irregularity
	b)	Borocalendula Prickly heat powder	Under Sub-heading No.3304.00 as Cosmetic	-do-
4.	Calcutta-II	Banphool Ayurvedic Oil	Under Sub-heading No.3305.10 as Cosmetic	-do-

"The products namely Anoop Ayurvedic/Herbal hair oil and tampco Harbal hair Tonic are still being classified as Sidha medicine in pursuance of Board's instructions contained in its letter F.No.103/10/89-CX.3 dated 9.1.90 wherein it was clarified that if a preparation was made out of drugs mentioned in Sidha Books and no flavour from out-side was added then such preparation may be treated as Sidha Medicine. This view was supported by drug Controller of India and D.G.H.S. in the Ministry of Health & Family Welfare."

50. On being asked as to whether the Ministry of Finance/Board examined the above referred cases of misclassification and issued instruction to the field formations for correct classification, the Ministry of Finance stated :

"Out of the above referred cases of misclassification only in one case i.e. Tampco Herbal Hair Tonic the classification angle was examined by the Board in consultation with Drug Controller of India and Director General of Health Services. And as such clarification was issued **vide** Ministry's instructions No.103/10/89-CX.3 dated 9.1.1990 stating that if the preparation is made out of drugs mentioned in Sidha

Books and no flavour from outside is added, then it may be treated as a Sidha medicine subject to their fulfillment of provisions of the Drugs and Cosmetics Act and Rules.

Other cases of misclassification as referred to in the Audit Para 1.02(4)(iii)(a) & (b) of the C&AG's Report for the year ended 31 March, 1995 were not specifically examined by the Ministry of Finance/Board. However, general guidelines have been issued from time to time clarifying there under the classification of Ayurvedic products/medicines."

50. The following revisions effected on the question of classification of Lal Dant Manjan for the purpose of levy of central excise duty were brought to the notice of the representatives of Ministry of Finance:

	Letter No. & Date	**Classification**
(i)	103/14/88-CX3 Dated 12.5.89	Chapter 30
(ii)	103/10/90-CX3 Dated 10.4.91	Chapter 33
(iii)	-do- Dated 25.9.91	Chapter 30
(iv)	103/2/96-CX3 Dated 31.10.96	Chapter 33
(v)	-do- Dated 28.5.97	Chapter 30
(vi)	102/6/97-CX3 Dated 10.9.97	Chapter 33

52. The Committee drew the attention of Ministry of Finance to the case of Shree Baidyanath Ayurvedic Products Pvt. Ltd. Vs. Collector of Central Excise [1991 (51) ELT (T)] where CEGAT had held that Ayurvedic products like "Dant Manjan" which were able to prevent dental decay pyorrhoea, alveerine, toothache etc. were not ayurvedic medicines but a product for dental hygiene only and enquired whether in the light of CEGAT decision the Board had revised their instructions dated 12 May 1989 to the effect that Vicco Vajardanti (powder and Paste) and Vicco Turmeric Cream manufactured by Vicco Laboratories should be classified as Ayurvedic medicaments? The Ministry of Finance in a note stated :

"The Board has examined the question of classification of Vicco Vajardanti Paste/Powder and Vicco Turmeric Cream manufactured by M/s. Vicco Laboratories and **vide** letter F.No.103/2/96-CX.3 dated 31.10.96 the Board has withdrawn the instructions contained in letter dated 12.5.89 classifying the said products as ayurvedic medicines. The concerned Commissioners have been requested to decide the classification issue keeping, inter-alia, in view the Supreme Court

judgement dated 30.3.95 in the case of M/s. Shree Baidyanath Ayurved Bhavan Ltd. (1996) (83) ELT 492 (SC).

However, the classification matter of `Dant Manjan Lal' manufactured by Shree Baidyanath Bhavan Ltd. has been examined by the Board after receipt of the CEGAT's decision in the case of Shree Baidyanath Bhavan Ltd. Vs. CCE, Indore vide their order No.22/91-CE dated 8.1.91. The Board, in their, instructions issued from F.No.103/10/90-CX.3 dated 10.4.91 (Circular No.11/91-CX.3) accepted the decision of the tribunal in the case of Dant Manjan Lal whereunder it has been held that the more appropriate classification of the impugned goods would be under Chapter 33 of the schedule to the CETA, 1985. Board asked the field formations to decide all pending assessments in the light of the Tribunal's judgement refer to Supra.

Govt. after examination of the representation dated 3rd August, 1991 of Shree Baidyanath Bhawan Ltd. and another representation (undated) addressed to the Hon'ble Minister of State for Finance issued revised instructions dated 25.9.91 from F.No.103/10/90-CX.3 whereunder the said Dant manjan Lal manufactured by Shree Baidyanath Bhawan Ltd. was to be classified as Ayurvedic medicine …… .

However, …… Supreme Court in its judgement dated 30.3.95 has held that `Dant Manjan Lal' (tooth powder) is not a medicine classifiable as medicine (Ayurvedic), hence not eligible for exemption under Notification No.62/78-CE.

Based on the above judgement Board issued instructions vide F.No.103/2/96-CX.3 dated 31.10.96 withdrawing instructions contained in letter F.No.103/10/90-CX.3 dated 12.5.89 and 25.9.91."

53. The Committee wanted to know the precise circumstances leading to the issue of the instructions dated 25 September, 1991 and the manner and the level at which the decision was taken to classify it as ayurvedic medicine. The Secretary (Revenue) stated during evidence that at the level of the then Minister of State it was decided to change the classification.

54. The Committee observed that there was a loss of revenue and no precautions were taken by the Government to safeguard the revenue. The Secretary (R) stated during evidence:

"It is a fact that after September 91 order of the Board no further precautions were taken."

55. He further elaborated :

"From September 1991 and October 96 order issued by Supreme Court there was no bond or any other legal paper."

56. When asked about the action contemplated against concerned officers for the lapses, the Ministry of Finance stated:

"As regards the fixation of responsibility for revenue loss w.e.f. 25.9.91, it may be mentioned that these instructions were issued by the Govt. superceding Boards instructions dated 10.4.91 on the representation made by Shree Baidyanath Ayurved Bhawan. PAC may kindly consider further action in the matter."

