TWENTY-FOURTH REPORT

PUBLIC ACCOUNTS COMMITTEE (1991-92)

(TENTH LOK SABHA)

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

MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)

Presented to Lok Sabha on 29.4.1992
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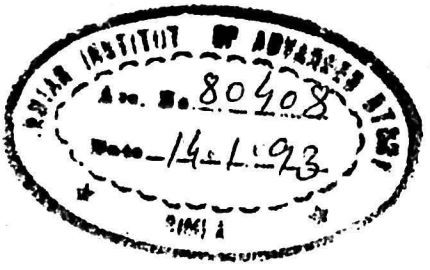

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8.1.1992 (AN)
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(1991-92)

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INTRODUCTION

I, the Chairman of the Public Accounts Committee, as authorised by the Committee do present on their behalf this Twenty-Fourth Report on Paragraph 3.22 of the Report of the Comptroller and Auditor General of India for the year ended 31 March, 1990, No. 4 of 1991, Union Government (Revenue Receipts—Indirect Taxes) relating to Union Excise Duties—Short-levy of duty due to misclassification—Prickly heatpowder—a cosmetic.

2. The Report of the Comptroller and Auditor General of India for the year ended 31 March, 1990, No.4 of 1991, Union Government (Revenue Receipts—Indirect Taxes was laid on the Table of the House on 26 July, 1991.

3. The Report deals with 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* resulting in total short levy of duty amounting to Rs. 1.05 crores.

4. The Committee have found that after the changes made in the Central Excise Tariff in 1985 and 1986 under the Tariff Heading cosmetic and toilet preparation, the departmental officers were convinced that the excisable item viz., prickly heat powder merited classification as cosmetics. According to them, this is amply borne out by the fact that the departmental officers had issued notices classifying the product as cosmetics 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, which, in fact, was done even before the Audit objections were raised. They have pointed out that 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 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 have 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 have

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. 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. To their surprise, the Committee have 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 contained the composition of the products indicating clearly that it contained 5% boric acid, the Committee have concluded that the Ministry were merely interested in getting confirmation of their view point instead of having an objective assessment of this case. The Committee have greatly deplored the way a case involving substantial revenue was grossly mishandled by the Ministry showing little concern for protecting the interest of Government. They have 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.

5. 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 have expressed their distress that divergence in classification of similar excisable items still continue to exist. In the case of the product under examination, viz. prickly heat powder, they have found that the manner of classification was not exactly uniform throughout the country. The Committee have recommended 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.

6. The Committee (1991-92) examined Audit paragraph 3.22 at their sitting held on 8 and 22 January 1992. The Committee considered and finalised the Report at their sitting held on 21 April, 1992. Minutes of the sittings from Part II of the Report.

7. For facility of reference and convenience, the observations and recommendations of the Committee have been printed in thick type in the body of the Report and have also been reproduced in a consolidated form in Appendix II* of the Report.

8. The Committee would like to express their thanks to the Officers of the Ministry of Finance (Department of Revenue) for the cooperation extended to them in giving information to the Committee.

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

ATAL BIHARI VAJPAYEE
Chairman,
Public Accounts Committee.

NEW DELHI;
April 23, 1992

Vaisakha 3, 1914 (Saka)

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REPORT

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

Classification of Pharmaceutical products and cosmetic items

Prior to 28.2.1986, patent and proprietary medicines were classifiable under tariff item 14E of the then Schedule to the Central Excise Tariff Act and cosmetic and toilet preparations were classifiable under the then tariff item 14F for the purpose of levy of central excise duty. After the introduction of the new Central Excise Tariff on 28.2.1986 (based on the Harmonised system of Nomenclature), 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).

2. In their 208th Report (Seventh Lok Sabha) the Public Accounts Committee had examined a case of classification of an excisable item, namely, Boroline. The Committee had observed that the product had been classified as a patent and proprietary medicine which fell under tariff item 14E under the erstwhile Tariff and attracted duty 12.5% *ad valorem* and not under tariff item 14F—cosmetics and toilet preparations on which rate of duty was 100% *ad valorem*. Pointing out the Borline was commonly used as a cream and as a cosmetic and its antiseptic qualities were admittedly weak, the Committee had recommended that Government should re-examine the matter and reclassify Boroline taking into consideration its properties, therapeutic value and its general usage. They had also recommended that in order to remove any ambiguity, Government should examine the feasibility of redefining the tariff item 14E on the pattern of international nomenclature under tariff heading 33.06.

3. In pursuance of the said recommendations of the Committee, the following explanation was added by the Government under item cosmetic and toilet preparations:

> "This item includes cosmatics and toilet preparations whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value"

Accordingly all antiseptic creams were brought within the purview of cosmetics. This explanation is now included as not 2 to Chapter 33 (cosmetics) w.e.f. 1.3.1985.

4. Thus, as per the above mentioned explanation, such items falling under headings 33.03 to 33.08 are also classifiable under Chapter 33 even if they contain, subsidiary pharmaceutical or antiseptic constituents or are held out as having subsidiary curative or prophylactic value.

Audit Para

5. This Report is based on Para 3.22 of the Report of the Comptroller & Auditor General of India for the year ended 31st March, 1990, No. 4 of 1991, Union Government (Revenue Receipts—Indirect Taxes) which is reproduced as Appendix I.

6. 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 manufacturing prickly heat powder in two Collectorates of Central Excise 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.

7. The details of short levy, in brief, as intimated by the Ministry of Finance (Deptt. of Revenue) to the Committee are as follows:

Sl. No.	Name of the assessee	Name of the product	Collectorate	Period of short levy	Amount of short levy
1.	Muller & Phipps (I) Ltd.	Johnson Prickly Heat Powder	Bombay-I	March 1987 to July 1987	Rs. 12.49 lakhs
2.	Johnson & Johnson Ltd.	Johnson Prickly Heat Powder	Bombay-III	April 1986 to March 1987	Rs. 88.03 lakhs

Facts of the cases

8. The facts relating to both the cases of short levies as informed by the Ministry are narrated in the succeeding paragraphs.

