

**Read :-** Application dt. 18.02.2006 by M/s Siddhayu Ayurvedic Research Foundation P.Ltd., holding Registration No. 441207/S/152.

**Heard :-** Shri Paliwal, C.A.

## **PROCEEDINGS**

(Under Section 56(1)(e) of the Maharashtra Value Added Tax Act)

No. DDQ-11-06/ Adm-5/13/B-2

Mumbai, dt. 30.1.09

An application has been preferred by M/s Siddhayu Ayurvedic Research Foundation Pvt.Ltd., bearing address as Desai Gunj, Wadsa, Gadchiroli, seeking determination of rate of tax on the sale of 'Dant Manjan Lal' effected through Invoice No. 79 dt. 26.10.2005.

### **02. FACTS OF THE CASE**

The applicant has his factory at Wadsa, District Gadchiroli. It is stated by the applicant that he is a manufacturer of an Ayurvedic drug called 'Dant Manjan Lal'. It is submitted by the applicant that he manufactures medicine called as 'Dant Manjan Lal' which is Ayurvedic pharmacopieal medicine. It is also stated by the applicant that he holds drug licence No. ND/AYU/60 under the Drugs & Cosmetics Act, 1940.

It is the contention of the applicant that the product is covered under Schedule Entry C-29 of the Maharashtra Value Added Tax Act.

### **03. DOCUMENTS SUBMITTED BY THE APPLICANT**

1. Copy of the sale invoice
2. Copy of the licence issued by the authorities under the Drugs & Cosmetics Act.
3. An extract from the text "Ayurved Sar Sangreha" giving the ingredients for manufacture of 'Dant Manjan Lal'
4. List of ingredients of 'Lal Dant Manjan'.

The applicant then gave a written submission dt. 16.01.2008, in which the applicant has stated the following :-

- a. There is a provision under the Central Excise Act in Chapter heading 3306 that 'tooth powder' is fully exempted from excise duty without any condition. Therefore, no licence is obtained under Excise and no excise registration is obtained.
- b. The Drug licence No. under the Drug Act, 1948 is printed in the sales invoice.
- c. The product 'Dant Manjan' is manufactured under registered trade mark in the name of 'Shree Baidyanath Ayurved Bhavan Pvt. Ltd.' The aforesaid product is manufactured by the applicant under the aforesaid trade mark is exclusively sold to 'Shree Baidyanath Ayurved Bhavan Pvt. Ltd.' who are the proprietor of the aforesaid trade mark.
- d. The product is effective in the diseases of teeth & gums and helps to prevent tooth decay.
- e. Photo copies of certificates from Dr. Pradeep Kolhe, M.D. and Dr. Sarang Deshpande, M.D. is attached.
- f. The publicity material clearly indicates the manner in which the above product helps in various diseases and the above can be treated is evidence of common parlance

### **04. HEARING**

The case was fixed for hearing on 14.08.2008, Shri R. S. Paliwal, C.A. And Shri B.K. Shreekhande, attended on behalf of the applicant. They submitted that the DDQ application is made on the basis of reply to query made by them on the website. He stated that the product is prepared as per the formulae given in "Ayurved Sar Sangraha". They referred to the fact that there is no exclusion clause to tooth powder under entry C-29. Therefore, their product would be covered by the Schedule entry C-29. They also made the alternative

submission that in case the order is not held in their favour, they should be given prospective effect.