57. The precise revenue implication of the decisions of CEGAT and Supreme Court were explained by the Ministry of Finance in a note as follows:

"Following is the revenue implications due to nonacceptance of the decision of the CEGAT by the Govt. in case of CCE Indore Vs. M/s. Baidyanath Ayurved Bhawan dated 8.1.91 and delay in communication of the judgement of Hon'ble Supreme Court dated 30.3.95 in case of M/s. Baidyanath Ayurved Bhawan to the field formations.

S.No.	Commissionesrate	Amount in Lacs	Remarks
1.	Kanpur	13.75	
2.	Patna	179.35	However, there is no loss of revenue.
3	Allahabad	18.91	
4.	Indore-II	40.74	
5.	Nagpur	152.70	
6.	Calcutta-II	58.14	However, action to safeguard revenue has been taken.

58. On being asked as to what specific action was taken by the Collectors/Commissioners concerned to protect revenue subsequent to the decision of the CEGAT and the Supreme Court, the Ministry in a note furnished the following information:

Sl. No.	Commissionerate	Name of the Assessee	Action Taken
1.	Kanpur	M/s. Baidya Nath Ayurvedic Bhawan Ltd.	Three Show Cause cum demands notices viz.V(15) 113-Demand/96 Dated 5.5.96 for amount of Rs.1,75,541/-,V(15)206 Dem. 96/238-85 dated 13.11.96 for amount of Rs.2,57,732/- and 9-SBBBL/Manjan/R-III/ 96/274 dated 23.4.97 for Rs.1,16,286/- have been issued. It is further stated that out of the above 3 SCNs, the first two have already been confirmed and the 3rd one is pending adjudication. The party have paid duty during the period

			7.1.97 to 5.6.97. The party has, however, filed appeal before CCE (A) Allahabad. The CCE(A) **vide** stay order No.7-C/stay/KNP-I/97 dated 1.8.97 granted stay for recovery proceedings.
2.	Patna	M/s. Baidyanath Ayurvedic Bhawan Ltd. Patna/Hajipur	It has been reported that subsequent to the decisions of CEGAT/Supreme Court, five SCNs for amount of Rs.179.35 lakhs covering period upto 23.9.97 have been issued and got confirmed. Another SCN-cum demand for the subsequent period is under progress.
3.	Allahabad	M/s. Baidyanath Ayurvedic Bhawan Ltd. Patna/Satharia/Jampur	It has been reported that after the pronouncement of CEGAT judgement dated 8.1.91, a seizure had been effected against the party on 26.2.91 and an offence case has also been made for the period July,'89 to 25.2.91 involving Central Excise duty of Rs. 9.43 lakh. However, the case was dropped by the then Collector of Central Excise, Allahabad vide his order dated 25.9.91. After the judgement of Supreme Court dated 30.3.95, the Board vide its Circular No.103/7/96-CX.3 dated 31.10.96 withdrew its aforesaid circular dated 25.9.91 and directed to classify the product under Chapter 33. Therefore, the demand was raised covering the period from August, 1996 to 26.12.96 which is under adjudication.

4.	Indore-II	M/s. Shree Baidyanath Ayurvedic Bhavan Ltd. Chindwara	It has been reported that the Range Officer issued Show Cause - cum - Demand Notice covering the period from November, 1989 to October, 1990 demanding duty of Rs.12.84 lakhs on `Dant Manjan Lal' under Chapter 33 and the same have been confirmed vide A.C.'s order dated 13.5.91. No demands were issued for period from November, 1990 to 24.6.91 as the factory was closed. From 25.9.91 onwards the product was classified under chapter 30. Further, the Hon'ble Supreme Court vide its judgement dated 30.3.95 in case of M/s. Shree Baidyanath Ayurved Bhavan Ltd. Vs. CCE, Nagpur upheld the CEGAT judgement classifying the product `Dant Manjan Lal' under Chapter 33. Subsequently, the Range Officer had issued summons to the Party calling for details of productions and clearance of the said item (Dant Manjan Lal). However, the matter was not pursued in view of the Board's letter dt. 28.5.97 issued from F.No. 102/2/96.CX.3.
5.	Nagpur	M/s.Shri Baidyanath Ayurvedic Bhavan Ltd.	Subsequent to the CEGAT judgement dated 8.1.91, the Board has issued instructions **vide** F.No.103/ 10/90-CX.3 dated 25.9.91 wherein they have directed that the product will be classified as Ayurvedic Medicine. Hence the product was classified as Ayurvedic Medicine.

			However, in view of the Supreme Court's decision in the case of M/s. Baidyanath Ayurvedic Bhavan Ltd. Vs. CCE, Nagpur, two Show-cause Notices have been issued classifying the goods under sub-heading No.3306.10, viz.SCN/OML/Baidyanath/R-V 1996-97 dated 22.5.97 involving duty of Rs.10,84,794/ for the period 3/97 to 8/97.
6.	Calcutta-II	M/s. Baidyanath Ayurvedic Bhavan Ltd. Banaras Road Howrah SCNs	It has been stated that to, safeguard the revenue 3 SCNs for Rs.67.75 lakhs covering the period from 1-4-92 to 7/97 have been issued. Details of the said SCNs are : i) V(30)15(95)/CE/Col.I I/ADj/97/258 dated 10.6.97 for period 1.4.92 to 31.7.96 involving duty amount of Rs. 52,82,298/- ii) I.R. No.233 dt. 26.6.97 for the period 1.8.96 to 1/97 for duty amount Rs.8,64,642/-. iii) I.R.No.692 dt. 7.8.97 for period 2/97 to 7/97 for duty amount of Rs.6,27,953/- It is further reported that in respect of the above SCN dt. 10.6.97 personal hearing has already been fixed for 10.2.98. Thus adequate action has already been initiated to protect the revenue subsequent to the

decisions of the CEGAT and
the Hon'ble Supreme Court.

59. It was observed that subsequent to the decision of the Supreme Court on 30 March 1995 in the case of M/s Baidyanath Ayurved Bhawan that Dant Manjan Lal was not a medicine, instructions were issued on 31 March 1996 to the field formation to this effect. Asked about the reasons for delay of about one year in issuing instructions, the Chairman, CBEC stated during evidence:

> "I have to concede that a certified copy of the Supreme Court order never reached the Board for almost a year. The Central Law Agency is supposed to compile it and send it to us."

60. The Secretary (Revenue) further elaborated during evidence as follows :

> ".....The date of judgement was 30 March 1995. Judgement was reported in ELT in 1996, certified copy was not received till March 1996."