First case

9. Muller & Phipps (I) Ltd. had been manufacturing Johnson prickly heat powder on behalf of Johnson & Johnson Ltd., Bombay since 1985. The assessee had filed a classification list on 28.3.1985 claiming classification of prickly heat powder as medicine chargeable to duty at 15% *ad valorem* under Tariff Item 14E of the erstwhile Central Excise Tariff. The Assistant Collector rejected this claim and passed an order on 24.10.1986 classifying the product as cosmetics and toilet preparations under Tariff Item 14F chargeable to duty @105% *ad valorem*. The Assistant Collector

chose to classify the product as cosmetic and toilet preparation mainly because of the changes effected in the Tariff Item 14F in the Budget, 1985. Against the order of the Assistant Collector, the assessee filed an appeal with the Collector (Appeals) who vide his order dated 4.4.1990 set aside the order of the Assistant Collector and held the product classifiable under Tariff Item 14E. The Department filed an appeal against the order of the Collector (Appeals) in the Customs, Central Excise and Gold Control Appellate Tribunal (CEGAT) on 19.7.1990. The appeal is pending decision.

10. The new Central Excise Tariff (based on the Harmonised System of Nomenclature) was brought into force with effect from 28.2.1986 as per which medicines became classifiable under Chapter 30, while cosmetics and toilet preparation became classifiable under Chapter heading 33 of the new Tariff. On 7.3.1986 the assessee filed another classification list seeking classification of the product under sub-heading 3003.19 as medicine chargeable to duty @15% *ad valorem*. The Assistant Collector vide his order dated 5.1.1987 classified the product under the heading 33.04 (preparations for the care of skin) chargeable to duty @105% *ad valorem*.

11. On 12.1.1987 the assessee again filed a classification list claiming classification of the product as medicine on the ground that the same product manufactured by Johnson & Johnson Ltd. in Bombay III Collectorate was classified as medicine under sub-heading 3003.19. They also stated that the Collector of Central Excise (Appeals), Bombay in his order-in-appeal dated 15.12.1986 had held that Nycil Prickly Heat Powder manufactured by Manisha Rolling Mills Pvt. Ltd., Umbergaon was classifiable as medicine. The Assistant Collector accepted the contention of the party and passed an order on 27.2.1987 holding that the product was classifiable as medicine under heading 3003.19. In the light of this order, Johnson Prickly Heat Powder was charged to duty at 15% *ad valorem* from March 1987 to June 1987.

12. In pursuance of the orders passed by the Assistant Collector in October 1986 and January 1987 respectively, two demands for Rs. 26.72 lakhs and Rs. 30.32 lakhs were issued to the party on 10.11.1986 and 19.3.1987 in respect of the clearances made by the party for the period from 17.3.1985 to 28.2.1986 and from 1.3.1986 to 12.1.1987 respectively. The party went in writ before the Bombay High Court against the demand notice dated 10.11.1986 with the prayer for quashing of all the orders and all demand notices issued by the Assistant Collector on the ground that the Assistant Collector had just passed an order on 27.2.1987 holding their product as drug and not as cosmetic and toilet preparation. The High Court by their order dated 3.3.1987 allowed the writ petition to be withdrawn by the party after the counsel for the department conceded that until the appeal filed by the party against the Assistant Collector's order dated 24.10.1986, the demand notice dated 10.11.1986 and the 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 27.2.1987, without prejudice to the department's right to review the said order.

13. The manufacture of Johnson Prickly Heat Powder by Muller & Phipps (India) Ltd. was discontinued from July 1987. However, the order of the Assistant Collector dated 27.2.1987 was reviewed and an appeal was filed before the Collector of Central Excise (Appeals) on 15.3.1988. The appeal was rejected by the Collector (Appeals) vide his order dated 26.4.1990 holding that the product was classifiable under heading 3003.19. The Department filed an appeal before CEGAT on 23.8.1990 against the order of the Collector (Appeals). The decision of the CEGAT is awaited.

Second case

14. The product was being manufactured within the jurisdiction of Bombay III, Central Excise Collectorates by Johnson & Johnson Ltd. since 1961. Initially, the product was being manufactured in the name of the Johnson Prickly Heat Powder and later the brand name Shower to Shower Prickly Heat Powder came into existence w.e.f. February 1988. The classification of this product was being made under Tariff Item 14E of the first schedule to the erstwhile Central Excise Tariff as patent and proprietary medicine.

15. Pursuant to the changes made in the Tariff Item 14F w.e.f. 1.4.1985 the Department issued a show-cause notice on 18.4.1985 for classification of the product under Tariff Item 14F as Cosmetics and Toilet preparations.

16. In July 1986 another show-cause notice was issued for classifying the product under sub-heading 3304.00 of the new Central Excise Tariff which came into effect from 28.2.1986.

17. However, taking into consideration the Board's clarification issued on 1 December 1986 that the Drug Controller of India had held a similar product to be a drug and was, therefore, classifiable under sub-heading 3003.19, the Divisional Assistant Collector withdrew the two show-cause notices vide his order issued on 30.12.1988. The Audit objection relating to the period April 1986 to March 1987 was raised in December 1987. The Collectorate did not admit the Audit objection.

Views of the Ministry over classification

18. The Committee desired to know the views of the Ministry of Finance (Department of Revenue) over the classification of prickly heat powder for the purpose of levy of central excise duty. The Finance Secretary stated during evidence:

> "In our view, the correct classification is, it is drug and not a cosmetic".

19. On being enquired by the Committee, the Chairman, Central Board of Excise and Customs stated in evidence that the Ministry had arrived at this conclusion on 1 December 1986. Expressing the Ministry's point of view, the Finance Secretary stated during evidence that the issue relating to the classification of prickly heat powder for the purpose of levy of central excise duty was examined by the Ministry/Board in the past at various stages since 1965.

20. When asked to indicate the various stages in which the issue was examined, the Ministry in a note furnished after evidence recounted them as follows:

"(i) The Govt. of India vide their order No. 907/1966 dated 11.10.1966 had held that Nycil powder shall be assessed to duty as P and P medicines under TI-14E of the erstwhile Central Excise Tariff.

(ii) Govt. of India in its order dated 22.3.70 in respect of the products manufactured by Johnson and Johnson India Ltd. directed that the product shall be assessed to duty as Patent and Proprietory Medicines under TI-14E of the erstwhile Central Excise Tariff.

(iii) In 1983 the Public Accounts Committee examined paragraphs 2.17 and 2.70 of the Report of the C&AG for the year 1981-82, Union Government (Civil) Revenue Receipts, Vol.I—Indirect Taxes relating to Union Excise Duties—Cosmetics and Suppression of Production. In course of the examination, Ministry of Finance (Department of Revenue) intimated the Committee that Nycil powder was being classified under TI-14E as Patent or Proprietory Medicines of the erstwhile Central Excise Tariff. This is reflected at p. 18-19 of the 208th Report of the PAC (1983-84) (7th Lok Sabha).