In a written statement dt. 20.12.08, the applicant has made the following submission :-

- a. The composition and proportion of the various ingredients used in the 'Dant Manjan' are in accordance with that given in the authoritative Ayurvedic text book-- "Ayurved Sar Sangraha"..
- b. The ingredients are indicated in the label sleeve of 'Dant Manjan.'
- c. The label used to wrap around the container display the information as required by Rule 161 of the Drug & Cosmetic Act.
- d. Copy of DDQ in case of 'Vicco Laboratories' (21<sup>st</sup> January 1985) holding that 'Vicco Vajradanti' tooth powder is an 'Ayurvedic medicine'.
- e. Copy of the First schedule of the Drugs & Cosmetics Act where the book "Ayurved Sar Sangreha" is listed as one of the authoritative texts on Ayurved. Extracts from publication "Bhav Prakash" in which the medicinal qualities of Kali Mirch, Soonth, Pipalmul, Tamaru, Babul, Neem, Kapur, Lavang, Peppermint is indicated.
- f. Photo copy of the label sleeve of 'Dant Manjan Lal', which shows the composition of the product. Photo copies of certificates given by Vaidya Deepak Karanjkar, Dr. Veena Dev, Vaidya Kiran Tiwari, Dr. Sonali Dhore, Dr. Pracheta Jyoti.

**05. OBSERVATIONS :-**

I have carefully gone through on the facts of the case. The applicant is of the view that the product 'Dant Manjan Lal' is a medicine due to the following reasons :-

- a) It is manufactured under a drug licence issued under the Drugs & Cosmetics Act.
- b) It is manufactured as per the formulae given in "Ayurved Sar Sangraha".
- c) It is an effective Ayurvedic medicine in oral diseases.

**1] SUPREME COURT DECISION IN THE CASE OF SHREE BAIDYANATH AYURVED.**

Before going into the deliberations on the issue, I would refer to the decision of the Supreme Court in the case of the applicant himself (83 ELT-492) where it had to decide whether the 'Dant Lal Manjan' is an 'Ayurvedic medicine' covered by the relevant entry which read as "all drugs, medicines, pharmaceuticals and drug intermediates not elsewhere specified" or is a 'toilet preparation'. **The Supreme Court held that the product is not a medicinal preparation** and observed the following in defence of its conclusion:

..."We have heard the learned counsel at some length. He also invited our attention to the provisions of the Drugs & Cosmetics Act, 1940, the opinion of the Experts, the statements of a few consumers as well as the description given in certain Ayurvedic Books and contended that the preparation would fall within the relevant entry in the exemption notification. The Tribunal rightly points out that in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say, the meaning attached to them by those using the product. It is for this reason that the Tribunal came to the conclusion that scientific and technical meanings would not advance the case of the appellant if the same runs counter to how the product is understood in popular parlance. That is why the Tribunal observed in Paragraph 86 of the judgment as under :

"So certificates and affidavits given by the Vaidyas do not advance the case of Shri Baidyanath Ayurved Bhawan Limited in the absence of any evidence on record to show and prove that the common man who uses this Dant Manjan

daily to clean his teeth considers this Dant Manjan as a medicine and not a toilet requisite."

It is this line of reasoning with which we are in agreement. The Tribunal rejected the claim of the appellant holding that ordinarily a medicine is prescribed by a Medical Practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with a specific disease like diabetes. We are, therefore, of the opinion that the Tribunal applied the correct principles in concluding that the product in question was not a medicinal preparation ('Ayurvedic') and, therefore, the appellant was not entitled to the benefit of the exemption notification. Having heard the learned counsel at length and having perused the line of reasoning adopted by the Tribunal with which we are in general agreement, we see no reason to interfere with the conclusion reached by the Tribunal and, therefore, we dismiss these appeals, but make no order as to costs.

The Supreme Court categorically held that the product does not come under the purview of 'Ayurvedic Medicine'. The reasons for the same are clearly underlined in the judgement;.

- a) Ordinarily a medicine is prescribed by a Medical Practitioner.
- b) It is used for a limited time and not every day.
- c) In absence of any evidence on record to show and prove that the common man who uses this 'Dant Manjan' to clean his teeth and considers this 'Dant Manjan' as a medicine and not a toilet article, the certificates given by the Doctors does not advance the case of the applicant.
- d) In interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say, the meaning attached to them by those using the product. The same principle would apply in the case of the VAT Act wherein also the primary object is to raise revenue.