61. When asked as to who was responsible for supplying a copy of the judgement to the Department the Secretary (Revenue) during evidence named Central Law Agency.

62. Asked whether they had their own legal cell, the Secretary (Revenue) stated during evidence:

> "No Sir, we do not have. We have a legal cell but the problem is that we have to go to the Central Law Agency. The quality of people who are representing revenue related cases in the High Courts and the Supreme Court is not good. In the last four months, the Chief Justice has made very adverse comments on their quality in regard to two-three cases. He has said, `you better have a section here in which you at least maintain a panel. Give that panel for vetting to Attorney-General or to the Law Ministry. Out of this panel, please select, because we want better quality of people to represent the Revenue Department cases."

63. He further stated:

> "In fact, we are going to have a meeting in this regard. Nobody likes to part with jurisdiction very easily. But we are planning to have a meeting in the next few days with the Law Minister and the Finance Minister with the proposal that we should have a panel."

64. When asked to furnish the latest position in this regard, the Ministry of Finance in a note stated:

> "…….At present, the panels for lawyers to defend cases in various High Courts is constituted by the Ministry of Law without prior consultation with the jurisdictional Commissioners of Customs and Central Excise. Even amongst the impaneled counsels, the Department generally has no say in deciding on a particular counsel to whom the brief can be handed over. It is once again the Law Ministry which takes the decision on this issue. Ministry of Law has also appointed Sr. Law Officers i.e. Additional Solicitor General (ASGs) at Delhi, Mumbai, Chennai and Calcutta Exclusively for High Court cases.

Having regard to complexity of the Customs and the Central Excise Law and Procedures and to the huge revenue involved in litigation matters in the Customs and Central Excise Department, a need has been felt to make certain modifications in the existing procedure of empanelment of lawyers and advocates and standing counsels. During a meeting taken by the Hon'ble Finance Minister with senior officers of the Department from Chennai, Bangalore and Cochin at Chennai on 14.7.97, the Finance Minister had directed that a list of advocates of proven calibre, willing to handle Customs and Central Excise cases should be prepared and sent to the Ministry of Law for approving these names as Central Revenue had indicated to the Public Accounts Committee in the oral evidence held on 26.9.97 that a separate panel of lawyers for defending revenue cases will be prepared.

As a follow up action, the Central Board of Excise and Customs has sent a proposal to the Ministry of Law seeking their approval for a revised procedure for engagement of standing counsels and other panel counsels for various High Courts and Tribunals. This proposal is similar to a procedure already in operation with the Central Board of Direct Taxes.

It has been proposed that the Chief Commissioners of various zones in the country will prepare a panel of suitable lawyers in consultation with respective Chief Justices of various High Courts and forward the same to the Central Board of Excise and Customs, which in turn will approach the Ministry of Law for approval of the panel received from the field formations. Once approved, the panel will be used by the Chief Commissioners and Commissioners to allocatecases to the lawyers on the approved panel without reference to the Ministry of Law.

Such a proposal will also contain the terms and conditions of engagement and will seek appointment of the Counsels initially for a period of one year. The Department's proposal sent to the Ministry of Law also contain a provision where the performance of the panel counsels is constantly reviewed by the Chief Commissioners and such an appraisal is taken into account at the time of seeking extension of term or re-appointment of a lawyer.

The aforesaid proposal has been sent to the Ministry of Law on 23.9.97 and their approval is awaited.

The Honourable Supreme Court has had occasion to observe that the Union of India should entrust sensitive cases involving important questions of law or high revenue stakes to counsels with proven knowledge and experience in this branch of Law. Accordingly, the Law Secretary has been recently requested by the Secretary (Revenue) to ensure that the Supreme Court's observations are complied with in the matter of assigning of revenue cases to experienced and knowledgeable advocates and law officers. Further, the Law Secretary has also been apprised of the delays involved in filing of appeals or special leave petitions in the Supreme Court on account of the existing lengthy procedure of processing of cases and assigning them to the

drafting counsels. Accordingly, Central Agency Section, Ministry of Law requires streamlining so as to make its working more effective and smooth.

It is proposed to request the Honorable Finance Minister to call for a meeting with the Minister of State for Law and Justice to discuss and settle theaforesaid issues concerning appointment of competent Government Counsels for important cases in the Supreme Court as also for streamlining of the working of the Central Agency section of the Ministry of Law."

65. The Committee note that in the instructions issued on 28 May 1997, classifying Dant Manjan Lal as Ayurvedic medicine, the Board had maintained that Supreme Court's decision of March 1995 was not relevant to the issue. On being asked whether legal opinion was obtained before issuing these instructions, the Ministry of Finance in a note stated:

"Keeping in view the changes i.e. issue of notification No.75/94-CE dated 23.3.1994 and creation of Separate sub heading No.3003.31 in the 1996-97 Budget read with Board Circular No.B-30/1/94-TRUdated 29.3.1994 and Circular No.196/30/96-CX dated 3.4.1996 issued by TRU and the fact that Supreme Court judgement in case of M/s. Baidyanath Ayurved Bhawan was in the context of the erstwhile Tariff, the Board felt that in view of the sketchy changes in Heading 3003 the said judgement was not relevant. As such, in view of the Tariff Heading the Board did not consider it necessary to obtain the opinion of the Ministry of Law & Justice."

(c) <u>Classification of Cosmetic goods as Ayurvedic Medicaments manufactured by M/s Shahnaz Ayurvedics</u>

66. During the period the subject "different classification for similar products" was under examination by the Committee it was reported in the press (on 24 September, 1999) that Central Excise Department had issued demand-cum-show cause notice to herbal beautician Shahnaz Hussain for alleged evasion of Central Excise Duty by wrongfully classifying products as Ayurvedic medicaments instead of cosmetics. On being asked to furnish full facts of the case, the Ministry of Finance in a note stated:

"Ms. Shahnaz Hussain, a well known herbal beautician, at her factory premises viz. M/s. Shahnaz Herbals, C-40, DDA Sheds, Okhla Industrial Area, Phase-I, New Delhi, was found engaged in the manufacture of a large range of products which were known as beauty or make-up preparations or preparations for the care of skin/preparation for use on hair and preparations for pre-shave or after-shave use and preparation for dental hygiene etc. under the guise of Ayurvedic/Herbal drugs/medicines. A Central Excise Licence (now called registration) for manufacturing products of Chapter 33 was also obtained for the above manufacturing unit. However, in respect of her another unit viz. M/s. Shahnaz Ayurvedics, New Delhi a declaration for the manufacture of Patent and Proprietary Medicines/drugs had been filed. Both these units were alleged to be the proprietary concerns of Ms. Shahnaz Hussain.