(iv) The question of classification of Nycil Prickly Heat Powder was examined by the Ministry in 1986. The Drug Controller of India was consulted in the matter. On the basis of the opinion of the Drug Controller of India that Nycil Prickly Heat Powder was a drug, it was clarified by the Board that Nycil Prickly Heat Powder was classifiable under sub-heading 3003.19 of the Schedule to the Central Excise Tariff Act, 1985. The clarification was issued by Board's Telex F.No.103/21/86-Cx-3 dated 1.12.1986.

(v) In 1988, the Board examined the issue of classification of Boroquin Prickly Heat Powder. The issue for consideration was whether the same merited classification as Ayurvedic medicine or Alopathic medicine. The Board decided that the product was appropriately classifiable as Alopathic medicine.

(vi) In course of examination of the audit objection in D.A.P. No. 466/89-90 relating to Johnson Prickly Powder the Board examined the issue of classification of Shower to Shower Prickly Heat Powder manufactured by Johnson and Johnson India Ltd. The Drug Controller of India was consulted in the matter who stated that the product may be treated as a drug."

21. According to the Audit paragraph, the Ministry had accepted the underassessment in one case whereas in the second case, the objection was stated to be under examination. The Committee desired to be clarified with the actual factual position. In a note furnished to the Committee, the Ministry of Finance (Department of Revenue) stated:

"In case of DAP No. 137/89-90 the Ministry intimated the audit on 31.8.1990 that it has no comments to offer. This was because the Collector of Central Excise, Bombay-I had admitted the objection on the basis of Chemical Examiner's report and he had filed appeal before CEGAT and also in the light of C&AG's letter dated 15.6.1990. Subsequently on 29.7.1991 the opinion of the Drug Controller of India was received in the case of 'Shower to Shower' Prickly heat powder manufactured by Johnson & Johnson Ltd. The Drug Controller stated that the product may be treated as a 'drug'. It was considered at this stage that further consideration was necessary, also taking into account the decisions of the Collector (Appeals) and the pending appeals before the CEGAT. It is for these reasons that the audit was intimated that the issue is under further examination. The audit was only intimated about the present position of the examination."

22. Asked why the Ministry had not categorically communicated to Audit that the impugned product was classifiable as drug, if it was the considered view of the department as was maintained by the representatives of the Ministry during the course of evidence, the Chairman, CBEC stated:

"Appeals were pending in the Tribunal".

23. When pointed out that in the appeals pending in CEGAT, the department's contention was that the product merited classification as cosmetics, the witness replied:

"We have to carry Audit alongwith us".

Opinion expressed by the departmental Chemical Examiner

24. According to Rule 56 of the Central Excise Rules, 1944 read with the notification issued thereunder, the Chief Chemist, Central Revenues Control Laboratories, New Delhi, the Dupty Chief Chemist, Chief Examiner, Assistant Chief Examiner and Chemical Assistants of Central Revenues Control Laboratories New Delhi and Customs House Laboratories of Calcutta, Madras, Bombay, Okha, Cochin, Kandla and Digboi have been appointed for drawing of samples of excisable products

and conducting testing of the same for the purpose of deciding classification and levy of central excise duty.

25. The Committee have been informed that the departmental Deputy Chief Chemist/Chemical Examiner had expressed opinions on two occasions in the past namely in October, 1985 and in March, 1989 regarding the classification of prickly heat powder.

26. In October 1985 chemical examination was undertaken in respect of the samples of Nycil Prickly Heat Powder produced by Glaxo Industries (I) Ltd. Thane. The Deputy Chief Chemist, Bombay in his views expressed on the basis of the declared information given on the container of the product had stated as follows:

> "The product is stated to contain Chlorophenesin, Boric Acid and Zinc Oxide, which are subsidiary pharmaceutical and antiseptic constituents. The product also contain perfume, thus it can not be considered solely to be used for curing or preventing skin diseases.
>
> In view of above, I am of opinion that such product is more akin to cosmetic rather than dedixion".

27. It is understood that on 9.2.1986 the Deputy Chief Chemist had further clarified:

> "It contains perfumes also. It is true that chlorophenesin has bacterilogical fungicidal properties. However, the preparation containing mainly Talc. Zinc Oxide and with small quantities of bactericides and perfumes are commonly used as Talc powders/ deodorant powder. Moreover, prickly heat powders are also reported under body cosmetics in authoritative book cosmetics. In view of the above, the product, in my opinion, by virtue of Explanation II, is covered within the scope of item 'cosmetics'."

28. While giving his advice in March 1989 on the test check conducted of the sample of Johnson Prickly Heat Powder produced by Muller & Phipps (I) Ltd. based on the information on the packing material of the product, the Chief Chemical Examiner Bombay had stated as follows:

> "The sample is in the form of white fine powder having a perfumed talc base - containing antiseptic ingredients, salicylic acid, boric acid. The product under reference in my opinion satisfies the definition of cosmetics and toilet preparations given in Chapter note (2) of Chapter 33."

29. The Committees' attention has also been drawn to a communication of the Office of the Chief Chemist addressed to the superintendent of Central Excise, Thane dated 19 April, 1989 which stated as follows:

> "Please refer to your letter No. C.Ex./R VIII/Glindia/87/46 dt. 11.1.88 and subsequent reminder on the above subject.

The duplicate sample of Nycil powder forwarded under cover of your above cited letter has been registered here under CLR I dated 4.4.88 and analysed with the following results.

Sample is a fine white powder with a pleasant odour, composed of starch, and answers test of zinc, Borate and a chloro compound, Magnesium and silica.

The analytical findings on the sample are in conformity with those given on the printed label of lthe container. The product is stated to contain mainly of starch. Starch as given in books is to impart covering power and has good moisture absorbency, good adhesion, a neutral reaction and is completely non toxic & powder based on starch is reported to have the unique property of achieving a peach brown effect. It is also mentioned in literature that some Body powders have starch as the amin ingredient (as much as 70%).

Zinc Oxide is reported to be among materials which impart covering powder (masking property) like ZNO_2 kaolin starch etc. Some face powders are also reported to contain as high as 25% Zinc Oxide. Boric Acid is one of the most important disinfectant and it is used in quantities up to 20% in body powders. Even Baby powders contain 5% Boric Acid.

