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**UNION EXCISE DUTIES —
SHORT LEVY OF DUTY DUE TO
MISCLASSIFICATION — PRICKLY
HEAT POWDER — A COSMETIC**

**MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)**

**PUBLIC ACCOUNTS
COMMITTEE
1993-1994**

TENTH LOK SABHA



**LOK SABHA SECRETARIAT
NEW DELHI**

**SIXTY EIGHTH REPORT
PUBLIC ACCOUNTS COMMITTEE
(1993-94)**

(TENTH LOK SABHA)

**UNION EXCISE DUTIES—SHORT LEVY OF
DUTY DUE TO MISCLASSIFICATION—
PRICKLY HEAT POWDER—A COSMETIC**

**MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)**

*[Action Taken on 24th Report of Public
Accounts Committee (10th Lok Sabha)]*



*Presented to Lok Sabha, 26 April, 1994
Laid in Rajya Sabha on 26 April, 1994*

**LOK SABHA SECRETARIAT
NEW DELHI**

April, 1994/Chaitra, 1916 (Saka)

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CORRIGENDA TO 68TH REPORT OF PUBLIC ACCOUNTS
COMMITTEE (10TH LOK SABHA)

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PUBLIC ACCOUNTS COMMITTEE
(1993-94)

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| 4. Shri P. Sreedharan | — <i>Under Secretary</i> |

* Ceased to be a Member on completion of her tenure in Rajya Sabha w.e.f. 2 April, 1994.

INTRODUCTION

1. I, the Chairman of the Public Accounts Committee, as authorised by the Committee, do present on their behalf this Sixty-Eighth Report on action taken by Government on the recommendations of the Public Accounts Committee contained in their 24th Report (Tenth Lok Sabha) on Union Excise Duties—Short levy of Duty due to misclassification—Prickly Heat Powder—A cosmetic.

2. In their earlier Report while examining two cases of short levy of Central Excise Duty aggregating Rs. 1.05 crores due to misclassification of prickly heat powder, the Committee had desired that the Ministry of Finance should take immediate steps to enforce rational classification of prickly heat powder for the purpose of levy of central excise duty keeping in view the revenue interest of Government, and also the general usage of the product. They had desired it to be done without waiting for the response to the second reference made by the Ministry of Finance to the Customs Co-operation Council, Brussels, who already had in response to the first reference opined that the item merited classification as "cosmetics". In this Report the Committee have noted that the Ministry of Finance have on 17.3.93 issued a circular clarifying that "Johnsons" and "Shower to Shower" prickly heat powders should be classified for the purpose of levy of central excise duty as "cosmetic" but another prickly heat powder "Nycil" be classified as "medicament" since it contained 1% chlorophenesin. Pointing out that this has led to a peculiar situation wherein products used for similar purposes are now being subjected to different treatments for the levy of central excise duty, the Committee have recommended that the Ministry of Finance should look into the same with a view to having uniformity in the classification of similar excisable products. The Committee have also felt that the entire matter including making repeated references to different authorities and thereby delaying decision on an issue involving revenue of more than a crore of rupees requires a deeper probe.

3. The Report was considered and adopted by the Public Accounts Committee at their sitting held on 4 April, 1994. Minutes of the sitting form Part II of the Report.

4. For facility of reference and convenience, the 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 of the Report.

5. The Committee placed on record their appreciation of the assistance rendered to them in the matter by the office of the Comptroller and Auditor General of India.

NEW DELHI;
April 11, 1994

BHAGWAN SHANKAR RAWAT,
Chairman,
Public Accounts Committee.

Chaitra 21, 1916 (S)

CHAPTER I

REPORT

This Report of the Committee deals with the action taken by the Government on the recommendations and observations contained in their 24th Report (Tenth Lok Sabha) relating to Union Excise Duties—Short-levy of Duty due to misclassification—Prickly Heat, Powder—A Cosmetic based on the Report of the Comptroller and Auditor General of India for the year ended 31st March, 1990, (No. 4 of 1991), Union Government Revenue Receipts—Indirect Taxes).

2. The 24th Report which was presented to Lok Sabha on 29 April, 1992 contained 15 recommendations. Action taken notes have been received in respect of all the recommendations and these have been broadly categorised as follows:

- (i) Recommendations and observations which have been accepted by Government:
Sl. No. 1, 2, 3, 6, 11, 12, 13, 14 and 15.
- (ii) Recommendations and observations which the Committee do not desire to pursue in the light of the replies received from Government:
Sl. No. 4, 5, 7 and 8.
- (iii) Recommendations and observations replies to which have not been accepted by the committee and which require reiteration:
Sl. No. 9 and 10.
- (iv) Recommendations and observations in respect of which Government have furnished interim replies:

—Nil—

3. The Committee will now deal with action taken on some of their recommendations/observations.

Classification of prickly heat powder

4. In their 24th Report (10th Lok Sabha) the Committee had examined two cases of short levy of Central Excise duty due to misclassification of prickly heat powder. The Committee had found that two assessees—Muller & Phipps (I) Ltd. and Johnson & Johnson Ltd. both manufacturing Johnson Prickly Heat Powder in the Collectorates of Central Excise of Bombay—I and Bombay—III respectively, classified the product as

pharmaceutical products on payment of duty at 15% *ad valorem* whereas the product should have been classified as cosmetics attracting higher rate of duty @105% *ad valorem* resulting in total short levy of duty amounting to Rs. 1.05 crores.

5. The Committee had found that the dispute over the classification of prickly heat powder for the purpose of levy of Central Excise duty had arisen as a result of the changes made in the Central Excise Tariff in 1985 and 1986. In the Budget 1985 the scope of the tariff item 14F of the then tariff was widened by adding an explanation whereby cosmetic and toilet preparations whether or not they contained subsidiary pharmaceutical or antiseptic constituents or were held out as having subsidiary curative or prophylactic value, were to be treated as cosmetic and toilet preparations. The new Central Excise tariff (based on Harmonised System of Nomenclature) was brought into force with effect from 28.2.88 whereby medicines became classifiable under Chapter 30, while cosmetics and toilet preparations became classifiable under Chapter Heading 33. There was no change in the descriptions of the commodity under the then tariff item 14F as it stood after the Budget 1985 and the description of Chapter 33 of the new tariff which was made effective from 1.3.1986.

6. Pursuant to the above changes, the departmental officers had issued notices to manufacturers of prickly heat powder classifying the product as cosmetics. This was done not only in the Collectorates of Bombay I and III in the cases under examination but also in certain other collectorates. Meanwhile the Central Board of Excise & Customs received a representation from an assessee.

7. The Committee had pointed out that the Board at that point of time instead of making the intentions of Government clearer to the field formations through appropriate measures, chose to make repeated references to the Drugs Controller (India) in quick succession 1986 and 1991 (twice) and accepted his opinion that the item may be treated as medicine without examining the issue in all its ramifications. They had found that this was done in the face of opinion expressed to the contrary categorically and consistently that the item merited classification as cosmetics by the departmental authorities who were actually concerned with the chemical examination of the excisable item. The Committee had also found that no attempt was made by the Ministry of Finance at any stage to ascertain the practice followed internationally in the assessment of prickly heat powder for the purpose of levy of excise duty. Further, when the Ministry actually sought the opinion of the Customs Co-operation Council, Brussels, on 10.1.1992 at the instance of the Committee, the Council Secretariat, vide their communication dated 14 January, 1992 advised that the product might be regarded as toilet preparation and classified under sub-heading 3307.90 of the Harmonised System.

8. To their surprise, the Committee had found that instead of accepting the opinion of the Council, the Ministry again made another reference on

22.1.1992 to Customs Co-operation Council seeking further clarification by specifically drawing their attention to the fact that the prickly heat powder under examination besides containing two pharmaceutically active ingredients, namely Zinc Oxide and Salicylic acid also contain Boric acid (IP) to the extent of 5% of the total content and seeking the Council's confirmation over the view of the Ministry that the Council's opinion about classification cannot be adopted in the cases under examination. Questioning the justification of making another reference to the Council Secretariat in view of the fact that the reference made to the Customs Co-operation Council earlier already contained the composition of the products indicating clearly that it contained 5% boric acid, the Committee had concluded that the Ministry were merely interested in getting confirmation of their view point instead of having an objective assessment of this case. Deploring the way a case involving substantial revenue was grossly mishandled by the Ministry showing little concern for protecting the interest of Government, the Committee had recommended that the Ministry of Finance should without waiting for any further response from the Council take immediate steps to enforce rational classification of prickly heat powder for the purpose of levy of central excise duty keeping in view the revenue interests of Government, and also the general usage of the product.