## 2] SCHEDULE ENTRY C-29

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |    |                       |
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| <p>The schedule entry under consideration is as follows:-29. (a) <i>Drugs (including Ayurvedic, Siddha, Unani, Spirituous Medical Drugs and Homoeopathic Drugs), being formulations or preparations conforming to the following description:-</i></p> <p><i>Any medicinal formulation or preparation ready for use internally or on the body of human beings, animals, and birds for diagnosis, treatment, mitigation or prevention of any diseases or disorders, which is manufactured or imported into India, stocked, distributed or sold under licence granted under the Drug and Cosmetic Act, 1940, but does not include mosquito repellants in any form.</i></p> <p><i>(b) Medical Oxygen and Nitrous Oxide manufactured under licence granted under the Drug and Cosmetic Act, 1940</i></p> | 4% | 1.0.2006 to till date |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|-----------------------|

As per the schedule entry C-29, there are certain conditions which are essential for a product to fit in the said entry:-

- a) It should be a medicinal formulation or preparation
- b) It should be read for use internally or on the body of human beings, animals, birds
- c) It should be used for treatment mitigation or prevention of any disease or disorder.
- d) It should be manufactured or imported into India under licence granted under the Drugs & Cosmetics Act, 1940.

The applicant has claimed that the product is a drug as which is used in the treatment of diseases. The Doctors have certified that they prescribed the product for patients suffering from bleeding gums, Pyorrhoea etc. It is significant to note that the Supreme Court had dismissed the evidence or the Doctor certificates as being irrelevant. It had observed that when a common man certifies the product as a medicine only in such a case would the product be a medicine. The applicant has not put forth any evidence to show that the common man perceives the product as medicine. The product is an ordinary tooth powder which is used for maintaining dental hygiene. It is not the case that it is only prescribed when any person suffers from bleeding gums – in fact it is meant for daily use and is one of the products for maintaining oral hygiene.

The tooth powder is commonly understood to be a product which one uses daily with a view to undertaking dental care and hygiene. The applicant's product 'Lal Dant Manjan' is admittedly used daily. It is used for cleaning the teeth and it is an ordinary tooth powder. The fact that the ingredients used in the product are medicinal would not make the product an 'Ayurvedic medicine'. Ayurvedic ingredients and herbs are also predominantly used in cosmetics. But that would not make the products 'Ayurvedic medicine'. Sandalwood is an Ayurvedic herb but sandalwood soap or sandalwood powder would surely not be 'ayurvedic medicine'. The product 'Lal Dant Manjan' does not require a prescription from the doctors to purchase the same. It is available in the market across the counter. As the Supreme Court observed in the applicant's case himself, the fact that the product is used daily and does not require any prescription takes it out of the purview of a drug.

### **3] LICENCE NOT DECISIVE**

The applicant has canvassed the proposition that the product is prepared as per the formula given in the 'Ayurved Sar Sangraha'. The Excise Tribunal in the applicant's case (140 ELT 459) has observed that the book 'Ayurved Sar Sangraha' is published by the applicant himself and the Tribunal further observed that in respect of 'Lal Dant Manjan' there is no reference to any ancient book or document from which these formulae has been taken. However, the applicant has shown evidence that the 'Ayurved Sar Sangraha' is listed in Schedule 1 of the Drugs & Cosmetics Act. The Schedule 1 should be read along with Section 3(a) of the Drugs & Cosmetics Act. Section 3(a) defines Ayurvedic drug as including those medicines which are manufactured in accordance with the formulae described in the authoritative books of Ayurvedic system of medicine specified in the first schedule. As per 'Ayurved Sar Sangreha, the following ingredients should be used in the 'Dant Manjan Lal'

- a) Geru b) Tamal Patra c) Kali Mirch d) Soonth e) Pipal f) Tumbalbeej g) Akkarkara h) Neemchal i) Kapur j) Lavang Tel k) Peppermint