Chlorophenesin is an anti-fungal agent and is used in Dusting powders.

From the declaration, it is clear that the product, apart from chlorophenesin, has all the ingredinents which are normally present in face powder, Body powder or other talcum powders and are meant for the care of the skin. According to the label on the container, the product is not to be applied where the skin is raw, broken or ulcered, which in otherwords means that normally the powder is meant for a normal, healthy only. All the constituents present in the sample except chlorophenesin, are ingredient meant for care of the skin. It is thus true a Cosmetic and toilet preparation containing subsidiary pharmaceutical or antiseptic constituent, satisfying Explanation II to Central Excise tariff 1985-86.

In view of the above facts and by virtue of explanation II under item 14F of Central Excise Tariff 1985-86 the product under reference in my opinion is covered within the scope of cosmetic and toilet preparation containing subsidiary pharamaceutical or antiseptic constituents."

Reference to Drugs Controller (India)

30. The clarification issued by the Board vide their telex dated 1.12.1986 (referred to earlier) read as follows:

"It is considered by the Board that Nycil Prickly Heat Powder has been held to be as "drug" by the Drug Controller of India, is appropriately classifiable under sub-heading No. 3003. 19 of TI".

31. The Committee enquired about the basis for the issue of the above mentioned clarification. The Ministry of Finance (Deptt. of Revenue) in a note stated as follows:

"The classification of 'Nycil Prickly Heat Powder' manufactured by M/s Manisha Rolling Mills Pvt. Ltd., umbergaon. Dt. Valsad, was examined by the Board on a representation made by the firm on 16.9.1986, by referring the matter to the Drugs Controller (India) Directorate General of Health Services, Ministry of Health & Family Welfare, Department of Health. The Drugs Controller (India), Directorate General of Health Services, after taking note of the following composition of the product had expressed the view that 'Nycil powder' falls under category III of the classification of the formulation under the Drugs (prices Control) Order and the retail price has been fixed by the Government. The composition of Nycil is as under:

Cholorophenesin	I.P.	1%
Boric Acid	I.P.	5%
Zinc Oxide	I.P.	16%
Starch	I.P.	51%
Talc purified	I.P.	100%

That department had opined that Chlorophenesin is the anti-bacterial and anti-fungal agent. Nycil powder actively prevents prickly heat and protects the skin from the sores from dhobic itch and athelet's foot and accordingly the product in question may be treated as a 'drug'. The Central Board of Excise and Customs clarified to the Collector of Central Excise, Vadodara and Thane (Bombay-III) that Nycil Prickly Heat Powder which has been held to be a drug by the Drugs Controller of India is appropriately classifiable under Sub-Heading 3003. 19 of the Schedule to the Central Excise Tariff Act, 1985. The Clarification was issued by Board's telex F.No. 103/21/86-Cx. 3 dated 1.12.1986."

32. The Committee asked whether the Board had reviewed their clarification issued on 1.12.1986 after the departmental Dy. Chief Chemist had expressed his view in March 1989 that the product merited classification under Chapter 33 (Cosmetics). In reply the Ministry in a note stated as follows:

"The Deputy Chief Chemist's opinion of March, 1989 (opinion that the product satisfied the definition of Cosmetics and Toilet Preparations) came to the notice of the Board in August, 1990, when Collector of Central Excise, Bombay-I sent a detailed reply to DAP No. 137/89-90. This in turn was sent to Collector of Central Excise, Bombay-III in December 1990, following up the reply sent by Collector of Central Excise, Bombay-III to DAP No. 466/89-90.

When the Collector still held that the classification as Drug, was more appropriate, the matter was again referred to Drug Controller of India on 21.6.1991."

33. In his opinion given in 1991, the Drugs Controller (India) stated that 'Shower for shower Prickly Heat Powder' contains salicylic acid and boric acid which cause keratolytic and bacterlostalic/fungistatic only when there is a cause and as such the product is meant for therapeutic use and may be treated as a drug. The said views were expressed by the Drugs Controller (India) On 29.7.1991 and again on 29.11.1991.

34. The Committee desired to know whether the ingredients of the samples on which the Drug Controller's opinions were sought in 1986 and 1991 and the ingredients of the impugned product in the case under examination were the same. The Ministry of Finance in a note stated as follws:

"In 1986, the opinion of Drug Controller was sought on Nycil Prickly Heat Powder. The ingredients of the product are:

1.	Chlorophenesin	—	1%
2.	Boric Acid	—	5%
3.	Zinc Oxide	—	16%
4.	Starch	—	51%
5.	Talc purified	—	100%

In 1991, the opinion was sought on shower to Shower Prickly Heat Powder. The ingredients of which are as below:

1.	Salicylic Acid	—	1.5%
2.	Boric Acid	—	5%
3.	Zinc Oxide	—	10%
4.	Perfumed talc base		

The Ingredients of impugned product under examination, i.e. Johnson Prickly Heat Powder, are as below:

1.	Salicylic Acid	—	0.8%
2.	Boric Acid	—	5%
3.	Talc base of Hydrous Magnesium Silicate	—	

35. The Committee asked whether the Board/Ministry had accepted the opinion of the Drugs Controller both in 1986 and 1991. The Ministry replied in a note that in 1986 the opinion of the Drug Controller was accepted and the the concerned Collectorates were intimated. In 1991 the opinion of the Drug Controller was forwarded to the concerned Collector for taking necessary action at his end.

36. To a question of the Committee whether the issue was deliberated in any of the Board's meeting the Ministry replied in negative. The Ministry, however, maintained that the clarification was issued as per the decision of the Board.

37. The Committee desired to know as to how often references were being made to the Drugs Controller (India). In reply the Ministry stated that whenever doubts were expressed by Collectors the matter was referred to the Drugs Controller.

38. It will be seen from the above that the departmental Chemical Examiner and the Drugs Controller of India had expressed contradictory opinion regarding classification of prickly heat powder. In this context the Committee enquired about the role of the Chief Chemical Examiner of the Department and the Drugs Controller (India) as defined in the law in the administration of Central Excise. In reply the Ministry of Finance in a note stated:

> "As regards the relative merits of the opinion of the Drugs Controller and the Chief Chemist on the issue whether the product has medicinal value or not, it may kindly be appreciated that the opinion of the Drugs Controller would prevail."