9. From the Action taken note furnished by the Ministry of Finance (Deptt. of Revenue) it is seen that the Harmonised System Committee of the Customs Cooperation Council (CCC), Brussels in their 10th Session held in October, 1992 expressed the view that the three prickly heat powders referred to them might be classified as follows:

| | |
|--------------------|-----------------------------|
| "Nycil" | — heading 30.04 (medicine) |
| "Shower to Shower" | — heading 33.04 (cosmetics) |
| "Johnsons" | — heading 33.04 (cosmetics) |

The decision of the Council were contained in a communication dated 26th October, 1992 addressed to the Central Board of Excise & Customs.

10. Based on the advice of the Council, Central Board of Excise & Customs, issued a circular on 17.3.1993 for classification of prickly heat powder "Johnson" and "Shower to Shower" as cosmetic (heading 33.04). As regards "Nycil" instructions have been issued for classification of the product as medicine (heading 30.04) on the basis of the opinion of CCC to do so in view of the presence of 1% chlorophenesin in the product.

11. Explaining the reasons for the delay in issuing the clarifications even after receipt of the advised from the council, the Ministry in their Action taken note stated:

"It may be mentioned that the second reference to CCC was made on 22.1.1992. The reply was sent by the CCC on 26.10.1992, but was not received. A copy was obtained by FAX on 16.2.1993. However, a copy of the relevant portion of the report of the Harmonised System

Committee (10th Session) said to have been enclosed was not enclosed. This was received on 4.3.1993."

12. As regards the decision to classify "Nycil" prickly heat powder as medicine Audit have made the following comments:

- (i) As per note 2 to chapter 33 subsidiary pharmaceutical constituents are to be ignored if the product is primarily used as cosmetics.
- (ii) Nycil is also a prickly heat powder and its usage is the same as other brands of prickly heat powder.
- (iii) The Chief Chemist had already opined that cosmetic preparations may contain as high as 5% boric acid (subsidiary pharmaceutical constituents). In case of Nycil also boric acid contents is 5%.
- (iv) The Dy. Chief Chemist in the case of prickly heat powder 'nycil' had opined that the product contain chlorophenesin, boric acid, zinc oxide which are subsidiary pharmaceutical antiseptic constituents. The product also contains perfumes. Thus it cannot be considered solely to be used for curing or preventing skin disease. In view of this he concluded that the product was more akin to cosmetics.
- (v) In order to have uniformity in classification of the product prickly heat powders' it would be rationale to classify 'Nycil' brand also under the same heading (33.04).

13. In para 95 of their earlier report the Committee had also observed that the issue relating to classification of prickly heat powder was also pending with the Customs, Central Excise and Gold Control Appellate Tribunal (CEGAT). The Committee had desired the matter to be appropriately pursued in the Tribunal. Similarly, the matter is also pending before the Bombay High Court. The Ministry have now stated that the Chief Departmental Representative has been apprised of the opinion of the CCC and asked to take necessary action for expeditious disposal of the appeals. In a communication dated 22 March, 1994 the Ministry of Finance (Deptt. of Revenue) further stated that the cases lying in CEGAT/ Bombay High Court are still subjudiced and efforts are being made by the Department for early finalisation of the same.

14. In their earlier report, the Committee had examined two cases of short levy of Central Excise Duty due to misclassification of an excisable item, viz., prickly heat powder. The dispute, whether the item merited classification as "medicament" with lower rate of duty or as "cosmetics" attracting higher rate, had arisen as a result of the changes made in the Central Excise Tariff in 1985 and 1986. The Committee had adversely commented upon the manner in which the Central Board of Excise and Customs had chosen to make repeated references to the Drugs Controller (India) in quick succession and accepted his opinion that the item may be treated as medicine without examining the issue in all its ramifications. After pointing out several factors which the Board had over looked while

accepting the opinion of the Drugs Controller, the Committee had desired that the Ministry of Finance should take immediate steps to enforce rational classification of prickly heat powder for the purpose of levy of Central excise duty keeping in view the revenue interests of Government, and also the general usage of the product. They had desired it to be done without waiting for the response to the second reference made by the Ministry of finance to the Customs Co-operation Council, Brussels, who already had in response to the first reference opined that the item merited classification as "cosmetics."

15. The Committee note that the Ministry of Finance have on 17.3.1993 issued a circular clarifying that "Johnsons" and "Shower to Shower" prickly heat powders should be classified for the purpose of levy of Central Excise duty as "cosmetics" but another prickly heat powder "Nycil" be classified as "medicament" since it contained 1% chlorophenesin. The decision, according to the Ministry was taken by the Board in consultation with the Harmonised System Committee, Customs co-operation Council, Brussels. Evidently, this has led to a peculiar situation wherein products used for similar purposes are now being subjected to different treatments for the levy of central excise duty. In this connection, Audit have raised certain points emphasising the need for re-examination of the decision regarding classification of "Nycil" prickly heat powder. The Committee, therefore, desire that the Ministry of Finance should look into the same with a view to having uniformity in the classification of similar excisable products.

16. The Committee in their earlier report had urged the Ministry to enforce rationality in classification without waiting for any further response from the Customs Co-operation Council. In this connection, they note that while the Council had expressed their opinion in October 1992, the clarificatory circular was issued by the Ministry in March 1993 only. Thus, there was a delay in issuing the clarification even after the Council had given their advice. The Committee cannot but express their displeasure over the delay.

17. The Committee note that the appeals filed by the Department against the orders of the Collector (Appeals) that prickly heat powder was classifiable as drug in one of the cases under examination are still pending in the Customs, Central Excise and Gold Control Appellate Tribunal. Similarly, the matter is also pending before the Bombay High Court. The Committee desire that in the light of the clarifications now issued, the cases should be vigorously pursued to safeguard governmental revenues. They would also like to be informed of the recovery action taken in respect of the dues from past cases.

18. The Committee also feel that the entire matter including making repeated references to different authorities and thereby delaying decision on an issue involving revenue of more than a crore of rupees requires a deeper probe.

CHAPTER II

RECOMMENDATIONS AND OBSERVATIONS WHICH HAVE BEEN ACCEPTED BY GOVERNMENT

Recommendation

Pharmaceutical products are classifiable for the purpose of levy of central excise duty under Chapter 30 of the schedule to the Central Excise Tariff Act, 1985, whereas personal deodorants and antiperspirants are classifiable under Chapter 33 (sub-heading 3307.00 and 3307.20 with effect from 1.3.1987). As per note 2 to Chapter 33, such products falling under headings 33.03 to 33.08 are classifiable under them, even if they contain, subsidiary pharmaceutical or antiseptic constituents or are held out as having subsidiary curative or prophylactic value.

[S. No. 1—(Para—84) of Appendix-II to 24th Report of the PAC (1991-92—10th Lok Sabha)]

Action Taken

No specific recommendations have been made in the para.

[Ministry of Finance (Department of Revenue) F. No. 234/2/92-CX-7 dated 17/11/92]

Recommendation

The Audit paragraph under examination involves a dispute over the classification of an excisable item, namely, prickly heat powder. Audit have pointed out that two assessees—Muller & Phipps (I) Ltd. & Johnson & Johnson Ltd. both manufacturing Johnson Prickly Heat Powder in the Collectorates of Central Excise of Bombay-I and Bombay III respectively, classified the product as pharmaceutical products on payment of duty at 15% *ad valorem* whereas the product should have been classified as cosmetics attracting higher rate of duty @105% *ad valorem*. According to Audit, the incorrect classification in the two cases resulted in total short levy of duty amounting to Rs. 1.05 crores. The short levy in the case reported from the Bombay I Collectorate amounted to Rs. 12.49 lakhs for the period March 1987 to July 1987 and Rs. 88.03 lakhs in the case reported from Bombay III in respect of the period April 1986 to March 1987.

[S. No. 2—(Para—85) of Appendix-II to 24th Report of PAC (1991-92—10th Lok Sabha)]

Action Taken

No specific recommendation has been made.