As per the label sleeve the ingredients used by the manufacturer in the product which as follows:-

- a) Geru b) Tamal Patra c) Kali Mirch d) Soonth e) Asvattha f) Tejovati Beej h) Babool Chal i) Neemchal j) Akarakaraaha k) Kapur l) Lavang Tel m)Peppermint

Thus it is seen that the ingredients are not strictly as per the formulae given in the 'Ayurved Sar Sangreha". However, the applicant may point out that he has obtained the licence under the Drugs & Cosmetics Act which certifies that the product is prepared as per formulae given in the books listed in Schedule 1. To this I may counter that irrespective of the fact that the product holds a Drug licence, the Supreme Court and the Excise Tribunals have not categorised the product as a medicine. Thus mere obtaining of ayurvedic licence was not held to be crucial to the classification of the product. The WBTT in the case of Commissioner of Commercial Taxes, West Bengal and another vs West Bengal Commercial Taxes Tribunal and another (89 STC 355) observed that a drug licence issued under the Drug & Cosmetics Rules is no proof of the fact that the preparation for which a licence has been issued is a drug within the meaning of the 1940 Act.

#### **4] PRIMARY USE IS IMPORTANT**

The literature submitted by the applicant claims that the product is 'Ayurvedic medicine' as it is effective in the disease of tooth and bleeding gums. It is also claimed that it helps to prevent the tooth decay and bad breath. On the basis of these claims, the applicant proposes to categorise the product as a drug. It is a well known fact that all tooth powders help to prevent tooth decay, bleeding gums and bad breath. Infrequent use of tooth powder and any negligence in brushing of teeth would cause decay and bad breath. Such tooth decay then leads to bleeding gums. Therefore, if I categorised the 'Lal Dant Manjan' as a 'drug' then by that criteria, all tooth powders available in the market would be 'Ayurvedic medicine'.

The fact remains uncontroverted that the product is primarily a tooth powder. As it is primarily a tooth powder it has been advised on the labels that it should be used daily. It is not that it is to be used for the limited period, unless the disease is cured. Also it is nowhere stated that it is a specialised product i.e. special medicine which is to be used in addition to a common tooth powder for the extra benefit. The product is advertised and marketed as a stand alone product for oral hygiene. To be a medicine the product has to be used for the treatment, diagnosis and mitigation of diseases. The applicant's product is used for the cleanliness of teeth. Prevention of tooth decay and bad breath is the result of use of any tooth powder. These conditions are not diseases or disorders. In fact, they can be avoided by the use of any ordinary tooth powder.

The question of classification of 'Dant Manjan' has already been dealt with by the Supreme Court and the Excise Tribunals from time to time under the provisions of the Central Excise Act in the applicant's case itself.. Before giving my opinion in the case, it would be entirely reasonable and logical to follow the judicial precedents in the case. The Judicial precedent and the ratio laid down assume significance in view of the fact that the judgments are in the case of the applicant himself.

#### **5] OTHER JUDICIAL PRECEDENTS**

- a. The Supreme Court judgment was followed by the Excise Tribunal again in the case of "Shree Baidyanath Ayurved Bhavan Pvt.Ltd." Vs CCE Allahabad (135 ELT 0127) in which the Tribunal held that the product is a 'tooth powder' and not a medicine.
- b. The Excise Tribunal in the case of "Shree Baidyanath Ayurved Bhavan Pvt.Ltd." Vs Commissioner of Central Excise Nagpur (138 ELT 218) however gave a different interpretation to the Supreme Court Judgement. After the judgement of the Supreme Court the concerned entry under the Excise Act underwent a change. After the amendment, the entry was redrafted as 'medicaments including those used in Ayurvedic medicine and manufactured exclusively in accordance with the formulae described in the authoritative books was

introduced in the Central Excise Act'. The Tribunal in this judgement observed that after the amendment, those medicaments manufactured as per description given in the authoritative books are classifiable under Chapter 30 which is for medicines. It further observed that there is no dispute that the product is manufactured in accordance with the formulae prescribed in the "Ayurvedic Sar Sangreha". It entirely based its decision on the fact that the entry was amended and as the product is now manufactured as per the formulae given in the ayurvedic text, it would be 'ayurvedic medicine'.