The products manufactured by Ms. Shahnaz Hussain were meant for the care of skin and also for removal of skin blemishes and disorders and the samewere used as home skin care programme for beautification and smoothening of skin. These products were not sold on the prescription of any doctor. Instead they were sold and used at their

own franchise clinics only and also through I.T.D.C. outlets, emporiums and duty free shops at airports. Thus, these products were popularly known in common parlance as "cosmetics", in the market and could not be classified as drugs/medicines.

Accordingly, a show cause notice was issued to the above named assessee on 7.3.1988 for allegedly mis-classifying the subject products by them. The case was adjudicated by the then Additional Collector of Central Excise, New Delhi vide order-in-original No.51/89 dated 29.8.1989 issued from C.No.V(3304)15/5-CE/88/3060 dated 1.9.1989 wherein the product "SHAH-SMILE" was classified under Heading No.33.06 as "cosmetics" and rest of all products manufactured by the assessee were accepted to be classified under Chapter 30 as P.P. medicines/Ayurvedic drugs." Charges of fraud, wilful suppression and contravention of Central Excise Rules with an intent to evade payment of duty were also dropped and no penalty was imposed by the Adjudicating authority.

Recently, based on the investigations conducted by Director General Anti Evasion (DGAE), the following SCNs have been issued to M/s. Shahnaz Ayurvedic, New Delhi as well as Noida, calling upon them to show cause as to why their product should not be classifiable as cosmetics under Chapter 33 and as to why differential duty should not be demanded from them.

a) M/s. SHAHNAZ AYURVEDIC, NEW DELHI

SL. NO	SCN DATE	PERIOD COVERED	AMOUNT OF DUTY INVOLVED
1.	28.2.97	1.2.92 to 30.9.96	Rs.6,51,43,965.88
2.	1.5.97	Oct. 96 to Dec 96	Rs. 26,82,838.00

b) M/S SHAHNAZ AYURVEDIC, NOIDA (MEERUT COMMISSIONERATE).

SL. NO.	DATE OF ISSUE OF SCN.	ISSUED BY	PERIOD INVOLVED	AMOUNT
1.	1.4.97	CCE, Meerut	1.3.92 to 31.3.96	Rs.7,50,16,506.67
2.	14.7.97	CCE, Meerut	1.4.96 to 31.10.96	Rs.1,30,25,975.00
3.	9.6.97	AC,CE,Div.-III,	1.11.96	Rs. 43,06,188.85

		Noida	to 31.12.96	
4.	24.7.97	AC,CE,Div.-III, Noida	1.1.97 to 28.2.97	Rs. 49,07,454.25

The adjudications of all the aforesaid Show Cause Notices are pending."

67. In reply to a question whether the adjudicating order dated 29.8.89 passed by the Additional Collector of Central Excise, New Delhi was implemented, the Ministry of Finance in a note stated that the Copy of the adjudication order No.51/89 dated 29.8.1989 passed by Sh. K.S. Sivaraman, Addl. Commissioner was not received.

68. Asked whether the adjudicating order was as per the practice, endorsed to all concerned, the Ministry of Finance in a note stated that the dispatch register indicates that the copies of the said order were endorsed only to the on 29.8.89 and to the Secretary, CBEC on 6.9.89. The Ministry further stated that as regards the endorsement of the copy of adjudication to all concerned, a categorical report was being submitted separately. The same is yet to be received by the Committee.

69. Asked whether the demand was confirmed **vide** the orders of the Assistant Collector of Central Excise MODII New Delhi (File NO.V(30)/15/4/88/Offence) dated 26 November 1991 and (File C.No.V(Misc.)/15/Gen/91/45) dated 6 January, 1992, the Ministry of Finance in a note stated:

> ".....It has been reported by the Chief Commissioner, Central Excise, Delhi that since the file is 9 years old it is not
> traceable. However, the matter is still under examination and further reply would follow."

70. No further reply has so far been received.

71. During evidence the Secretary(R) admitted, on being confronted that the file was missing. On being asked that in such a state of affairs, what do the PAC conclude, the Secretary(R) replied:

> "I do not think that you can come to a happy conclusion".

72. The Committee enquired whether it was a fact that the duty imposed was initially confirmed and later dropped. The Ministry of Finance stated that the matter was under examination.

73. In a communication dated 2 November, 1999, the Ministry of Finance stated as follows:-

> "So far as the controversy about initially confirming the duty and later on dropping the same, is concerned, a report was sought from the Commissionerate. It has been observed that the

duty was confirmed only on one item i.e. Shahsmile which was classified as Cosmetic while all the other products were classified either as P.P. Medicines or as Ayurvedic Drugs. The penalty earlier proposed in the Show Cause Notice was dropped by the Adjudicating Authority in view of the findings explained in the said Order.

The information received in this regard mentions that as the clearances of Cosmetic products of M/S Shahnaz, including the clearance of Shahsmile were within the exemption limits, no duty was recovered for the period 1986-87, 1987-88, 1988-89 and 1989-90. As such although the product Shahsmile was classified as Cosmetic, no duty was payable as the production of the same was within the limit exempted from Excise duty. Hence, the question of dropping the demand did not arise. It appears that two contradictory letters in respect of demand in this case got issued because of some misunderstanding."

74. In reply to a query of the Committee as to what was the total revenue loss in this case from 30 August, 1989 to 1992, the Ministry of Finance in a note stated:

"The revenue loss for the period 30.8.89 to 1992 assuming the issue was incorrectly decided **vide** said adjudication order of Addl. Collector as the order has not been reviewed is Rs.4,27,50,461 in respect of Shahnaz Ayurvedic and Rs.41,17,186 in respect of Ms. Shahnaz Herbals".