[Ministry of Finance (Department of Revenue) F. No.—234/2/92-CX-7
dated 17-3-93]

Recommendation

The Committee find that the dispute over the classification of prickly heat powder for the purpose of levy of central excise duty had arisen as a result of the changes made in the Central Excise Tariff in 1985 and 1986. In the Budget, 1985, the scope of Tariff item 14F of the then Tariff was widened by adding an explanation whereby cosmetic and toilet preparations whether or not they contained subsidiary pharmaceutical or antiseptic constituents or were held out as having subsidiary curative or prophylactic value, were to be treated as cosmetic and toilet preparations. The new Central Excise Tariff (based on Harmonised System of Nomenclature) was brought into force with effect from 28.2.1986 whereby medicines became classifiable under Chapter 30, while cosmetics and toilet preparations became classifiable under Chapter heading 33. There was no change in the descriptions of the commodity under the then Tariff item 14F as it stood after the Budget 1985 and the description of Chapter 33 of the new Triff which was made effective from 1.3.1986. Pursuant to the above changes, show-cause notices were issued by various Assistant Collectors to the assessee manufacturing this excisable item in different Collectorates. It was done so, not only to the assessee involved in the cases under examination but also in the Vadodara Collectorate in respect of another prominent manufacturer of prickly heat powder. The Assistant Collector concerned in the Bombay I Collectorate rejected the claims made by the party both in 1985 and 1986 for the classification of the product as medicine. Against the order of the Assistant Collector, the assessee filed an appeal with the Collector (Appeals). A similar appeal was also filed by the manufacturer of the Vadodara Collectorate. Meanwhile, the assessee in the Vadodara Collectorate also made a representation to the Central Board of Excise and Customs on 16.9.1986. The Board referred the matter to the Drugs Controller (India) who expressed his view on 19.11.1986 that the product may be treated as a drug. On the basis of the said advice, the Board clarified to the Collectors on 1.12.1986 at Bombay III and Vadodara that the item might be classified as drug. In the light of the clarification issued by the Board, the show-cause notices issued to the assessee in Bombay III were dropped. The appeals filed by the assessee in Bombay I and Vadodara before the Collector (Appeals) Bombay were also decided in their favour. However, when it was pointed out by Audit that the item merited classification as "cosmetics" the Collector of Bombay I admitted the objection and an appeal was filed before the Customs, Central Excise and Gold Control Tribunal (CEGAT) after review of the decision of the Collector (Appeal). The Collector, Bombay III referred the matter to the Board and the Board, in turn, made two further references to the Drugs Controller (India) in 1991 who reiterated his opinion expressed in 1986 that the product should be treated as drug. During evidence, the

representatives of the Ministry of Finance maintained that it was the Ministry's considered view that the item should be classified as drug. However, further examination of the matter by the Committee revealed that the Ministry before arriving at this conclusion had failed to examine the issue adequately from all angles and had overlooked certain vital considerations.

[S.No. 3—(Para—86) of Appendix-II to 24th Report of PAC
(1991-92—10th Lok Sabha)]

Action Taken

The Department had examined the question of classification in consultation with the Drugs controller of India, as was the practice.

[Ministry of Finance (Department of Revenue) F. No. 234/2/92-CX-7
dated 17-3-1993]

Recommendation

The Committee note that one of the reasons given by the Drugs Controller (India) to treat prickly heat powder as drug was that it fell under category II of the classification of formulation under Drugs (Prices Control) Order and that the retail prices had been fixed by the Government. Drawing attention of the Committee to the above argument, the Chairman, CBEC stated during evidence, "that clinches that issue that this item being drug", in this connection, it has come to the notice of the Committee that as per clarifications issued by the Central Board of Excise and Customs of 10 July 1975, "for the purposes of levy of excise duty, the classification of a product as between tariff item 14E and 14F (of the then Tariff) should depend on whether the product has more of the properties of a drug or that of a cosmetic. Further, the classification should be made on the basis of the literature, ingredients and usage in respect of the product and is not to be decided merely on the fact that the product has been brought under the control of the Drugs Controller". The Committee's examination also revealed that indeed there were items which though covered by the drug price regulation were still classified as cosmetic under heading 3304.00. For instance, Boroline was being classified under sub-heading 3304.00 as cosmetics despite the fact that it was covered under the drug price regulation. In fact, a view was expressed in the Tariff conference of Collectors held in November, 1981 that everything that falls within the ambit of Drugs Control order might not necessarily be classified as a P&P medicine. Thus, it is evident from the above that prickly heat powder cannot be classified as medicine merely because it has been brought under the control of Drugs Controller (India) and that prices are fixed under Drugs (Prices Control) order.

[S. No. 6—(Para—89) of Appendix-II to the 24th Report of the PAC
(1991-92 — 10th Lok Sabha)]

Action Taken

The observations are noted. However, in the case of Prickly Heat Powder, the department was guided by the express opinion of the Drug Controller rather than by the Drugs (Prices) Control order.

[Ministry of Finance (Department of Revenue) F. No.—234/2/92-CX-7
dated 17-3-93]

Recommendation

The Committee are also informed that the Board in the light of the advice given by Customs Co-operation Council on 14.1.1992 that prickly heat powder was a toilet preparation have on 3.2.1992 instructed all Collectors to safeguard revenue by raising protective demands under Chapter 33 and keep the proceedings of the classification of prickly heat powder pending till further opinion is received from the Council. Unfortunately, the matter does not appear to have been pursued with the Customs Co-operation Council after making a fresh reference to them on 22.1.1992. The Committee recommend that the Ministry of Finance should, without waiting for any further response from the Council take immediate steps to enforce rational classification of prickly heat powder for the purpose of levy of central excise duty keeping in view the revenue interests of Government, and also the general usage of the product. The Committee would like to be informed of the conclusive action taken in the matter within a period of six months.

[S. No. 11 (Para—94) of Appendix—II to the 24th Report of the PAC
(1991-92 — 10th Lok Sabha)]

Recommendation

To sum up, it is abundantly clear that the changes in the Central Excise Tariff in 1985 and 1986 provided ample scope for classifying prickly heat powder as cosmetics instead of medicine. This view is confirmed by the action taken by various assessing Assistant Collectors in different Collectorates to issue show-cause notices after the aforesaid changes in the Tariff and the advices given clearly and categorically by the departmental chemical examiners repeatedly and also further reinforced by the opinion expressed by the Customs Co-operation Council Secretariat, Brussels. In the light of the above, the Committee desire that as recommended by them in Para 94 of this Report, the Ministry of Finance should take immediate steps to enforce rational classification of prickly heat powder for the purpose of levy of Central excise duty keeping in view the revenue interests of Government and also the general usage of the product.

[S. No. 15 (Para—98) of Appendix—II to the 24th Report of the PAC
(1991-92—10th Lok Sabha)]

Action Taken

Accepting the opinion of the CCC, instructions* are under issue for classification of Shower to Shower and Johnson & Johnson under Heading 33.04 as cosmetics and toilet preparations and Nycil under Heading 30.04 as medicament.

[Ministry of Finance (Department of Revenue) F. No. 234/2/92 - CX-7
dated 17-3-93]

F. No. 103391-CX.3
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
Department of Revenue
Central Board of Excise and Customs

New Delhi, the 17th March, 1993.

To

All Principal Collectors of Central Excise & Customs.

All Collectors of Central Excise.

All Collectors of Customs.

All Collectors of Central Excise & Customs.

All Collectors of Central Excise (Appeal).

All Collectors of Central Excise (Judicial).

**SUBJECT:—Central Excise—Classification of “Prickly Heat Powder”—
whether under Chapter 30 or 33—clarification regarding.**

Sir, Madam,

Your kind attention is drawn to Audit Para 3.22 of the report of Comptroller and Auditor General of India for the Union Government (Revenue Receipts—Indirect for the year ended 31st March, 1990 (copy enclosed) wherein the Audit has objected to the classification of “Prickly Heat Powder” manufactured by M/s. Muller & Phipps (i) Ltd. and M/s. Johnson & Johnson Ltd. under sub-heading 3003.19 as medicaments. The PAC felt that prickly heat powder is correctly classifiable under sub-heading No. 3307.00. At the time of oral hearings before PAC held in the month of January, 1992 the Ministry expressed the view that on the basis of Drugs Controller of India’s opinion prickly heat powder merited classification as medicament. However, PAC desired that the Government should obtain the opinion of the Nomenclature and Classification Directorate, Customs Cooperation Council, Brussels in the matter.