- c. However, this judgement was referred to the larger bench of the excise Tribunal which gave its decision as reported in 140 ELT 459. The Tribunal observed ."

"We have considered the submissions made by both the parties and we agree with the first arguments of the appellants that the classification of 'Dant Manjan Lal' is to be decided in view of the changed tariff entries. The issue before the Hon'ble Supreme Court in their own case (supra) is in respect of eligibility of 'Dant Manjan Lal', under the Notification No. 62/78, which provides exemption to all drugs/medicines/pharmaceuticals and drugs intermediates not elsewhere specified and while interpreting the provisions of notification, the Hon'ble Supreme Court held that 'Dant Manjan Lal', is not an ayurvedic medicine. With the introduction of the new Central Excise Tariff, 1985, the classification of the product, in question, is to be decided in view of the tariff entries.

For deciding the classification, the relevant entries of the tariff are reproduced below :

Chapter 30 -

Pharmaceutical Products -

Notes :

1. This Chapter does not cover

(a) -----

(b) -----

(c) -----

(d) Preparation of Chapter 33 even if they have therapeutic or prophylactic properties.

2. For the purpose of Heading 30.03 :

"(i) 'Medicaments' means goods (other than foods or beverages such as dietetic, diabetic or fortified foods, tonic beverages) not falling within Heading No. 30.02 or 30.04 which are either :

(a) products comprising two or more constituents which have been mixed or compounded together for therapeutic prophylactic uses; or

(b) unmixed products suitable for such used put up in measured doses or in packings for retail sale or for use in hospitals."

Heading 30.03 is reproduced as under :

"30.03 -Medicaments, including those used in Ayurvedic,Unani, Siddha, Homoeopathic or Bio-chemic systems".

This tariff entry was subsequently amended in the year 1996 and sub-heading 3003.31 is reproduced below :

3003.31 – Manufactured exclusively in accordance with the formulae described in the authoritative books specified in the First Schedule to the Drug and

Cosmetics Act, 1940 (23 of 1940) or Homoeopathic Pharmacopoeia of India or the United States of America or the United Kingdom or the German Homoeopathic Pharmacopoeia, as the case may be, and sold under the name as specified in such books or pharmacopoeia”.

The contention of the appellants is that they were manufacturing 'Dant Manjan Lal', as per the formulae prescribed in the book 'Ayurveda Sar Sangreh' and were also using the same name. This book was included in the First Schedule to Drugs & Cosmetic Act, 1940. From the reading of the above chapter notes of Chapter 30, the definition of medicament provides that medicament is a drug comprising two or more constituents which had been mixed or compounded together for therapeutic or prophylactic uses. The appellants had produced only two undated certificates issued by one Dr. M.R. Unyal, Herbal Specialist to show that 'Dant Manjan Lal' prevents dental diseases. The other certificate is issued by Dr. V.N. Pandey, Ayurvedic Consultant, who describes the formulae and gave details of ingredients of the 'Dant Manjan Lal', to show that each ingredient has therapeutic /prophylactic properties. Except these certificates, the appellants had not produced any acceptable evidence that the product is prescribed by Medical Practitioner as a medicine for any disease or condition. On the other hand, it is admitted fact that the “Dant Manjan Lal” is for daily use. **In the absence of any evidence, we are unable to hold that “Dant Manjan Lal” is a medicament as provided under Note 2 of Chapter 30 of the Tariff.**

Further, we find that the book ' Ayurveda Sar Sangreha' is published by the appellants and the contention of the appellants is that they had complied formulae had been taken. Further, the ratio of the decisions, relied upon by the appellants, is not applicable in the facts of the present case. In case of B.P.L. Pharmaceuticals (supra), the Hon'ble Supreme Court in Para 21 of the judgment held as under :

..”So far as medical properties of the product are concerned, it can be gathered from the technical and /or pharmaceutical references that Selenium Sulfide has anti-fungal and anti-seborrhoeic properties and is used in a detergent medium for the treatment of Dandruff on the scalp which is milder form of Seborrhoeic dermatitis and Tinea Versicolour. 2.5% of this compound is the Therapeutic quality”.