Classification and application of Drugs (Prices Conorol) Order

39. During evidence, the Chairman, CBEC drew attention of the Committee to the opinion expressed by the Drug Controller of India that Nycil prickly heat powder could be treated as drug. One of the arguments adduced by the Drug Controller in support of his view was that Nycil Powder fell under Category III of the classification of formulation under this Drugs (Prices Control) Order and the retail prices had been fixed by the Government. In his connection, the Chairman, CBEC deposed:

> "There are three opinions of the Drugs Controller. But the more relvant fact is that they cannot sell it at a price other than what has been approved by the Drugs Controller. That clinches the issue that this item being drug.
>
> In the Drugs Act, there is a definition of a drug and a cosmetic. It will fall under the drug more than under cosmetic."

40. When the Committee pointed out that whether it was not true that Boroline was being classified under sub-heading 3304.00 as cosmetics despite the fact that it was also covered under the drug price regulation, the Ministry in a note furnished after evidence stated:

> "Yes, Sir, it is a fact. The Drugs (Price Control) Order is one among many factors considered."

41. In this connection, the Committee's attention was also drawn to the clarification issued by the Central Board of Excise and Customs clarified on 10 July, 1975, that for purposes of levy of excisd duty, the classifcation

of a product as between tariff item 14F or 14E, should depend on whether the product has more of the properties of a cosmetic or that of a drug. Classification should be made on the basis of the literature, ingredients and usage in respect of the product. It is not to be decided merely on the fact that the product has been brought under the control of the Drugs Controller.

42. The Public Accounts Committee in Para 1.57 of their 208th Report (Seventh Lok Sabha) had observed:

> "The classification of boroline was again discussed in a Tariff Conference of Collectors held in November 1981 wherein a view was expressed that everything which falls within the ambit of Drugs Control Order may not necessarily be classified as a P&P medicine. The main purpose of usage has also to be seen mainly as to whether a product is used as medicine or is for the care of the skin or for beautifying the skin."

43. The Committee wanted to know whether the issue of classification of prickly heat powder was ever discussed at any of the Collectors/Tariff Conferences. In a note furnished to the Committee after evidence, the Ministry replied in negative.

Concentration of Boric Acid

44. During evidence, the Chairman, CBEC drew attention of the Committee to the opinion of the Drugs Controller (India) expressed in 1991 that because of the high concentration of boric acid (5%), prickly heat powder cannot be used as talcum powder.

45. In this connection it would be relevant to mention here, the following observations of the Public Accounts Committee made in para 1.59 of their 208th Report (Seventh Lok Sabah):

> "The Committee also note that according to the advice given by the Chief Chemist in 1976, "the use of Boric Acid to the extent of 1% in Boroline does not necessarily make it a P and P medicine since antiseptic cosmetic preparations (Talc) may use as high as 5% Boric Acid and still continued to be cosmetic". Even in British Pharmacopeia Codex an ointment with 1% Boric Acid has since been deleted from the definition of drugs, a fact which came out in evidence before the Committee."

46. While giving further clarification on the chemical examination of the sample of Nycil Prickly Heat Powder, the Deputy Chief Chemist on 19 April 1989 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."

Relevance of Drug Licence in classification

47. According to the Audit, the department had contended in June 1990 that 'Johnson prickly heat powder' was being manufactured in accordance with a drug licence issued by the Food and Drug Administration of the State Government as an argument to support classification of prickly heat powder as drug. This was also observed by the Drug Controller (India) in his opinion tendered in 1986 and 1991. The Committee asked whether a Drug Licence issued by the Food and Drug Administration of the State Government is binding on the Central Excise Authorities to treat the product as a drug when note 2 of Chapter 33 and sample of the product identified as cosmetics. In a note furnished to the Committee, the Ministry stated as follows:

> "The 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 of the products under Chapter 30 or 33 of the Central Excise Tariff. However it is also one of the factors that can be taken into account by the appropropriate authorities".

48. The Committee in para 1.56 of their 208th Report (Seventh Lok Sabha) had observed on the above aspect:

> "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 14 E. Mere possession of a drug licence would not entitle the manufacturer to claim assessment of his product under tariff item 14E".

Changes in Tariff in 1985 and 1986 and its impact on classification

49. From the facts of the two cases enumerated in the early portion of this report it will be seen that the show-cause notices were issued by the adjudicating Assistant Collectors in both the cases, admittedly, after the changes made in the Central Excise Tariff in 1985 and 1986. As stated elsewhere, in the Budget 1985, Explanation II was added to Tariff Items 14F which read as follows:

> "This item includes cosmetics and toilet preparations whether or not they contain subsidiary pharmaceutical or antiseptic constituents, or are held out as having subsidiary curative or prophylactic value".

50. The Assistant Collector in the case of Muller & Phipps (I) Ltd. had, in fact, come to the conclusion that the presence of the ingredients such as Salycylic Acid and Boric Acid in the product, does not make any

difference to it being classified as Cosmetic and toilet preparation, as these are only subsidiary Pharmaceutical and Antiseptic constituents and the prickly heat powder in question is primarily a preparation for the case of the skin. The new Central Excise Tariff (based on the Harmonised system of Nomenclature) was brought into force with effect from 28.2.1986 as per which medicines became classifiable under Chapter 30, while Cosmetics and toilet preparations became classifiable under Chapter Heading 33 of the above Tariff. The Assistant Collector in the case of Muller & Phipps(I) Ltd. had held that evenafter the changes in the Tariff in 1986, the product was classifiable as "cosmetics". The Assistant Collector concerned in the case of Johnson & Johnson had also issued a show cause notice to the party after the changes made in 1985 and 1986. Such show cause notices were found to have been issued in certain other Collectorates as well. The Assistant Collector who dealt with the case of Johnson & Johnson had dropped the show-cause notices after the Board issued the clarification on 1 December 1986 that the product was classifiable as "Drug". In fact, he recorded as follows:

> "Now in view of Board's clarification that the Drug Controller of India has held the above product to be a 'Drug' and classifiable under Heading No. 3003.19 the show cause notices issued in the assessee as herein above mentioned are treated as withdrawn with immediate effect".

The adjudicating Assistant Collector in the case of Muller & Phipps (I) Ltd. held the product as medicine in the light of the Board's clarification referred to above and the decision of the adjudicating officer referred to above.