2. Accordingly, the issue of classification of prickly heat powder manufactured under the brand names of ‘Nycil’, ‘Shower to Shower’ and ‘Johnsons’ has been examined by the Board in consultation with the Harmonized System Committee, Customs Cooperation Council, Brussels. The Harmonized System Committee in its report (copy enclosed) has

recommended that the classification of the prickly heat powders in question would be as under:—

| | |
|----------------------|----------------|
| 'Nycil' | —heading 30.04 |
| 'Shower' to 'Shower' | —heading 33.04 |
| 'Johnsons' | —heading 33.04 |

3. The Board has accepted the recommendations of the Harmonized System Committee and, accordingly, a copy of the same alongwith the background note, is enclosed for necessary action. The classification of all Prickly Heat Powders may, therefore, be decided taking into account the above.

4. The receipt of its letter and its implementation may please be intimated. Hindi version will follow.

Your's faithfully,

(C.K. KALONI)
DIRECTOR

Copy to:—The CDR, CEGAT, West Block, No. 2, Sector-I, R.K. Puram, New Delhi, alongwith a copy of the opinion of the Harmonized System Committee, Customs Cooperation Council, Brussels in the matter. She is requested to kindly have the matter listed for hearing at the earliest possible.

(C.K. KALONI)
DIRECTOR

Encl.—As above.

3.22 Prickly heat powder—a cosmetic

Pharmaceutical products are classifiable under chapter 30 of the schedule to the Central Excise Tariff Act, 1985, while personal deodorants and anti-perspirants are classifiable under chapter 33 (sub headings 3307.00 and 3307.20 with effect from 1 March 1987). As per note 2 to chapter 33 such products falling under headings 33.03 to 33.08 are classifiable under them, even if they contain, subsidiary pharmaceutical or antiseptic constituents or are held out as having subsidiary curative or prophylactic value.

Two assessees manufacturing 'pickly heat powder' in two collectorates classified the products under sub heading 3003.19 and cleared them on payment of duty at 15 per cent *ad valorem*. The ingredients of the product were salicylic acid, boric acid, talcum powder and perfume. This powder when applied on human body blocks sweat glands and prevents sweating, thereby providing relief from itching sensation and eruption of rashes on body due to heat. The product, thus, was more of an antiperspirant rather

than a medicament used for the treatment or prevention of an ailment. The product was, therefore, correctly classifiable under sub heading 3307.00 (sub heading 3307.20 from 1 March 1987) attracting duty at the rate of 105 per cent ad valorem. Incorrect classification of this product under heading 3003.19 resulted in short levy of duty amounting to Rs. 100.52 lakhs (approx) on clearances made during the period from April 1986 to July 1987.

On this being pointed out in audit (October 1987), the department in one case stated (March 1989) that as per the test report received from the Deputy Chief Chemist on a sample drawn of the 'prickly heat powder' the product merited classification as cosmetics and toilet preparation under chapter 33. In the second case, however, the department informed (June 1990) that product viz. 'johnson prickly heat powder' was being manufactured in accordance with a drug licence issued by the Food and Drug Administration of the state government. The opinion of the Deputy Chief Chemist to the effect that product satisfied definition of cosmetics and toilet preparation given in chapter note (2) of chapter 33 loses its weight in the face of specific 'drug licence' issued by the competent authority for the same. It was also informed that as per a decision given by the Board in December 1986 the goods were classifiable under sub heading 3003.19.

The department's reply is not acceptable for the reasons that

- (i) holding of a licence under the Drugs and Cosmetic Act, 1940 is not relevant as the scheme and scope of central excise classifications are quite different from those of Drugs and Cosmetics Act;
- (ii) the product when applied blocks the sweat glands. It is, therefore, classifiable as 'anti-perspirant' under sub heading 3307.20 as per harmonised Commodity Description and Coding System notes at page 477; and
- (iii) as per chapter note 2, heading 33.03 to 33.08 would apply to cosmetics and toilet preparation even if they contain subsidiary pharmaceutical or antiseptic constituents.

Ministry of Finance have accepted (November 1990) the under assessment in one case. In the second case the objection is stated to be under examination.

COPY

**CUSTOMS CO-OPERATION COUNCIL
CONSEIL DE COOPERATION DOUANIERE
NOMENCLATURE AND CLASSIFICATION
DIRECTORATE**

92.N.688—Sa./F1

Brussels, 26 October 1992

Reference : Your letter
No. 103/3/91-CX. 3
of 26 May
Enclosures : Two

Dear Mr. Batra,

SUBJECT : *Classification of prickly-heat powders*

Please refer to our correspondence concerning the classification of prickly-heat powders.

As indicated in my tele fax of 22 January 1992, the question was submitted to the Harmonized System Committee at its 10th Session (October 1992). I am enclosing a copy of document 37.537 summarising the issue for examination by the Committee.

The Harmonized Systems Committee decided that the prickly heat powders in question should be classified as follows:-

| | |
|--------------------|--------------------|
| "Nycil" |heading 30.04 |
| "Shower to shower" |heading 33.04 |
| "Johnsons" |heading 33.04 |

A copy of the relevant portion of the report of the Harmonized System Committee (10th Session) is also enclosed.

Yours sincerely,

Sd/
(H. ASAKURA)
DIRECTOR

Mr. J.K. Batra,
Director (Customs),
Central Board of Excise & Customs.
Ministry of Finance,
Department of Revenue,
New Delhi 110001

1.**2**

37.537**Classification of "Prickly-heat powder".**

**DECISIONS OF THE HARMONIZED SYSTEM COMMITTEE
(O. Eng.)**

1. The Committee examined the classification of three prickly-heat powders as described in paragraph 10 of, Doc. 37.537.

2. The Committee unanimously agreed with the view expressed by the Secretariat in paragraphs 32 and 33 of the working document that the prickly-heat powders under examination should be classified as follows:

| | |
|--------------------|--------------------|
| "Nycil" |heading 30.04 |
| "Shower to shower" |heading 33.04 |
| "Johnsons" |heading 33.04 |

3. The Committee did not consider it necessary to make any changes to the Legal texts or the Explanatory Notes in this connection.

Brussels, 19 June 1992.

CLASSIFICATION OF "PRICKLY-HEAT POWDER"

(Item VII. 3 on Agenda)

I. Background

1. In a letter dated 10 January 1992 the Indian Administration requested the Secretariat's opinion on the classification of "Prickly-heat powder". The letter from India is reproduced below.

Letter of 10 January 1992 from the Indian Administration

2. "The question of classification of prickly-heat powder under the Central Excise Tariff was examined by the Public Accounts Committee (PAC). During the oral evidence on this subject held last week the Committee has desired the Department of Revenue to ascertain the practice of assessment of such powders under the Harmonized System of Nomenclature followed by different countries of the world. In pursuance of the aforesaid directions of the PAC, you are requested to let this office know the practice of assessment of prickly-heat powder as per information available in the Secretariat of the CCC. The detailed compositions of the products in question are annexed. In case, however, the practice of assessment in different countries is not immediately available, we shall be grateful for the views of the Secretariat of the CCC. The Public Accounts Committee has asked us to furnish the information by 15 January, 1992. We shall be grateful if the aforesaid information is sent to us by fax immediately.

(File No. 2353)

Secretariat's reply of 14 January, 1992

3. "The Secretariat has no specific information concerning the classification practice with regard to prickly-heat powders in other countries.

4. However, the Secretariat has in the past examined the classification of "Dakosan" prickly-heat powder (manufactured by Dakin Brothers, London). This powder contained two pharmaceutically active ingredients,

namely, zinc oxide (10%) and salicylic acid (0.75 %) with the balance of the product made up of menthol (0.1 %) and perfumed chalk. The product was recommended for use against prickly heat (irritation caused by the blockage of the pores of the skin, often followed by fungal infection) and was advertised as giving quick relief to prickly-heat irritation and destroying fungi. It was also stated that continued use of the powder would prevent a recurrence of the complaint. However, there was no indication concerning the dosage or possible harmful effects of the product.

