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WINTHROP-STEARNS, INC.,
Petitioner,

\- versus - C.T.A. CASE NO. 2930

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.
x - - - - - - - - - - - - x

5/30/83

D E C I S I O N

The basic question for us in this case is the correct classification, for sales tax purposes, of the "Tussy Products" of petitioner, namely:

(a) Tussy Lemon Hand and Body Lotion

(b) Tussy Hand and Body Lotion

(c) Tussy Lemon Moisturizer, and

(d) Tussy Lemon Cleansing Cream.

Petitioner Winthrop-Stearns, Inc. contends that its "Tussy Products" should be classified as medicinal preparations subject to the 7% sales tax prescribed in Section 186 of the 1939 National Internal Revenue Code, while respondent Commissioner of Internal Revenue avers that they are toilet articles or preparations within the purview of Section 184(b) of the same Code subject to the 70% sales tax prescribed therein. Section 184(b) of the Tax Code reads at the time as follows:

> "SEC. 184. <u>Percentage tax on sales of jewelry, toilet preparations and others</u>.- There shall be levied, assessed, and collected once only on every original sale, barter, exchange, or similar transaction for nominal or valuable consideration intended to transfer ownership of, or title to, the articles hereinbelow enumerated a tax equivalent to seventy per centum of the gross value in money of the article so sold, bartered, exchanged, transferred, such tax to be paid by the manufacturer or producer: <u>Provided</u>, <u>further</u>, That, where the articles enumerated hereinbelow are manufactured out of materials subject to tax under this section, the total cost of such materials, as duly established, shall be deductible from the gross selling price or gross value in money of such manufactured articles:
>
> xxx xxx xxx
>
> (b) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders, and any similar substance, article, or preparations, by whatsoever name known or distinguished; and any of the above which are used or applied or intended to be used or applied for toilet purposes; except tooth and mouth washes, dentifices, tooth paste; and talcum or medicated toilet powders.
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> xxx xxx xxx."

Parenthetically, it may be stated that articles not enumerated in Sections 184, 184-A, 185, 185-A, 185-B and 186-B of the then in force National Internal Revenue Code are considered ordinary articles, including medicinal preparations, subject to the

This amount represents the difference between the 70% sales tax under Section 184(b) and the 7% sales tax imposed under Section 186.

It maybe stated that in a previous letter dated August 9, 1977, respondent, in reply to petitioner's letters of March 24, 1976 and November 27, 1975 requesting for a ruling that the "Tussy Products" be categorized as "medicinal preparations" subject to the 7% sales tax prescribed in Section 186 of the Tax Code, instead of 70% sales tax, ruled that even assuming that said products are medicated, nevertheless they remain under the classification of "toilet articles or preparations" subject to 70% sales tax.

Taking respondent's failure to take categorical action on its claim for refund or tax credit filed on January 17, 1978 as implied denial thereof, as the prescriptive period of two years provided for in the then Section 306 of the Tax Code for the institution of the judicial suit for the recovery of any national internal revenue tax alleged to have been erroneously or illegally collected was about to expire, petitioner initiated the present action with this Court on January 20, 1978 praying that its "Tussy Products" be declared medicinal preparations sales tax of 7%.

Petitioner is a domestic corporation duly organized and existing under the laws of the Philippines, with principal business address at No. 74 Epifanio de los Santos Avenue, Mandaluyong, Metro Manila. It is engaged in the manufacture and sale of pharmaceutical, medicated, cosmetic and toilet products, among which are the Tussy Lemon Hand and Body Lotion, Tussy Hand and Body Lotion, Tussy Lemon Moisturizer and Tussy Lemon Cleansing Cream, referred to as "Tussy Products".

On the sale of the aforesaid products for the period starting from the 4th quarter of 1975 up to the 4th quarter of 1976, petitioner made a total gross sales amounting to ₱1,975,979.00, with a net sales of ₱809,244.00. On said net sales, petitioner paid sales tax in the sum of ₱566,471.00 at the rate of 70% under Section 184(b) of the Tax Code.