75. On being asked whether it was not a lapse on the part of the collector concerned not to review the decision in terms of the Boards Instructions issued under file No.390/12/84-AU dated 20 July 1988, the Ministry of Finance in a note stated:

"In terms of Board's instructions contained in letter F.NO.390/12/84-AU dated 20.7.88 the order dated 29.8.89 of Addl. Collector Central Excise was required to be reviewed by the then Collector of Central Excise. At the relevant time Shri Tarun Roy, the then Principal Collector of Customs and Central Excise held the charge of Collector of Customs and Central Excise. But the Order was not reviewed by the Principal Collector, nor the same was sent to Board Office for review, as per Commissioner (Review) letter vide C.NO.390/54/97-JC(BMB) dated 23.9.97."

76. In a post evidence communication dated 2 November, 1999, the Ministry of Finance have stated as follows:-

"A perusal of file No.V(3304)15/5-CE/88 of the Office of the Collector of Customs and Central Excise, Delhi has revealed that Shri K.S. Sivaraman, the then Additional Collector who adjudicated the matter, marked the file on 30.8.1989 to the then Principal Collector Shri Tarun Roy. It was suggested that the Order may be endorsed to the Board for their information. The proposed action was approved by the Principal Collector on 30.8.1989. It has also been reported by the Commissionerate that the Order was endorsed to the Party as well as to the Central Board of Excise and Customs.

As the Principal Collector had seen the file and the Order passed by Shri Sivaraman, and had approved the same, it could be said that he was in agreement with the views of the Additional Collector. Thus the direction of the Board regarding the scrutiny of adjudication orders by the Collector was duly complied with."

77. Keeping in view the manner in which the case was handled by the Department, the Committee enquired whether the Ministry of Finance consider a thorough investigation of the same by an appropriate independent agency to fix responsibility for the lapses? The Ministry in a note stated that "the Board had already proposed appointing of Addl. Secretary (Admn.), Department of Revenue to investigate the case of Shahnaz Hussain and fix responsibility in the matter. However, the matter is under examination".

78. The Ministry of Finance have in a latest communication dated 2.11.1999, enclosing a copy of the report of the Investigation copy reproduced and marked Annexure-II to the Report have stated that the question of fixing up of responsibility in view of the findings contained in the Report does not arise as there was no loss to the exchequer.

79. The Committee enquired as to what is the total quantity manufactured/cleared during 1994-95 to 1996-97 by the said manufacturer and the Central Excise duty paid on classification as Ayurvedic medicine vis-a-vis the duty that would be payable if classified as cosmetics. The Ministry of Finance furnished the following information:

YEAR	PRODUCTION	CLEARANCES	DUTY PAID AS AYURVEDIC MEDICINES (2 10% UPTO 2/97 AND 8% IN 3/97)	DUTY PAYABLE IF PRODUCTS ARE CLASSIFIED AS COSMETICS (50% UPTO 2/95 40% UPTO 2/97 30% IN 3/97	DIFFERENCE
1.	2.	3.	4.	5.	6.
	(Nos.)	(Nos.)	(Rs. In lakhs)	(Rs. in lakhs)	(Rs. in lakhs)
1994-95	1692743	1734715	66.64	326.01	259.37
1995-96	1835584	2260445	79.91	319.66	239.75
1996-97	1449173	1340460	93.07	359.36	266.29
TOTAL	4977500	5335620	239.62	1005.03	765.41

80. In this connection, the Committee's attention was drawn to press reports which appeared in a section of the press on 24 September 1997 to the effect that the Delhi High Court on 23 September 1997 dismissed a petition by Shahnaz Ayurvedics challenging the Central Excise

authority's decision to classify its products as cosmetics and toiletries and not as Ayurvedic medicines thus making it liable for levy of Central Excise duty.

81. Asked as to what was the exact decision of the Delhi High Court, the Ministry of Finance in a note stated:

> "The decision of the Delhi High Court dated 18.9.1997 is as follows:
>
> > This is a petition filed against order No.104/1997 dated 11.9.97 passed by the Assistant Commissioner, MOD-II, New Delhi under rule 173-B of the Centra Excise Rules. It is not disputed that the order is appealable. The Ld. Standing Counsel for the respondent having made appearance on advance notice, made a statement that in the event of an appeal being filed by the petitioner, the Commissioner (Appeals) will dispose of the appeal within a period of one week from the date of filing of the same. In view of that statement Ld. Counsel for the petitioner seeks to withdraw the petition reserving liberty to file the appeal. Dismissed as withdrawn with liberty, as prayed."

82. The effect of the judgement of Delhi High Court was explained by Ministry of Finance in a note thus:

> "The effect of the judgement in respect of the products manufactured by the assessee in M/s Shahnaz Ayurvedics Ltd. is that they are liable to pay Central Excise Duty (presently @30%) in terms of the order of Assistant Commissioner, order in Original No.104/97 dated 11.9.97 who has classified their products under Chapter 33 of CETA'85 as products for "care of the skin".

83. The Committee enquired whether the Departmental Authorities had taken adequate steps to protect the revenue? The Ministry of Finance in a note stated:

> "Based on the investigation of Director General Anti Evasion (DGAE) demand cum show cause notices were issued to M/s Shahnaz Ayurvedic w.e.f. February 1992 raising the demand of duty under Section 11A of the Central Excise Act for the last five years. However, no demand was raised prior to it. For the present the assessee is paying the leviable Central Excise Duty at the higher rate of classifying the products as "preparation for care of skin" classifiable under Chapter 33 of CETA."

84. Asked about the present status of the case, the Ministry of Finance stated that the assessee has filed an appeal against the adjudication order dated 11.9.97 passed by the Assistant Commissioner before Commissioner (Appeal) which is still pending decision.

OBSERVATIONS/RECOMMENDATIONS

85. The matter of classification of pharmaceutical products classifiable for the purpose of levy of central excise duty under the Central Excise Tariff Act, 1985 had engaged the attention of Public Accounts Committee earlier also. The Committee in their 24th and 68th Reports (10th Lok Sabha) had recommended inter alia that the Ministry of Finance should ensure rational classification of Prickly Heat Powder keeping in view the revenue interest of the Government and also the general usage of the product and that uniformity should be maintained in the classification of similar excisable products. In pursuance of the recommendations of the earlier Committee the Ministry of Finance issued order dated 19 September, 1994 for classification of three brands of Prickly Heat Powder viz., "Nycil", "Shower to Shower" and "Johnson" under Chapter 33 of Central Excise Tariff Act 1985 as cosmetics. The Audit highlighted a case wherein a decision taken and implemented in pursuance of the recommendations of the Public Accounts Committee was reversed within a period of three months. The Committee note that the Central Board of Excise and Customs (CBEC) again revised their decision on 28 December, 1994 reclassifying the Nycil brand of prickly heat powder as medicament. The Audit has also pointed out that the difference between duty collected under Chapter 30 and the notional duty under heading 33.04 worked out to Rs.69.08 crore for the period from October 1987 to September 1994 in two Commissionerates alone.