5. The Secretariat was of the view that "Dakosan" should be classified in heading 33.07 (subheading 3307.90) of the Harmonized System since the product had the essential character of a toilet preparation. Further, Note 1 (d) to Chapter 30 excludes preparations of headings 33.03 to 33.07, even if they have therapeutic or prophylactic properties.

6. The three products mentioned in your letter are also described as "prickly-heat powder" and in the absence of further details regarding their properties and use, it would appear that they are similar to "Dakosan" and accordingly should also be classified in subheading 3307.90 of the Harmonized System.

7. Should you disagree with the classification suggested above, I would be prepared to re-examine the matter on the basis of additional information which you might wish to furnish.

8. In a letter dated 22 January, 1992, the Indian Administration challenged the classification of prickly-heat powder in heading 33.07 in view of the content of pharmaceutically active ingredients in such products. This letter is reproduced below.

Letter of 22 January, 1992 from the Indian Administration

9. "It is stated that in respect of "Dakosan" prickly-heat powder, which contain two pharmaceutically active ingredients, namely, zinc oxide (10 %) and salicylic acid (0.75%) with the balance of the product made up of menthol (0.1 %) and perfumed chalk, the Secretariat had taken the view that the same should be classified under heading 33.07 (subheading 3307.90) of the Character of a toilet preparation. However, it is observed that the prickly-heat powders whose classification is under scrutiny, besides containing two Pharmaceutically active ingredients, namely, zinc oxide and salicylic acid, also contain boric acid to the extent of 5% of the total content. It is possible that the classification of prickly-heat powders which does not have boric acid in it.

10. The composition of the three brands of prickly-heat powders for which the classification has to be decided is as under:

NYCIL PRICKLY-HEAT POWDER

| | | |
|------------------|---|-------|
| Chlorphenesin | — | 1 % |
| Boric acid | — | 5 % |
| Zinc oxide | — | 16 % |
| Starch | — | 51 % |
| Talc purified to | — | 100 % |

SHOWER TO SHOWER PRICKLY-HEAT POWDER

| | | |
|--------------------|---|-------|
| Salicylic acid | — | 1.5 % |
| Boric acid | — | 5 % |
| Zinc oxide | — | 10 % |
| Perfumed talc base | | |

JOHNSONS PRICKLY-HEAT POWDER

| | | |
|--|---|-------|
| Salicylic acid | — | 0.8 % |
| Boric acid | — | 5 % |
| Talc base of hydrous magnesium silicate. | | |

11. We had consulted the Drugs Controller of India in the matter, who had, *inter alia*, opined that because of the high concentration of boric acid the product may be treated as a drug. His opinions in the case of "Shower to Shower" Prickly-heat powder and "Nycil" Prickly-heat powder are enclosed.

12. In view of the aforesaid advice and since the items are used for the treatment of prickly-heat which is a disease and since these items are not presented for use as cosmetic and toilet preparations, this administration is of the view that these products can be classified as "drugs" under Chapter 30 of the Harmonized System. A copy of the order passed in appeal in one of the matters confirming the said view is also enclosed. The relevant literature on the products in question is being sent alongwith the post copy.

13. We are of the view therefore that classification of "Dakosan" cannot be adopted for the products specified in paragraph 11 above. We shall like a confirmation of the view by the Customs Co-operation Council Secretariat in the matter.

14. Incidentally, it may be pointed out that we are unable to locate authentic technical opinion on what exactly constitute subsidiary pharmaceutical antiseptic constituents and on what exactly is a subsidiary curative or prophylactic value (refer Note 2 of Chapter 33). We would like to know whether these terms are used only in a general way or have a more precise technical significance, and whether a list of such constituents is available."

Secretariat's reply of 24 April, 1992

15. The Secretariat's reply to the India Administration letter of 22 January, 1992 is set out below.

16. "It was observed in your letter that the prickly-heat powders at issue contained 5% of boric acid and you expressed the view that because of that constituent, the use of the products in the treatment of a disease (Prickly-heat), as well as the presentation of the products, you were inclined to classify them as medicaments of Chapter 30.

17. You also requested our views as to the precise meaning to be given to the expressions "subsidiary pharmaceutical or disinfectant constituents" and "subsidiary therapeutic or prophylactic value" as used in the General Explanatory Notes Chapter 33.

18. The Secretariat has also noted difficulties in the interpretation of those expressions in relation to Note 1(C) to Chapter 30 which provides that preparations of headings 33.03 to 33.07, even if they have therapeutic or prophylactic properties, fall to be classified in those headings.

19. Since you have expressed doubts about the classification of all prickly-heat powders in Chapter 33 and have requested a clarification of the General Explanatory Note to Chapter 33, I would suggest that these questions be submitted to the Harmonized System committee's to the session in October 1992 for consideration.

20. Please let me know as soon as possible if you cannot agree with my proposal. If you can agree to submit these questions to the Harmonized System Committee, kindly send me samples of the products concerned."

21. The Secretariat has not yet received samples of the prickly-heat powders in question from India. When received, they will, of course, be made available for inspection by delegates during the Committee session in addition to the sample of "Dakosan" which is already available in the Secretariat.

II. SECRETARIAT COMMENTS

22. By virtue of Note 1 (d) to Chapter 30 preparation of headings 33.03 to 33.07 are excluded from Chapter 30 even if they have therapeutic or prophylactic properties.

23. The General Explanatory Note to chapter 33 on page 471 indicates that the products of headings to 33.03 to 33.07 remain in these headings whether or not they contain subsidiary pharmaceutical or disinfectant constituents, or are held out as having subsidiary therapeutic or prophylactic value.

24. On the other hand, exclusion (b) on page 471 to the General Explanatory Note to Chapter 33 and exclusion (a) on page 476 to the Explanatory Note to heading 33.04 direct "medicinal preparations having

subsidiary use as perfumery, cosmetic or toilet preparation" to headings 30.03 or 30.04, as medicaments.

25. The question to be considered is, therefore, whether the products at issue have the essential character of preparations of headings 33.03 to 33.07 or of medicaments of heading 30.04.

26. In responding to this question and in the absence of a precise demarcation line as to the meaning of the term "subsidiary", the Secretariat has tried to determine, on the basis of information obtained from official pharmacopoeias and other available reference works, whether the active ingredients in a product were present in such quantities as to have therapeutic or prophylactic value. If that was the case the Secretariat has generally classified the product as a medicament; if not, the product has been classified as a preparation of Chapter 33.

27. The minimum level of active ingredients which must be present in a product for that product to be classified as medicament of Chapter 30 is, of course, not specified either in the Nomenclature or the Explanatory Notes, the reason for this being that such levels are impossible to fix since they vary widely over the huge range of products in commerce. Thus, in response to one of the Indian questions, there is no list of subsidiary Pharmaceutical constituents.

28. In researching the question of the classification of the prickly-heat powders of concern to the Indian Administration, the Secretariat has determined that certain "dusting-powders" containing boric acid and zinc oxide or salicylic acid are used for their therapeutic value in the treatment of certain skin diseases. However, in such preparations, according to examples cited in the Martindale Extra Pharmacopoeia, the level of active ingredients is rather high. For example, "compound zinc dusting powder" specified in the section on dermatological against on page 460, contains zinc oxide (25%), boric acid (5%), sterilised purified talc (35%) and starch (35%). Another cited preparation—zinc and salicylic acid dusting powder—contains zinc oxide (20%), salicylic acid (5%) and starch (75%).

29. In pharmaceutical literature available to the Secretariat, boric acid is described as having *feeble* antibacterial and antifungal properties; salicylic acid is described as a keratolytic substance having bacteriostatic and fungicidal properties used in the treatment of fungus infections of the skin; zinc oxide is stated to be applied externally, in dusting powders, ointments, pastes and lotions, as a *mild* astringent for the skin, as a soothing and protective application in eczema and as a protective to slight excoriations. Chlorophenesin, an ingredient of "Nycil" prickly-heat powder, is described as having antibacterial, antifungal and antitrichomonal properties and is used mainly for the prophylaxis and treatment of dermatophytoses of the feet and other sites. It is applied, for instance, as a dusting powder, in a concentration of 1%.