51. The Committee asked whether it was not a fact that after the changes made in the Central Excise Tariff in 1985 & 1986, the departmental officers were convinced that prickly heat powder merited classification as "cosmetics" and therefore, show cause notices were issued. In a note furnished after evidence, the Ministry stated *inter alia* as follows:

> "In respect of Bombay-I and Bombay-III Collectorates, it is a fact that show cause notices for classifying as cosmetics and toilet preparations were issued by the officers after changes in the Central Excise Tariff in 1985 and 1986".

Treatment in British Pharmacopoeia

52. The Committee desired to know that details of the classification of prickly heat powder in the British Pharmacopoeia. In a communication the Ministry of Finance stated as follows:

> "Regarding the classification in British Pharamacopoeia it is stated by the Drug Controller of India that the British Pharmacopoeia is a book of standards for raw materials and pharmaceutical formulations of drugs and it does not specify and standards for cosmetics".

53. Asked whether it was not a fact that in the British Pharmacopeia prickly heat powder does not find a place in the list of drugs, the Chairman, Central Board of Excise & Customs stated in evidence:

"There a number of items have been shown".

54. In a note furnished after evidence the Ministry added:

"British Pharmacopoeia does not mention any product like prickly heat powder ..... The Chief Chemist is also agreed that British Pharmacopoeia does not mention any product like Prickly Heat Powder but the constituents of Prickly Heat Powder which impart the medicinal properties like Boric Acid, Zinc Oxide, Salicylic Acid are included in the British Pharmacopoeia".

International practice of assessment of prickly heat powder

55. The Committee desired to know the practice followed internationally in the assessment of prickly heat powder for the purpose of levy of central excise duty. During the evidence held on 8.1.1992 the representative of the Ministry expressed their inability to furnish the information.

56. At the instance of the Committee to ascertain the international practice, the Ministry referred the matter to the Customs Cooperation Council, Brussels in a communication dated 10.1.1992 which reads as follows:

"The question of classification of prickly heat powder under the Central Excise Tariff was examined by the Public Accounts Committee. 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 Harmonised System of Nomenclature followed by different countries of the world. In pursuance of the aforesaid directions of the P.A.C. 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 15th January, 1992. We shall be grateful if the aforesaid information is sent to us by FAX immediately".

57. In their reply dated 14.1.1992 the Council replied as follows:

"I refer to your above referenced FAX message concerning the classification of prickly heat powder. The Secretariat has no specific information concerning the classification practice with regard to prickly heat powders in other countries.

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.

The Secretariat was of the view that "Dakosan" should be classified in heading 33.07 (sub-heading 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.

The three products mentioned in your message 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 sub-heading 3307.90 of the Harmonized System.

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."

58. The Committee pointed out that the Council had, in fact, agreed with the Audit point of view. Reacting to that the Chairman, Central Board of Excise & Customs stated during evidence held on 22.1.1992:

"They had no knowledge about the international drug and they have referred to another drug which did not have Boric Acid. Based on that they gave their advice. In their view this should be regarded as cosmetics."

59. When asked whether the Ministry disagreed with the Council's view point the witness replied:

"That we cannot say. We would like to agree with you. We are safeguarding the revenue interest. This matter would be settled very seen".

60. The witness then stated that the Ministry had made a further reference to the Council after the receipt of the advice of the Council dated 14.1.1992.

61. On being asked whether the Ministry expected that the revised opinion of the Council will support their view point the witness replied:

"They must tell us what the right thing is and what is done by the other countries".

62. The Committee desired to be furnished with a copy of the further reference made to the Council. The communication dated 22.1.1992 reads as follows:

"Please refer to your letter No. 92 N.36-Sa/FI dated 14.1.92 in the context of the captioned subject.

2. It is stated that in respect of 'DAKOSAN' prickly heat powder, which contain two pharmaceutical active ingredients namely, zinc oxide (10%) and salicylic acid (0.75%) with the balance of the product made up on Menthol (0.1%) and perfumed chalk, the Secretariat had taken the view that the same should be classified under heading 33.07 (Sub-heading 3307.90) of the Harmonised System, since the said product had the essential 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, it also contain Boric Acid (IP) to the extent of 5% of the total content. It is possible that the classification of prickly heat powders containing Boric Acid will not be the same as classification of 'Dakosan prickly heat powder' which does not have Boric Acid in it.'

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

I. Nycil Prickly Heat Powder

i) Chlorophensin	—	1%
ii) Boric Acid	—	5%
iii) Zinc oxide	—	16%
iv) Starch	—	51%
v) Talic purified to	—	100%

II. Shower to Shower Prickly Heat Powder

i) Salicylic acid	—	1.5%
ii) Boric acid	—	5%
iii) Zinc oxide	—	10%
iv) perfumed talc base	—	

III. Johnson Prickly Heat Powder

i) Salicylic acid	—	0.8%
ii) Boric acid	—	5%
iii) Talc base of Hydrous Mangesium Silicate	—	

4. 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 opinion in the case of Shower to Shower prickly heat powder and Nycil prickly heat powder are enclosed.

5. 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 HSN. 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.

6. We are of the view therefore that classification of 'Dakosan' can not be adopted for the products specified in para 3 above. We shall like a confirmation of this view by the Customs Co-operation Council Secretariat in the matter.

7. 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 generally way or have a more precise technical significance, and whether a list of such constituents is available".

The Committee have been informed that the reply to the communication is still awaited.

Need for enforcing rational classification of prickly heat powder

63. It has been pointed out by Audit that as per Harmonised Commodity Description and Coding System Notes at page 477 the product is classifiable as 'personal deodorants and antiperspirants' under sub/heading 3307.20. Asked why prickly heat powder could not be treated as "personal deodorants and antiperspirants", the Ministry in a note *inter alia* stated:

> "As per Harmonised Commodity Description and Coding System Notes at page 477, it is not specifically indicated that products like Prickly Heat Powder under consideration are classifiable as "personal deodorants and antiperspirants".

64. When asked whether it was specifically mentioned that it should be classified as drug, the Chairman, CBEC stated in avoidence:

> "It does not mean such because we are free to interpret that way also".

65. The Committee further asked whether the logic applied in the case of prickly heat powder could be extended in the case of carbolic soap also. The Chairman, CBEC stated in evidence:

> "The point is very relevant. Now the subsidiary and principal is a matter where views can be different".

66. When asked whether any short of warning was given that prickly heat powder should not be treated as a talcum powder, the witness replied:

> "It is the job of the Ministry of Health".