86. At the instance of the Public Accounts Committee, the Ministry of Finance had sought the opinion of Customs Cooperation Council (CCC) Brussels on 10 January, 1992. The CCC, Brussels vide their communication dated 14 January, 1992 opined that prickly heat powder could be classified as cosmetics in the line of "Dakosan" prickly heat powder. The Ministry of Finance did not accept the recommendation of CCC, Brussels, ignoring the revenue interest and within a week referred the matter again to CCC, Brussels for opinion on 22 January, 1992. The Harmonised System Committees (HSC) decision was communicated to the Ministry vide CCC's letter dated 26 October, 1992 showing classification of "Nycil" under heading 30.04 and that of "Shower to Shower" and "Johnson" under heading 33.04. HSC's recommendations were accepted by the Board. The Committee were informed during evidence that the second reference to the HSC was made on the basis of a representation. Asked to supply a copy of the representation, the Ministry simply stated subsequently that no such representation was received. The Committee take a serious exception to the factually incorrect deposition made by the representative of the Ministry of Finance. The Committee would like the Government to ensure that its representatives deposing before the Committee come fully prepared and do not venture a reply which is later denied or cannot be substantiated factually.

87. The Committee note that the Harmonised System Committee(HSC) is a Committee established under the International Convention on the Harmonised Committee restrictions system. India is a signatory to this Convention. The Committee is composed of representatives from each of the contracting parties. When asked whether we have any Indian representative in HSC, the Secretary (Revenue) stated during evidence that whenever an issue comes up for consideration we send two officers to represent. But

the Committee find that when the issue relating to classification of nycil prickly heat powder was considered by HSC, nobody from CBEC attended the meeting of HSC held in October, 1992. This appears to the Committee a serious lapse on the part of the Department and they should like to be apprised of the reason thereof.

88. According to audit paragraph the difference between duty collected under Chapter 30 and the notional duty under heading 33.04 worked out to Rs.69.08 for the period from October 1987 to September 1994 in two Commissionerates. In their reply, the Ministry quantified the notional loss as Rs.55.35 crores consequent upon classification of Nycil Prickly heat powder as medicament under chapter 30 till 1995-96. The Committee find that the revenue implications arising out of reclassification of Nycil powder as medicament were not considered apparently while re-examining the matter and issuing the order dated 28 December 1994. The Ministry stated categorically in reply to a question that correct classification of the product was more important rather than its revenue implication. On the contrary, a well considered classification based on the recommendation of earlier PAC and expert opinion of Chief Chemist and Drug Controller of India was set aside and changed, to the detriment of revenue, on receipt of individual representation. The speed and the manner in which the Nycil powder was reclassified as medicament fuels strong suspicion that rather than the consideration of correct classification of the product, as claimed by the Ministry, reclassification was done for some extraneous consideration. The role of the then Secretary (R) in the entire episode is far from edifying. The Ministry would do well to refer to the recommendation of the PAC contained in their 155 Report (7th Lok Sabha) to the effect that it should not be left to a Member to set aside an order of the full Board particularly where such order has adverse revenue implications which was accepted by the Board on 28 October, 1983.

89. According to the Ministry of Finance six show-cause notices were issued in each of the Mumbai-II and Vadodra Commissionerates involving a Central Excise Duty of Rs.156.6 lakhs and 3177.1 lakhs respectively. None of the show cause notices were decided during the period 19.9.1994 to 28.12.1994 and the differential duty involved in respect of clearances made during the period 28 December, 1994 till date classifying prickly heat powder as cosmetic and not as medicament was Rs.8.65 crores in Vadodara Zone alone. The Committee are led to believe, keeping in view the tardy pace of disposal of cases by various statutory revenue authorities, that the realisation of legislative intent behind setting up such statutory authorities and tribunals remains a far cry. The Committee desire that the Ministry should make concerted efforts and devise suitable methodologies, including legislative amendments, if necessary, to realise the Central Excise dues with due despatch. They would like to be apprised of the steps taken or contemplated in this direction.

90. The Committee note that when Secretary(R)) had on 9 November 1994 directed the then Member(CX) to re-examine the issue in respect of Nycil prickly heat powder, the Member (CX) observed that they cannot apply different standards for similar product and CCC had not spelt out why the presence of chlorophensin would make a world of difference. When the Deputy Secretary in his note dated 16 November 1994 argued against reversing the decision of the Board, the Member (CX) had agreed with his views on 29 November 1994. The Committee note that Secretary(R), in total disregard of the views contained in the office note, made a proposal for review which was concurred in by the Finance Minister on 8 December 1994. Instead of placing the matter before the full Board for review, the Member (CX) submitted a note to the Secretary(Revenue) on 16 December

1994 stating that the draft order seeking to reverse the earlier decision of the Board issued in September 1994 classifying "Nycil" as cosmetics may kindly be seen before issue. Strangely, the policy reversal was not put up to Finance Minister. According to the Ministry, no Board meeting was held on classification of the impugned product during this period. The Committee note that the Finance Minister had only concurred in the proposal of Secretary(R) for review of the impugned decision. The Finance Secretary and the Member(CX) exhibited extraordinary haste to undo a well merited classification to the detriment of public revenue without even going through the formality of placing the matter before the Board for review. The Committee do not agree with the contention of the representatives of the Department that review necessarily means change. "Review" is a well-understood term implying re-examination which, after careful consideration, may or may not lead to change of a decision but review certainly does not, ipso facto, mean reversal or revision of a decision though an authority may revise its decision or uphold it depending upon the facts and circumstances placed before such authority for review. Further, the Committee are shocked to note that the Ministry, ignoring the dispassionate and objective opinion of the concerned Deputy Secretary, and the accepted recommendations of the PAC failed to act as a bullwark against unwarranted pressure/influence and proceeded post haste to change a well-merited classification. The Committee would like the matter to be examined de novo as to the circumstances which compelled the Ministry to circumvent the procedure laid down for review and fix responsibility for deliberate departure from the norms and to report back to the Committee in due course.