30. Further, according to Martindale (page 1714), the Council of the European Communities has issued a directive relating to cosmetic products indicating that boric acid can be used in cosmetics in specified maximum concentrations. For example, the concentration of boric acid in talc is limited to 5%. Based on the above information, it would appear that the quantity of 5% boric acid contained in the products at issue would not require their classification as medicaments nor prevent their classification as preparations of Chapter 33.

31. In this connection, the Secretariat would draw the Committee's attention to the classification decisions taken at the Committee's Fourth Session with respect to two products ("Eau Precieuse" "lotion and Listerine Antiseptic" mouth wash) containing boric acid which were classified in Chapter 33 in view of the subsidiary nature of their Pharmaceutical ingredients.

32. As concerns the classification of the products at issue, the Secretariat would question whether "Shower to Shower" and "Johnson's" prickly-heat powders, containing only boric acid, salicylic acid or zinc oxide on a talc base, have the essential character of medicaments of Chapter 30 in view of the low quantities of pharmaceutical substances present. Based on their use and composition, the Secretariat would lean towards classification of these two products as preparations for the care of the skin in heading 33.04. In this connection, it should be noted that, upon further reflection, the Secretariat also believes that "Dakosan" prickly-heat powder should be classified in heading 33.04.

33. However, as concerns "Nycil" prickly-heat powder, the Secretariat believes that it could be classified in heading 30.04, rather than in Chapter 33, in view of the presence of 1% Chlaphenesin.

III. CONCLUSION

34. The question to be decided by the Harmonized System Committee is whether "Nycil", "Shower to Shower" and "Johnson's" prickly-heat powders have the essential character of medicaments of heading 30.04 or of preparations of heading 33.04 or 33.07.

35. In answering this question the Committee should first decide whether it can agree with the Secretariat's approach, i.e., determining essential character on the basis of whether the pharmaceutical substances in the products are present in therapeutic or prophylactic doses.

36. If the Committee can agree to the Secretariat's approach, it may wish to ask the Scientific Sub-Committee for its views as to whether the pharmaceutical substances in the products in question are present in therapeutic or prophylactic doses.

37. Finally, the Committee is requested to express its opinion as to whether the texts of Chapter 30 Note 1(d) and the General Explanatory Note and exclusions to Chapter 33, referred to in paragraphs 22 to 24 above, should be aligned and, if so, how.

Recommendation

The Committee note that the appeals filed by the Department against the orders of the Collector (Appeals) that prickly-heat powder was classifiable as drug in the case of Muller & Phipps (I) Ltd. are pending decisions in the CEGAT. The Committee have been informed that the Department have now requested their representative to move CEGAT seeking adjournment in the light of the references made to the Customs Co-operation Council, Brussels. In view of their observations in para 92 of this Report the Committee desire that the matter should be appropriately pursued in the Tribunal. They would like to be informed of the progress made in the proceedings in the CEGAT.

[S. No. 12 (Para 95) of Appendix—II to the 24th Report of the PAC (1991-92)—10th Lok Sabha]

Action Taken

The Chief Departmental Representative has been apprised of the opinion of the CCC and asked to take necessary action for expeditious disposal of the appeals. The Committee will be apprised of the CEGAT's decisions on its receipt.

[Ministry of Finance (Department of Revenue) F.No. 234/92-CX-7 dated 17.3.93]

Recommendation

The Committee also note that in the case of the assessee in Bombay III Collectorate, the audit objections were not admitted and they were received after lapse of almost one year since the date on which the show cause notices were dropped by the Assistant Collector. However, the Collector of Central Excise, Bombay I had admitted the objection in October, 1987 on the basis of the Chief Chemical Examiner's report and chose to file appeals before the CEGAT. But no show cause notice was issued for safeguarding the short levy pointed out by Audit for the period March 1987 to June 1987. Explaining the reasons for the same, the Ministry of Finance stated that in March 1987, the Bombay High court passed an order and allowed the assessee to withdraw the writ petition filed by him against the demand notice issued by the Assistant Collector on 10.11.1986, after the counsel of the department conceded that until the appeal filed by the party against the Assistant Collector's order dated 24.10.1986, demand notice dated 10.11.1986 and Assistant Collector's order dated 5.1.1987 are disposed of, no action would be taken by the department and that the current and future clearances of prickly-heat powder would be in terms of the latest order of the Assistant Collector dated 27.2.87 treating the impugned product as medicine without prejudice to Department's right to review the said order. According to the Ministry, show cause notices could not be issued for the period March to June 1987,

as any action contrary to the Bombay High Court's order would have amounted to contempt of court. The Committee are not convinced with the arguments adduced by the Ministry. In their opinion, action should have been taken to issue show cause notices for the period, March 1987 to June 1987, keeping in view the subsequent developments in the case arising out of the Audit objections raised in October 1987 so as to safeguard revenue.

[S.No. 13 (Para 96) of Appendix—II to the 24th Report of the PAC (1991-92—10th Lok Sabha)]

Action Taken

The Committee's observations have been noted.

[Ministry of Finance (Department of Revenue) F.No. 234/92-Cx-7 dated 17.3.93]

Recommendation

The Public Accounts Committee have time and again emphasised the need to ensure uniformity in classification of similar products throughout the country for the purpose of levy of central excise duty. The Committee had also pointed out the need for a continuous exchange of information between various collectorates on important issues relating to classification, levy of duty, assessment etc. The Committee are distressed to find that divergence in classification of similar excisable items still continue to exist. In the case of the product under examination, viz. prickly-heat powder, it was seen that the manner of classification was not exactly uniform throughout the country. In fact, after the changes in the Tariff in 1985 and 1986, while the Assistant Collectors concerned had chosen to classify the item as cosmetics in the Collectorates of Bombay I, III and Vadodara, the item was treated as medicine for excise purposes in the Collectorate of Nagpur. Even today, the item is classified as cosmetics under Chapter 33 in the Jaipur Collectorate. No attempt was also made by the Board to ascertain the practice prevailing in all Collectorates in respect of classification of prickly-heat powder before making the reference to the Drugs Controller (India). Even while clarifying the classification matter in 1986 and 1991, the Board chose to issue the telex only to those Collectorates who had sought such a clarification. The Chairman, CBEC admitted the lapse during evidence and stated that such classificatory letters were normally issued to all. The Committee desire that the Board should give more attention to the matter and enforce uniformity in classification and assessment of excisable commodities for the purpose of levy of central excise duty.

[S.No. 13 (Para 97) of Appendix—II to the 24th Report of the PAC (1991-92—10th Lok Sabha)]

Action Taken

Central Board of Excise & Customs has been paying attention to the desirability of achieving greater uniformity in classification and assessment of excisable commodities; providing for exchange of information in inter and intra-Collectorates and for discussion of matter in the Tariff Conference of Collectors of Central Excise. Board has been issuing administrative instructions to the field formations for their guidance on Tariff classifications. Board will ensure that clarificatory letters are issued to all the Collectors of Customs and Central Excise.

[Ministry of Finance (Department of Revenue) F.No. 234/92-CX-7 dated
17.3.93]

CHAPTER III

RECOMMENDATIONS AND OBSERVATIONS WHICH THE COMMITTEE DO NOT DESIRE TO PURSUE IN THE LIGHT OF THE REPLIES RECEIVED FROM GOVERNMENT

Recommendation

According to Rule 56 of the Central Excise Rules, 1944 read with the notification issued thereunder, the Chief Chemist/certain other chemical officers of the specified Central Revenue Control Laboratories have been appointed for drawing of samples of excisable products and conducting testing of the same. The Committee find that the departmental Deputy Chief Chemist/Chemical Examiner had expressed views in October, 1985 as well as March, 1989 on the question of classification of prickly heat powder. On both the occasions these departmental authorities had categorically opined that the impugned product was classifiable as cosmetics and not as drug. In fact, the opinion given in March 1989 appears to have been given after considering the views expressed by the Board in December, 1986. The Committee regret to note that the Ministry did not accept the opinion consistently expressed by their own technical experts and made repeated references to the Drugs Controller (India).

[S.No. 4 (Para 87) of Appendix—II to the 24th Report of the PAC (1991-92)—10th Lok Sabha]

Action Taken

On the question of classification of an item as drug or otherwise, the department thought that it would be better guided by the opinion of the Drugs Controller of India being the highest technical authority for Drugs rather than the Chief Chemist or Dy. Chief Chemist.