67. The Committee asked whether the Ministry would consider taking suitable steps to make it abundantly clear that prickly heat powder is classified as cosmetics and not as pharmaceuticals without waiting for the decision of the CEGAT keeping in view the nature of the excisable item, the revenue interest of Government and the practice being followed internationally in the classification of the product. In a note furnished to the Committee after evidence the Ministry stated as follows:

> "Further action in this regard can be taken after receiving the opinion from the Customs Cooperation Council, Brussels. However, in view of the above opinion of the Council 14.1.1992 that prickly heat powder is a toilet preparation necessary instructions have been given to field formations for safeguarding revenue".

68. The instructions referred to above read as follows:

> "Cera has pointed out that the proper classification of prickly heat powders should be under Chapter 33 as cosmetic and toilet preparation instead of Chapter 30 as medicaments. Customs Cooperation Council Brussels has advised that such products are classifiable as toilet and cosmetic preparation under Chapter 33 (3307.90) of H.S.N. Matter relating to classification of prickly heat powders has further been taken up with Customs Cooperation Council, Brussels. In the meanwhile all collectors, Collectors (Judicial) and Collectors (Appeal) are requested to keep the proceedings of the classfication of prickly heat powders pending till the opinion if received from the Customs Cooperation Council. Collectors are also requested to raise protective demands under Chapter 33".

Decision of CEGAT

69. The appeals filed by the Department against the orders of Collector (Appeals) holding that the products, namely, prickly heat powder was classifiable as drug in the case of Muller & Phipps (I) Ltd. were pending decision in the CEGAT. The Committee were informed that the hearing in the cases were yet to be commenced.

70. The Committee asked if the CEGAT gave a decision which might be against the position as it prevailed internationally how the Department would deal with the situation.

The Chairman, Central Board of Excise & Customs stated in evidence:

> "There is nothing. We cannot give any authentic findings. We will go in appeal to the Supreme Court by a SLP or some other way. We will find a way. We have not given a thought to it".

71. The Committee pointed out that the Department could seek an adjournment in the light of the reference made to the Customs Cooperation Council. Reacting to that the Finance Secretary stated in evidence:

> "Now the case has been referred to them we can ask for an adjournment".

72. In a note furnished after evidence the Ministry stated:

"The Chief Departmental Representative, CEGAT has been requested to place the matter before CEGAT and to seek adjournment of the proceedings pending before CEGAT vide F. No. 238/1/91-CX.7 dated 27.1.1992 and 28.1.1992. Copy of the reference made to the Chief Departmental Representative has already been sent to Lok Sabha Secretariat vide F. No. 238/1/91—CX.7 dated 28.1.1992."

Scrutiny by Internal Audit

73. The Committee desired to know whether the units of the assessees were visited by Internal Audit Organisation of the department and about the observations made by them, if any. In a note furnished to the Committee, the Ministry of Finance (Department of Revenue) stated:

"In case of the assessee in Bombay-I collectorate the Internal Audit Party visited the unit and inspected the records from 20.1.1987 to 23.1.1987. During this period, the product was classified as cosmetics and toilet preparations and therefore there was no observations by the Internal Audit Party. In case of the assessee in Bombay-III collectorate the Internal Audit Party also visited the factory. However, no objection was raised".

Action Taken to safeguard revenue

74. The Committee enquired about the steps being taken to safeguard revenue in respect of the short levies pointed out by Audit. In a note furnished to the Committee the Ministry stated as follows:

"In the relevant periods pertaining to the DAP's in case of the assessee in Bombay-I collectorate a writ petition was filed in February, 1987 before the Bombay High Court with a prayer that the Asstt. Collector's earlier order classifying their product as a cosmetics and toilet preparations should be quashed. In March, 1987 the Bombay High Court passed an order and allowed the assessee to withdraw the writ petition on certain conditions, one of them being that the current and future assessments of Johnson Prickly Heat Powder shall be made treating it as medicine in terms of Assistant Collector's latest order dated 27.2.1987. In view of this specific direction from the Bombay High Court, no show cause notice was issued for safe guarding the short levy pointed out by the audit for the period from March, 1987 to June 1987, as any action contrary to the Bombay High Court's order would have amounted to contempt of' Court. In case of the assessee in Bombay-III collectorate, the audit objection was received after lapse of almost one year since the date on which the show cause notices were dropped by the Assistant Collector.

It may also be appreciated that at this stage, it cannot be definitely stated that there is any short levy, as the issue of classfication is pending in CEGAT".

Lack of uniformity in classi :ation

75. The Committee desir ɔ know the details about the manufacturers of prickly heat powder in the country other than those mentioned in the Audit Para and the manner in which the product was classified by them during the period (i.e. April 1986 to July 1987) of short levy pointed out in the cases under examination. The Ministry of Finance in a note furnished after evidence stated that according to the available information, apart from Bombay-I and Bombay-III prickly heat powder was manufactured in two other Collectorates where the position was as follows:

> "*Vadodara*: M/s. Manisha Pharma Plast Pvt. Ltd., Umbargam were manufacturing Nycil Prickly Heat Powder during this period. The assessee sought classification of the product under sub-heading 3003.19 as P and P medicament. The A.C. did not accept the classifcation and ordered classification of the product under sub-heading 3304.00 as Cosmetic and Toilet preparations by an adjudication order. The assessee preferred an appeal before the Collector (Appeals), Bombay. The Collector (Appeals) allowed the appeal of the assessee on 15.12.86 and held that the product was correctly classifiable under sub-heading 3003.19 as medicaments.
>
> *Nagpur:* M/s. Puma Ayurvedic Pharma Ltd., Nagpur were manufacturing Neem Tulsi Prickly Heat Powder from October, 1986. During this period, the assessee sought classification of the product as Ayurvedic medicament and the same was approved by the Assistant Collector".