91. The Committee have also found that the Secretary (R) in his note dated 14 December 1994 had referred to the decision of the Gujarat and Andhra Pradesh High Courts classifying Nycil as a drug. According to the Ministry of Finance while considering the matter of classification of nycil, there was no indication in the file that the Board examined the judgements of the Hon'ble High Courts of Gujarat and Andhra Pradesh as referred to in Secretary (Revenue)'s note dated 14.12.1994. The Ministry have also stated that the decisions of the High Courts were in the context of Sales Tax Act and as such these judgements were not applicable in the context of Central Excise Act, 1944 since the parameters of levy and collection under the two acts are different. The Committee deplore that the judgements of the High Courts of Gujarat and Andhra Pradesh were quoted out of context and a decision was arrived at based on incontextual judicial pronouncements.

92. The Committee note that the Ministry did not accept the opinion of the Chief Chemist and Drug Controller of India given in July and September, 1994 respectively who favoured classification of the particular brand of prickly heat powder as cosmetics. Adducing reasons for not accepting the said opinion, the Ministry stated that only for the purposes of the Central Excise Law, the Drug controller had said that it was possible to treat prickly heat powder as cosmetic. As regards the opinion of Chief Chemist, the Ministry stated that the Chief Chemist in his note dated 20.7.1994 had given categorical finding that Nycil powder is not a drug. The Committee find that the Chief Chemist had suggested in July 1994 for a re-reference to the HSC regarding the classification of Nycil as medicament since their second recommendation obtained by the Ministry was not specific on several points. The Ministry stated that they did not consider the suggestion of Chief Chemist in view of the unanimous opinion of the HSC and hence did not make further reference to the Council. The Committee note that in reply to the first reference made to them, the CCC had categorised Nycil powder as "Cosmetic" and normally even by the admission of the Ministry the recommendations of such an international body are accepted but it is quite intriguing that the Ministry on re-reference, accepted only the latter

recommendations which was against the revenue interest of the country. When the Chief Chemist on 28 July, 1994 advised that the sample of the product should be referred again to CCC, the Ministry simply ignored his advice. When asked whether there is any medical evidence to show that Nycil prickly heat powder has been recommended by medical practitioners for any germicidal activity on the skin or as anti-fungal or anti-bacterial medicine, the representative of the Ministry evaded the question by saying, 'the Department does take note of it'. The view that Nycil powder merited classification as cosmetic stands reinforced by the subsequent judgement of CEGAT and the Supreme Court. The Committee would like the Ministry to devise a more scientific and stable system for properly classifying excisable goods so as to prevent classification from becoming a convenient source of personal gain to the detriment of Revenue. Also, the institutional as well as procedural safeguards available should be further strengthened to ward off extraneous pressures and strengthen the moral fabric of the Department.

93. Para 1.02(3(ii)(a)(b) of Audit Report No.4 of 1996 pointed out cases of misclassification of herbal hair oil, ayurvedic hair oil, perfumed hair oil and prickly heat powder as Ayurvedic/Sidha medicine instead of as cosmetics. The Board examined the misclassification angle only in the case of Tempco Hair Oil. The Committee observed that from 1989 to 1997, six revisions were effected on the question of classification of Lal Dant Manjan for the purpose of levy of Central excise duty from Chapter 30 to 33 and vice-versa. Consequent upon the decision of CEGAT in the case of Shree Baidyanath Bhavan Ltd. V CCE, Indore, the Board issued instructions dated 10.4.1991 classifying Dant Manjan Lal under Chapter 33 of the schedule to CETA 1985. Again on the basis of representation from Shri Baidyanath Bhavan Ltd. and another undated representation, the Board issued revised instructions dated 25.9.1991 classifying the Dant Manjan Lal as Ayurvedic notwithstanding the fact that the issue was still under adjudication of the Supreme Court. During evidence the Secretary(R) stated that the instructions dated 25.9.1991 were issued at the instance of the then Minister of State for Finance. The Committee strongly deplore the action of the then Minister of State for Finance and the manner in which the Board revised their instructions at his instance. The Committee would like the officers responsible to be censured for their failure to bring the matter to the notice of the Finance Minister or Cabinet Secretary.

The Committee feel that had the Department brought the matter to the notice of the Finance Minister in proper perspective bringing out the revenue and other implications they could have thwarted the move to classify the product as Ayurvedic atleast pending the outcome of the Supreme Court judgement. While deploring the complicity of the Department in the matter, the Committee would like the Ministry to devise a foolproof mechanism so that all cases impinging on the autonomy and independence of the Board and having adverse revenue implications to the State are brought invariably to the notice of the Government at higher level. The Committee would also like the Ministry to study the legal provisions with a view to making suitable changes in the law so as to preempt the incidents of wrongful/arbitrary classifications.

94. The Secretary(R) conceded during evidence that after September, 1991 order of the Board, no further precautions were taken to safeguard the revenue. As regards the fixing of responsibility for the revenue loss w.e.f. 25.9.1991, the Ministry stated that the instructions were issued by the Government superceding Board's instructions dated 10.4.1991 on the representation made by Shree Baidyanath Ayurved Bhavan Ltd. The Ministry further stated that the PAC may kindly consider further action in the matter.

The Committee recommend that the matter may be thoroughly investigated with a view to fixing responsibility for loss of revenue and to devise suitable mechanism to ward off undue interference and to ensure fair and impartial functioning of the Board.

95. The Committee have been informed that Rs.463.59 lakhs are involved as a result of non acceptance of the decision of CEGAT in the case of CCE Indore V Shree Baidyanath Ayurved Bhavan Ltd dated 8.1.1991 and delay in communication of the judgement of Hon'ble Supreme Court dated 30.3.1995 in the case of M/s Baidyanath Ayurved Bhavan Ltd. According to the Ministry, show-cause-notices were issued to the assessees consequent upon the decisions of the CEGAT and the Supreme Court. The Committee desire that the Ministry should make sincere and expeditious efforts for realisation of government dues.