In the present case, this evidence is lacking. Similarly, the Hon'ble Delhi High Court in the case of 'Manisha Pharma Plasto Pvt.Ltd.' (supra) held that the product is not used as daily use talcum powder. It is a product normally used for specific purpose for treating prickly heat and as soon as the ailment is cured the use of the product is discontinued. **In the present case as mentioned above the 'Dant Manjan Lal' is for daily use and not as a medical prescription for treatment of any disease.**

**Thus the MSTT has conclusively stated that ‘the product is meant for daily use and it cannot be a medicine.**

- d. Again the Tribunal in (150 ELT 1290) observed that the decision of the Supreme Court reported in 83 ELT is binding even if the entry under the Excise Tariff Act had changed. It further observed that the change in the tariff will not make the product a ‘Ayurvedic medicine’. **Thus, the Tribunal very distinctly observed that the basis of a decision in the**

**case of the Supreme Court continues - the fact that medicine is prepared as per the 'Ayurveda Sar Sangraha' is not a determinant factor.**

- e. Again in the case of the applicant himself, Shree Baidyanath Ayurved Bhavan vs. Collector of Central Excise (165 ELT 494) the Tribunal followed the decision of the Supreme Court and held that the product 'Dant lal Manjan' is not a medicine.
- f. In their later judgment reported in 177 ELT 0332 in the case of the applicant, the Tribunal followed the decision of the Supreme Court and held that the product is not a ayurvedic medicine. It is an important thing to note that the amendment in the Schedule Entry under the Excise Act was not held to be germane to the conclusion.

The gist of the excise tribunal decisions is that 'Lal Dant Manjan' has, time and again, been held as a 'tooth powder' and the applicant's stand that the product is an 'ayurvedic medicine' has been consistently set aside by the Supreme Court and the Excise Tribunals. The relevance of this judgement is not dimmed by the fact that they are pronounced under the Excise Tariff Act - The classification of a product as a 'medicine' or 'tooth powder' and the principles underlying them would not be different under the Excise Act and the VAT Act. In the Excise Act, the Courts had to decide whether the product is a medicine and the question before me is also the same. Ultimately, the classification and categorization depends upon certain well defined and established principles which are the same under both the Acts- the nature of the product, its use, the evidence of common parlance and trade parlance, its constitution etc. The principles under the Excise Tariff Act are equally applicable to those under the VAT Act as far as the question of classification is concerned. **It is important to note that the applicant's product is exempted from registration under the Excise Act as it has been classified as a 'tooth powder' under the Central Excise Tariff Act and it is not cleared under Chapter 30 which is the Chapter for medicines under the Central Excise Act.**

- g. In the MTT judgement in the case of M/s Oketa (S.A No.1641 of 1992 dt.28.2.2002) the Tribunal had to decide where 'Oketa tooth powder' is a 'tooth powder' or a 'medicine'. In the said case the product was manufactured under a drug licence. The Tribunal observed in the case that,"