76. The present practice of assessment of prickly heat powder in different Collectorates as intimated by the Ministry is as follows:

Sl. No.	Collectorate	Name of the assessee	Name of the product	Chapter under which the product is being classified
1	2	3	4	5
1.	Bangalore	Mysore Cosmetic Ltd.	Mesmer Prickly Heat Powder	Chapter 30
2.	Bombay-I	Mistair Home Products	Shower to Shower Prickly Heat Powder	-do-
3.	Bombay-II	Nemi Pharma (P) Ltd.	Prickly Heat Powder	-do-
4.	Bombay-III	Glaxo India	Nycil Prickly Heat Powder	-do-
5.	Bombay-III	Johnson & Johnson	Shower to Shower Prickly Heat Powder	-do-

1	2	3	4	5
6.	Jaipur	Hosiden Labs (I) Pvt. Ltd.	Otian Tushar Prickly Heat Powder	Chapter 33
7.	Hyderabad	Sang-Sroia Remedies (P) Ltd.	Medicated Shower to Shower Prickly Heat Powder	Chapter 30
8.	Vadodara	Manisha Pharmaplast (P) Ltd.	Nycil Prickly Heat Powder	Chapter 30
9.	Vadodara	Snamps Pharma (P) Ltd.	Johnsons Prickly Heat Powder & Shower to Shower Prickly Heat Powder	-do-

77. The Committee wanted to know in the case under examination whether the practice prevailing in all the Collectorates in respect of classification of prickly heat powder was ascertained by the Board before making the reference to the Drugs Controller. In a note furnished subsequent to evidence, the Ministry stated that it was not considered necessary.

78. Asked whether the Ministry had issued clarifications to all the Collectors of Central Excise on 1.12.1986 that the items was to be classified as drug, the Finance Secretary stated during evidence:

> "Clarification was given to those Assistant Collectors who were dealing with this particular product".

79. The Chairman Central Board of Excise & Customs added:

> "This telex was sent only to Bombay and Vadodara".

80. On being asked by the Committee as to why the clarification was not issued to all the Collectors, the witness replied:

> "We admit the lapse. Normally we issue such letters to all".

81. It will be seen that the manner of classification of prickly heat powder was not exactly uniform throughout the country. In fact the assessee in Bombay-I had successfully pleaded before the adjudicating authority that the commodity was being classified in a different manner in Bombay-III.

82. The lack of uniformity in the classification of excisable commodities had engaged the attention of the Public Accounts Committee in the past also. The Committee had earlier emphasised the need for a continuous exchange of information between various Collectorates on important issues relating to classification, levy of duty, assessment etc.

so that the possibility of diversence in the classification of the same product is avoided.

83. In reply to a question of the Committee about the system to regulate and coordinate the classification of similar products being manufactured the Ministry of Finance in a note stated that such instructions had been issued in the past. On perusal of the copies of the instructions furnished it was seen that some of those instructions were, in fact issued in pursuance of the recommendations of the Public Accounts Committee.

84. 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-heating 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.

85. 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.

86. 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 Tariff which was made effective from 1.3.1986. Pursuant to the above changes,

show-cause notices were issued by various Assistant Collectors to the assessees manufacturing this excisable item in different Collectorates. It was done so, not only to the assessees 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 assessees 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.

87. 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

accept the opinion consistently expressed by their own technical experts and made repeated references to the Drugs Controller (India).

88. 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 that 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.

89. 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.

90. 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 manufacture 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.

91.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.

92. 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 examina

tion). We shall like a confirmation of this view by the Customs Co-operation Council Secretariat in the matter". The Committee fail to understand the 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.

93. 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 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 Governemnt 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.

94.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.

95. 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.

96. 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 the 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 casue 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.

97. 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.

98. 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 levey of central excise duty keeping in view the revenue interests of Government and also the general usage of the product.

NEW DELHI
23 April, 1992
3 Vaisakha 1914(Saka)

ATAL BIHARI VAJPAYEE
Chairman,
Public Accounts Committee.

APPENDIX-I

(vide Para 5)

PARAGRAPH 3.22 OF THE REPORT OF THE COMPTROLLER AND AUDITOR GENERAL OF INDIA FOR THE YEAR ENDED 31 MARCH, 1990, NO. 4 OF 1991, UNION GOVERNMENT (REVENUE RECEIPTS — INDIRECT TAXES)

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). A 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 are held out as having subsidiary curative or prophylactive value.

Two assesses manufacturing 'prickly 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 dt. 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 periods 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 'Johnoson 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 Cheif Chemist to the effect that product satisfied definition of cosmetics and toilet preparation given in chapter note (2) of chapter 33 closes 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, headings 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.

APPENDIX-II

CONCLUSIONS/RECOMMENDATIONS

S. No.	Para No.	Ministry/ Department concerned	Conclusion/Recommendation
1	2	3	4
1	84	Ministry of Finance (Department of Revenue)	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.
2	85	-do-	The Audit paragraph under examination involves a dispute over the clasification 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.

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3	86	Ministry of Finance (Department of Revenue)	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 pharmacedutical 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 Tariff which was made effective from 1.3.1986. Pursuant to the above changes, show-cause notices were issued by various Assistant Collectors to the assessees manufacturing this excisable item in different Collectorates. It was done so, not only to the assessees 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

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			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 assessees 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 his conclusion had failed to examine the issue adequately from all angles and had overlooked certain vital considerations.
4	87	Ministry of Finance (Department of Revenue)	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 Examinar 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

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			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).
5	88	Ministry of Finance (Department of Revenue)	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 that 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.
6	89	-do-	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

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			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 Committees' 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 Drug Controller (India) and that prices are fixed under Drugs (Prices Control) order.
7	90	Ministry of Finance (Department of Revenue)	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

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			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.
8	91	Ministry of Finance (Department of Revenue)	- 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.
9	92	-do-	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

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			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 the 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.
10	93	Ministry of Finance (Department of Revenue)	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

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			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 or case involving substantial revenue was grossly mishandled by the Ministry showing little concern for protecting the interest of Government which is greatly deplorable.
11	94	Ministry of Finance (Department of Revenue)	– 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.
12	95	-do-	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

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			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.
13	96	Ministry of Finance (Department of Revenue)	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 the 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

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			case arising out of the Audit objections raised in October 1987 so as to safeguard revenue.
14	97	Ministry of Finance (Department of Revenue)	– 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.
15	98	-do-	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 con-

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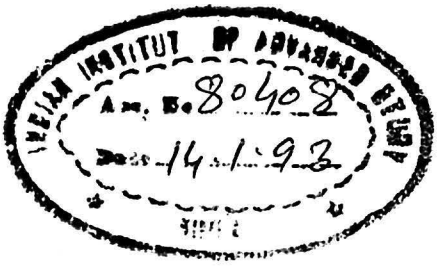
			firmed by the action taken by various assessing Assistant Collectors in different Collectorates to issue show cause notices after the aforesaid changes in the Tariff and the advices given clearly and categorically by the departmental chemical examiners repeatedly and also further reinforced by the opinion 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.



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