[Ministry of Finance (Department of Revenue) F.No. 234/2/92 CX-7 dated 17.3.93]

Recommendation

The Committee note that in his opinion expressed in 1991, the Drugs Controller (India) stated that because of the concentration of boric acid as high as five per cent, prickly heat powder cannot be used as talcum powder and, therefore, be treated as drug. The Committee, however, found that the recorded opinion of the departmental Chief Chemist was already available at the point of time on that score in which he had clearly expressed a different view. In paragraph 1.59 of their 208th Report (Seventh Lok Sabha), the Committee had recorded the views of the Chief Chemist tendered as far back as in 1976 in which he had stated that "antiseptic cosmetic preparations (Talc) may use as high as 5% Boric Acid

and still continue to be cosmetic." Again in April, 1989 the Deputy Chief Chemist stated "Boric Acid is one of the most important disinfectant and it is used in quantities upto 20% in body powders. Even Baby powders contain 5% Boric Acid". Undoubtedly, the above aspect needed further examination but had apparently been overlooked by the Ministry.

[S.No. 5 (Para 88) of Appendix—II to the 24th Report of the PAC
(1991-92)—10th Lok Sabha]

Action Taken

On the question of classification of an item as drug or otherwise, the department thought that it would be better guided by the opinion of the Drugs Controller of India being the highest technical authority for Drugs rather than the Chief Chemist or Dy. Chief Chemist.

[Ministry of Finance (Department of Revenue) F.No. 234/2/92 CX-7
dated 17.3.93]

Recommendation

Another argument adduced by the Ministry of Finance in support of classification of prickly heat powder as a drug was that it was being manufactured in accordance with a drug licence issued by the Food and Drug Administration of the State Government concerned. In this connection, the Committee wish to recall their observations made in paragraph 1.56 of their 208th Report (Seventh Lok Sabha) in which they had noted that "the Central Board of Excise and Customs issued instructions in 1961 that for the purpose of deciding whether a medicated product should be assessed to duty as a medicine or not, it should be verified whether the product is intended only for therapeutic purpose or merely for toilet or prophylactic purpose. Only in the event of its use for therapeutic purpose the product will qualify for assessment as medicine under tariff item 14E. Mere possession of a drug licence would not entitle the manufacturer to claim assessment of his product under tariff item 14E." The Ministry of Finance admitted that possession of a drug licence issued by the Food and Drug Administration of the State Governments may not in itself be a decisive factor for determination of the classification. The Committee fail to understand as to how and why the instructions issued by the Board themselves in 1961 were not found relevant in the instant case.

[S.No. 7 (Para 90) of Appendix—II to the 24th Report of the PAC
(1991-92)—10th Lok Sabha]

Action Taken

To decide whether a product is intended only for therapeutic purpose or prophylactic purpose or merely for toiletry purpose as required by the Board in its instructions issued in 1961, it was necessary to consult the proper authority on the subject, namely, the Drugs Controller of India. [Ministry of Finance (Department of Revenue) F.No. 234/2/92 CX-7 dated 17.3.93]

Recommendation

The Committee also find that no attempt was made by the Ministry of Finance at any stage to ascertain the practice followed internationally in the assessment of prickly heat powder for the purpose of levy of excise duty and the treatment of the item by the British Pharmacopeia. It was done so only after the matter was brought to their notice by the Committee during the course of evidence held on 8.1.1992. And, when the Ministry actually sought the opinion of the Customs Co-operation Council, Brussels on 10.1.1992, the Council Secretariat, vide their communication dated 14 January, 1992 advised that the product might be regarded as toilet preparation and classified under sub-heading 3307.90 of the Harmonised System. The Council had given their opinion on the analogy of a similar product 'Dakosan' prickly heat powder manufactured by Dakin Brothers, London which was thoroughly examined by the Council and advised to be classified under sub-heading 3307.90 of the Harmonised System.

[S. No.8 (Para 91) of Appendix—II to the 24th Report of the PAC (1991-92—10th Lok Sabha)]

Action Taken

It had not been the practice to seek the opinion of the Customs Cooperation Council in matters of classification relating to excisable products.

[Ministry of Finance (Department of Revenue) F.No. 234/2/92-CX-7 dated 17-3-93]

CHAPTER IV

RECOMMENDATIONS AND OBSERVATIONS REPLIES TO WHICH HAVE NOT BEEN ACCEPTED BY THE COMMITTEE AND WHICH REQUIRE REITERATION

Recommendation

It is surprising that instead of accepting the opinion of the Council, the Ministry again made another reference on 22.1.1992 to Customs Co-operation Council seeking further clarification by specifically drawing their attention to the fact that the prickly heat powders under examination besides containing two pharmaceutically active ingredients namely Zinc Oxide and Salicylic acid also contain Boric acid (IP) to the extent of 5% of the total content. The Committee were informed that the reply from the Council was expected soon and remedial steps would be taken thereafter. On perusal of the copy of the communication addressed to the Council, which was furnished subsequent to evidence, it is seen that the Ministry after narrating the history of the case, in the operative portion of the communication *inter alia* stated, "we are of the view, therefore that classification of 'Dakosan' cannot be adopted for the products specified in para 3 above (the different brands of prickly heat powder under examination). We shall like a confirmation of this view by the Customs Co-operation Council Secretariat in the matter". The Committee fail to understand that justification of making another reference to the Council Secretariat. Considering the fact that the reference made to the Customs Co-operation Council earlier contained the composition of the products indicating clearly that it contained 5% boric acid, the latter reference hardly sought any further clarification. The Committee therefore cannot help concluding that the Ministry were merely interested in getting confirmation of their view point ignoring the revenue interests instead of having an objective assessment of this case. No wonder, the Council, have so far not responded to the request of the Ministry.

[S. No. (Para 92) of Appendix—II to the 24th Report of the PAC (1991-92)—10th Lok Sabha]

Action taken

The need for second reference arose because the Drugs Controller of India had consistently held the view that prickly heat powder with a concentration of Boric acid as high as 5% cannot be treated as talcum powder and, has to be treated as drug. The need became even more urgent as the CCC stated that they had no specific information concerning the classification practice with regard to prickly heat powders in other countries. They had, they added, in the past examined the Classification of

Dakosan Prickly Heat Powder manufactured by Dakin Brothers, London. Later, they went on to talk about Dakosan. In the penultimate paragraph the CCC observed that in the absence of further details regarding the properties and use of the three products that the department had mentioned, it would appear that they are similar to Dakosan. They had further said that should the department disagree with the suggested classification, they would be prepared to re-examine the matter on the basis of additional information which the department might wish to furnish. It was in these circumstances that it became essential to refer back to the CCC and intimate the composition of the products and send the samples.

It may be mentioned that the second reference to CCC was made on 22.1.1992. The reply was sent by the CCC on 26.10.1992, but was not received. A copy was obtained by FAX on 16.2.1993. However, a copy of the relevant portion of the report of the Harmonised Systems Committee (10th Session) said to have been enclosed was not enclosed. This was received on 4.3.1993.

[Ministry of Finance (Department of Revenue) F.No. 234/292-CX.7 dated-17-3-1993]

Recommendation

From the facts stated in the foregoing paragraphs, it is abundantly clear that after the changes made in the Central Excise Tariff in 1985 and 1986, the departmental officers were convinced that the excisable item viz., prickly heat powder merited classification as cosmetics. This is amply borne out by the fact that the departmental officers had issued notices after the coming into force of the changes in the tariff description not only in the Collectorates of Bombay I and III in the cases under examination but also in certain other Collectorates. In fact, this was done even before the Audit objections were raised. And, yet, the Board instead of making the intentions of Government clearer to the field formations through appropriate measures, chose to make repeated references to the Drugs Controller (India) in quick succession and accepted his opinion without examining the issue in all its ramifications. Significantly, this was done in the face of opinion expressed to the contrary categorically and consistently by the departmental authorities who were actually concerned with the chemical examination of the excisable item. The issue of classification of prickly heat powder was also not placed for discussion at any of the Collectors/Tariff Conferences as was done in the case of Boroline. In these circumstances, the Committee cannot but conclude that a case involving substantial revenue was grossly mishandled by the Ministry showing little concern for protecting the interest of Government which is greatly deplorable.