..." the fundamental principle for deciding the impugned issue is that if a product is predominantly used as a medicine, and it has an incidental use of cleaning the teeth, then such product can certainly be called as a medicine. However, if the predominant use of the product is for cleaning the teeth and if it has an incidental medicinal use due to some ingredients involved therein, then such product cannot be considered as a medicine per se it will have to be called as a medicated product covered by the special entry meant therefor. So far as the tooth powder in hand is concerned, Mr. Bagri has produced before us copies of the relevant documents to show that the tooth powder is manufactured under drug licence. However, it is not clear therefrom whether it is observed by the 'Drug' part or "Cosmetics" part of the licence. **Moreover, it has to be noted that manufacturing of a particular product under Drug Licence is really not a decisive test so far as the levy of tax under sales tax law is concerned.** For example, diagnostic kits though manufactured/imported under a Drug licence are not medicines as per the Bombay Act. So the question as regards whether a particular product is a medicine under the Bombay Act or not as to be decided independently on the basis of the relevant sales tax provisions....."



Thus, the MSTT in the above case has held that 'Oketa' tooth powder is not a medicine. The MSTT has also held that holding of a licence is not a decisive test in deciding whether the product is a drug or not. Further, it observed,"

..."No doubt, Mr. Bagri has produced before us copies of certificates from some doctors and chemists stating that the tooth powder is useful for subsiding dental pains etc. and that it is recommended by Doctors. However, according to us, such certificates do not conclusively prove the character of the product which is so essential for deciding whether the product is predominantly medicine. Mr. Bagri has also not denied the fact that the impugned tooth powder is purchased/sold as a medicated tooth powder and not as an ayurvedic medicine. In that view of the matter, in our considered opinion, the tooth powder can at best be considered as a medicated tooth powder, but not an ayurvedic medicine itself. On this background, the impugned tooth powder which is admittedly covered by the special schedule entry C-II-36 will not be legally eligible of the notification entry 214 under section 41. In view thereof, the sales thereof are legally liable to tax @ 8% as held by the lower authorities. The Supreme Court judgement relied upon Mr. Bagri which pertains to "Selsun Shampoo" is on the particular facts and the peculiar characteristics of the product and the same does not seem to be applicable in the present case.

The MSTT has also dismissed the doctor's certificates by observing that such certificates do not conclusively prove the character of the product.

In the M.S.T.T. Judgement in the case of Johnson & Johnson (16 MTJ 70), it was held that 'Listerine mouth wash' which was used for cleaning mouth was held to be covered by the term cosmetics. In the said case, the applicant had made the claim that the product has therapeutic properties. It was claimed by the applicant that the product is manufacture under a drug licence. It was used for treating diseases like plaque & cavity. The Tribunal held that the product is a 'cosmetic' even though the applicant was making therapeutic claims. The claim of them being medicines was rejected. In the said judgement reference was made to the Bombay High Court decision in the case of 'Vicco Laboratories' (decision delivered on 18<sup>th</sup> October 1994). The Bombay High Court in this case was pleased to hold that 'Vicco Vajradanti' tooth powder is a toilet article irrespective of the possession of licence. The Bombay High Court accepted the case of the revenue that the product was purchased and sold as tooth powder.

## **6] PRAYER FOR PROSPECTIVE EFFECT'**

The applicant has made a prayer for prospective effect as he has a determination order in his case -(Order No. DDQ-1184/ADM-5/281/B-20 dt 18.7.85)in which 'Baidyanath Dant Manjan Lal' has been held as a 'medicine' covered by the then schedule entry for 'medicines'- C-I-24. In view of the above, the liability of the applicant is protected.

06. In the backdrop of the discussion held herein above, it is hereby ordered that :-

## **ORDER**

(Under Section 56(1)(e) of the Maharashtra Value Added Tax Act)

No. DDQ-11-06/Adm-5/13/B-2

Mumbai,dt.30.1.09

1. The application for determination posing the question as regard the rate of tax applicable to the product 'Dant Manjan Lal' sold through Invoice No. 79 dt. 26.10. 2005 is answered as being covered by Schedule Entry E-1 attracting tax @ 12.5%.

2. The liability of the applicant is protected up to the date of the determination order.

**(SANJAY BHATIA)**  
**Commissioner of Sales Tax,**  
**Maharashtra State,Mumbai.**