96. The Committee find that subsequent to the judgement of the Supreme Court dated 30 March, 1995, in the case of Shree Baidyanath Ayurved Bhavan Ltd., which was in favour of the State, instructions were issued only on 31 March, 1996, that is to say after a delay of one year, after the judgement was reported in the Excise Law Times. The Chairman, CBEC conceded during evidence that the certified copy of the judgement never reached the Board for almost a year. He further stated that the Central Law Agency is supposed to compile it and send it to them and held them squarely responsible for the delay. While the Committee would surely desire the Ministry of Law and Justice to look into the matter and fix responsibility for the failure to furnish a copy of the Supreme Court judgement to the Ministry of Finance, they record their extreme displeasure over this deplorable state of affairs where a Ministry charged with the onerous responsibility of mobilisation and management of public finance, due to its lackadaisical attitude, failed to secure even the copy of the Supreme Court Judgement for a year which was in favour of the revenue of the state. The Committee therefore, feel that the matter needs to be addressed jointly by the Ministry of Finance and Law & Justice so that an efficient system is evolved to cut delays and to ensure timely supply of court orders/judgements. The Committee would like to be apprised of the action taken in the matter in due course.

97. The Committee were informed during oral evidence and also in writing subsequently of a proposal to prepare with the approval of Ministry of Law & Justice, a panel of advocates of proven calibre willing to handle Customs and Central Excise cases before various High Courts and Tribunals. On a query from the Committee, the Ministry also stated that the Chief Commissioners of various zones could prepare a panel of competent lawyers in consultation with respective Chief Justices of the High Courts and forward the same to the CBEC for approval of Ministry of Finance for allocation of cases to the advocates on the approved panel. The Committee were informed that the Hon'ble Supreme Court has also observed that the Union of India should entrust sensitive cases involving revenue stakes to counsels with proven knowledge and experience in the relevant branch of the Law. The Committee feel that in view of the long felt need and the observations of the Supreme Court, the Ministry of Finance and the Ministry of Law should jointly and in consultation with the Attorney General of India take immediate steps in this regard so that government cases having large revenue implications are represented by counsels of proven knowledge, experience and standing. The Committee may be apprised of the action taken by the Ministry of Finance and Law & Justice in this regard within the next six months.

98. The Committee have noted that the Central Excise Department had issued show-cause-notice dated 7.3.1998 to M/s Shahnaz Hussain for allegedly mis-classifying the items

produced by them. The Additional Collector of Central Excise, New Delhi vide order in original No.51/89 dated 29.8.1989 classified "shah-smile" as cosmetics and all other products manufactured by the assessee were accepted as classified under chapter 30 CETA 1985. According to the Ministry, the copy of the adjudication order dated 29.8.1989 was not received by them. As per the despatch register of the Additional Collector, the copies of the said order were endorsed to the assessee on 29.8.1989 and to the Chairman, CBEC on 6.9.1989. As regards the endorsement of the copy of adjudication order to all concerned, the Ministry stated that a categorical reply will be submitted separately. However, the same is yet to be received by the Committee. According to the Chief Commissioner, Central Excise, Delhi the file relating to confirmation of the demand was not traceable in the office of the Assistant Collector of Central Excise, New Delhi and the matter was still under examination. During evidence the status reported was "the file is missing". There is no doubt that such an important file could not be misplaced or vanish without the sinister collusion or utter negligence on the part of the officers enjoined to keep it in safe custody. The fact that a file of this nature was reported missing points to a very disturbing state of affairs which needs to be thoroughly probed into. The Committee desire that investigations be launched to go into the facts and circumstances as to the reported loss of the file and to ascertain the culpability of the official(s) involved. The Committee would like to be apprised in due course of the action taken in the matter to punish the officials found guilty.

99. The Committee note that the adjudication order dated 29.8.1989 of the Additional Collector was required to be reviewed by the Collector of Central Excise in terms of Board's instructions dated 20 July 1988. According to the Ministry, the said order was not reviewed by the then Collector of Central Excise. There was a loss of revenue amounting to Rs.4.70 crores as the order was not reviewed and the difference between the central excise duty paid on classification of Shahnaz Hussain products as Ayurvedic medicine vis-a-vis the duty that would be payable if classified as cosmetics worked out to Rs.765.41 lakhs for the period 1994-95 to 1996-97. The Ministry stated that "the Board has already proposed appointing of Additional Secretary(Admn.), Department of Revenue to investigate the case of M/s Shahnaz Hussain and fix responsibility in the matter. However, the matter is under examination". In a subsequent note dated 2 November, 1999 the Ministry of Finance stated that since the Principal Collector had seen the file and the order passed by Shri Sivaraman and had approved the same it could be said that he was in agreement with the views of the Additional Collector. The Committee are perturbed to note the sudden volte face by the Ministry. The Committee are further shocked to find that the Investigation Report is a mere eye-wash as no serious efforts have apparently been made to investigate the matter. While taking a serious view of the contradictory statements of the Ministry, the Committee reiterate the need for holding a thorough and independent enquiry in the matter. They also feel, that more than individual lapse there is an urgent need for effecting systemic reforms in the Excise Department.

100. The Committee were informed that the Delhi High Court on 18 September 1997 dismissed the petition of M/s Shahnaz Hussain challenging the order No.104/1997 dated 11.9.1997 passed by Assistant Commissioner, MOD II, New Delhi classifying her products under Chapter 33 of CETA 1985 as products for the care of the skin. As per the orders of High Court the products of M/s Shahnaz Hussain will be liable to pay central excise duty as cosmetics. On the basis of the investigations of Director General Anti Evasion, show-cause-notices have been issued to M/s Shahnaz Ayurvedic w.e.f. February 1992 raising the demand of duty for the last five years. The assessee has filed an appeal against the adjudication order dated 11.9.1997 passed by Assistant Commissioner before Commissioner

(Appeal) which is still pending. The Committee are pleased to note that following the examination of the subject and the need underlined by them during evidence for rational classification in a manner that the Department does not lose its credibility and the people their faith in the classifications, the Department have issued a circular dated 10.9.1997 with a view to ensuring rational and uniform classification of similar excisable products in line with the views of the PAC. The Committee reiterate that whenever there is an application for change of classification, any such application having adverse revenue implications to the State must be reviewed by the full Board. While emphasising the need for making concerted efforts for speedy disposal of cases by various authorities under the CETA 1985, the Committee would also like the Ministry to examine the desirability of making legal provision to the effect that an appeal may be entertained by the appellate authority only when the party deposits the stipulated amount or a certain percentage of excise duty before filing the appeal.

NEW DELHI; **NARAYAN DATT TIWARI**
18 February, 2000 ***Chairman,***
29* Magha 1921 (Saka)** ***Public Accounts Committee
NEW DELHI;