[S.No. 10 (Para 93) of Appendix—II to the 24th Report of the PAC (1991-92)—10th Lok Sabha]

Action Taken

Some doubts arose because of the addition of Explanation to Tariff Item 14F of the erstwhile tariff in 1985 and subsequently, Note 2 of Chapter 33 in the current Central Excise Tariff Act, 1985 which came into force on 28.2.86 under which subsidiary pharmaceutical or antiseptic constituents were to be ignored if they are primarily used for cosmetics. As an abundant caution, some Collectorates issued notices. It was also found that it was a little difficult on the classification of these types of goods as illustrated below. While the departmental Chemist felt that all the goods could be classifiable as cosmetics, the Drug Controller of India held they should be classified as drugs. The CCC in its first opinion classified all of them as cosmetics on the basis of their opinion about Dakosan but later on detailed examination of the composition held Nycil as falling under drug and other two items falling under cosmetics under Heading 33.04 while it had earlier classified them under 33.07 HSN. Just the opinion of experts were also differing on first and re-examination. It may also be recalled that PAC had recommended that Boroline should be classified as a cosmetic. For this purpose a suitable explanation was inserted in Tariff item 14F of erstwhile tariff. However, Calcutta High Court has held that Boroline is a drug.

It will be seen that it is not always very easy to classify a product as a drug or a cosmetic.

[Ministry of Finance (Department of Revenue) F.No. 234/2/92-CX.7
dated-17-3-1993]

CHAPTER V
RECOMMENDATIONS AND OBSERVATIONS IN RESPECT OF
WHICH GOVT. HAVE FURNISHED INTERIM REPLIES

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NEW DELHI;
April 11, 1994

Chaitra 21, 1916 (S)

BHAGWAN SHANKAR RAWAT,
Chairman,
Public Accounts Committee.

APPENDIX

Statement of Conclusions/Recommendations

| Sl. No. | Para No. | Ministry/Deptt. Concerned | Recommendations/Observations |
|---------|----------|--|---|
| 1 | 2 | 3 | 4 |
| 1 | 14 | Ministry of Finance (Deptt. of Revenue) | <p>In their earlier report, the Committee had examined two cases of short levy of Central excise duty due to misclassification of an excisable item, viz., prickly heat powder. The dispute, whether the item merited classification as "medicament" with lower rate of duty or as "cosmetics" attracting higher rate, had arisen as a result of the changes made in the Central Excise Tariff in 1985 and 1986. The Committee had adversely commented upon the manner in which the Central Board of Excise and Customs had chosen to make repeated references to the Drugs Controller (India) in quick succession and accepted his opinion that the item may be treated as medicine without examining the issue in all its ramifications. After pointing out several factors which the Board had overlooked while accepting the opinion of the Drugs Controller, the Committee had desired that the Ministry of Finance should take immediate steps to enforce rational classification of prickly heat powder for the purpose of levy of Central excise duty keeping in view the revenue interests of Government, and also the general usage of the product. They had desired it to be done without waiting for the response to the second</p> |

| 1 | 2 | 3 | 4 |
|----|-----|--|---|
| | | | reference made by the Ministry of Finance to the Customs Co-operation Council, Brussels, who already had in response to the first reference opined that the item merited classification as "cosmetics". |
| 2. | 15. | Ministry of Finance (Deptt. of Revenue) | The Committee note that the Ministry of Finance have on 17.3.1993 issued a Circular clarifying that "Johnsons" and "Shower to Shower" prickly heat powders should be classified for the purpose of levy of Central excise duty as "cosmetics" but another prickly heat powder "Nycil" be classified as "medicament" since it contained 1% chlorophenesin. The decision, according to the Ministry was taken by the Board in consultation with the Harmonised System Committee, Customs Co-operation Council, Brussels. Evidently, this has led to a peculiar situation where in products used for similar purposes are now being subjected to different treatments for the levy of Central excise duty. In this connection, Audit have raised certain points emphasising the need for re-examination of the decision regarding classification of 'Nycil' prickly heat powder. The Committee, therefore, desire that the Ministry of Finance should look into the same with a view to having uniformity in the classification of similar excisable products. |
| 3. | 16. | -do- | The Committee in their earlier report had urged the Ministry to enforce rationality in classification without waiting for any further response from the Customs Co-operation Council. In this connection, they note that while the |

| 1 | 2 | 3 | 4 |
|----|-----|---|---|
| • | | | <p>Council had expressed their opinion in October 1992, the clarificatory circular was issued by the Ministry in March 1993 only. Thus, there was a delay in issuing the clarification even after the Council had given their advice. The Committee cannot but express their displeasure over the delay.</p> |
| 4. | 17. | <p>Ministry of Finance (Deptt of Revenue)</p> | <p>The Committee note that the appeals filed by the Department against the orders of the Collector (Appeals) that prickly heat powder was classifiable as drug in one of the cases under examination are still pending in the Customs, Central Excise and Gold Control Appellate Tribunal. Similarly, the matter is also pending before the Bombay High Court. The Committee desire that in the light of the clarifications now issued, the cases should be vigorously pursued to safeguard governmental revenues. They would also like to be informed of the recovery action taken in respect of the dues from past cases.</p> |
| 5. | 18. | -do- | <p>The Committee also feel that the entire matter including making repeated references to different authorities and thereby delaying decision on an issue involving revenue of more than a crore of rupees requires a deeper probe.</p> |

PART II

MINUTES OF THE 20TH SITTING OF THE PUBLIC ACCOUNTS COMMITTEE HELD ON 4 APRIL, 1994

The Committee sat from 1500 hrs. to 1645 hrs. on 4 April, 1994 in Committee Room 'E', Parliament House Annexe.

PRESENT

CHAIRMAN

Shri Bhagwan Shankar Rawat

MEMBERS

2. Shri Nirmal Kanti Chatterjee
3. Dr. K.V.R. Chowdary
4. Shri Bandaru Dattatraya
5. Shri Jagat Veer Singh Drona
6. Shri Srikanta Jena
7. Smt. Krishnendra Kaur
8. Shri Mrutyunjaya Nayak
9. Shri Sompappa R. Bommai

SECRETARIAT

1. Shri S.C. Gupta — *Joint Secretary*
2. Shri P. Sreedharan — *Under Secretary*

REPRESENTATIVES OF AUDIT

1. Shri N. Sivasubramanian — Dy. C & AG
2. Shri Vikram Chandra — Pr. Director, Reports (Central)
3. Shri T.N. Thakur — Pr. Director of Audit
(Scientific Depts.)
4. Smt. Anita Pattanayak — Director of Audit (Railways)
5. Shri Adya Prasad — Director of Audit (Excise)

2. The Committee considered the following Draft Reports and adopted the same subject to certain modifications and amendments as shown in Annexures I*, II*, III* & IV respectively.

- | | | | | |
|-------|-----|-----|-----|-----|
| (i) | *** | *** | *** | *** |
| (ii) | *** | *** | *** | *** |
| (iii) | *** | *** | *** | *** |

(iv) Union Excise Duties—Short levy of duty due to misclassification—Prickly Heat Powder—a Cosmetic [Action Taken on 24th Report of PAC (10th Lok Sabha)]

*. Not appended.

The Committee also adopted Draft Report on Union Excise Duties—Non-levy/Short-levy of duty due to incorrect grant of exemption—Motor Vehicles. [Action Taken on 44th Report of PAC (10th LS)] without any amendment.

3. The Committee authorised the Chairman to finalise these Draft Reports in the light of other verbal and consequential changes suggested by some Members and also those arising out of factual verification by Audit and present the same to Parliament.

The Committee then adjourned.

ANNEXURE IV

AMENDMENTS/MODIFICATIONS MADE BY THE PUBLIC
ACCOUNTS COMMITTEE IN THE DRAFT ACTION TAKEN
REPORT RELATING TO UNION EXCISE DUTIES—SHORT LEVY
OF DUTY DUE TO MISCLASSIFICATION—PRICKLY HEAT
POWDER—A COSMETIC

| <i>page</i> | <i>Para</i> | <i>Line</i> | <i>Amendments/Modifications</i> |
|-------------|--------------------|-------------|--|
| 10 | New Para No. 18 | | <i>Add new Para No.18 at the end. “The Committee also feel that the entire matter including making repeated references to different authorities and thereby delaying decision on an issue involving revenue of more than a crore of Rupees requires a deeper probe.”</i> |