Contending that the "Tussy Products" are medicinal preparations subject only to the 7% sales tax prescribed under Section 186, petitioner filed on January 17, 1978 with respondent a written claim for refund or tax credit of the amount of ₱594,260.00 as overpaid sales tax for the period starting the 3rd quarter of 1975 to the 4th quarter of 1976.

subject to 7% sales tax, and that respondent be ordered to grant petitioner's claim for tax credit or refund of the sum of ₱509,825.00. The alleged overpaid sales tax for the 3rd quarter of 1975' was excluded from petitioner's claim.

The parties are not in dispute as to the computation of the sales tax paid by, or the amount refundable to petitioner, as the case may be.

In assailing petitioner's right to the refund or tax credit of the amount of ₱509,825.00, respondent raises the issue that the "Tussy Products" are toilet articles or preparations within the purview of Section 184(b) of the then National Internal Revenue Code, falling under the term "x x x and any similar substance, article or preparations, by whatsoever known name known or distinguished; x x x except tooth and mouth washes, dentrifices, tooth paste; and talcum or medicated toilet powders". As respondent puts it, all toilet articles or preparations, except for powder, come within the purview of Section 184(b) of the Tax Code and therefore taxed under said section regardless of whether they are medicated or not. Consequently, even assuming that petitioner's "Tussy Products" are medicated, nevertheless they remain under the classification of "toilet articles or preparations", subject to the 70% sales tax prescribed in Section 184.

Apparently, petitioner does not quarrel with respondent that toilet articles or preparations are the subjects of taxation of Section 184(b). And the law seems clear on this matter. Section 184(b) of the Revenue Code enumerates the articles or preparations that are subject to the tax under said section and adds to the list "and any similar substance, article or preparations, by whatsoever known name known or distinguished; x x x". It is a settled rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. This rule is commonly called the "ejusdem generis" rule. (Ollada vs. Court of Tax Appeals, 99 Phil. 604.)

The term "any similar substance, article or preparations" should therefore be restricted to substances, articles or preparations similar or identical to "perfumes, essences, extracts, toilet waters, cosmetics, petroleum jelly, hair oils, pomades, hair dressings, hair restoratives, hair dyes, aromatic cachous, toilet powders", which for practical purposes and in every day life are toilet articles or preparations as stated in the title of Section 184. This is rendered clearer by the use of the word "similar" before the term "substance, article or preparations", and the provision "any of the above which are used or applied or intended to be used or applied for toilet purposes" which follows thereafter.

This brings us to the definition of the term "toilet preparations". Jurisprudence defines it as "Any preparation which is intended to affect, and conceivably, to improve the bodily appearance, such as a lotion intended to contribute to health and appearance of skin". (Peroxide Chemical Co. v. Sheehan, C.C.A. No. 11462, 108 F 2d 306, 308.) From this, we cannot but extract the view that any preparations or substances which are used or applied, or intended to be used or applied, for toilet purposes or for any purposes for which the articles enumerated in Section 184(b) subject to tax therein are customarily used, are considered toilet preparations, regardless of the name by which they are known or distinguished. They are commonly and primarily adjuncts to the daily toilet, intended to be used in connection with the care of the body, or applied to affect and, conceivably, to improve the body appearance.

Are the "Tussy Products" of petitioner toilet articles or preparations within the purview of Section 184(b) of the National Internal Revenue Code?

The Food and Drug Administration (now Bureau of Food and Drugs), after several analyses and examinations of the "Tussy Products", issued a certification dated November 20, 1975 (Exhibit "D") that:

November 20, 1975

TO WHOM IT MAY CONCERN:

In view of the medicinal components present in the following products manufactured in the Philippines by Winthrop-Stearns, Inc., Mandaluyong, Rizal for Valmont Inc., New York, U.S.A.:

TUSSY Hand and Body Lotion with Vitamin A
TUSSY Lemon Hand and Body Lotion with Vit. A
TUSSY Cleansing Cream with Borax
TUSSY Lemon Moisturizer with Vitamin A

the preparations are used in the treatment and prevention of skin problems and for medicated skin cleansing and to nutrify skin.

> Furthermore, the following products contain saponaceous and non-volatile components in excess of 5%:
>
> TUSSY Hand and Body Lotion - greater than 10%
> TUSSY Lemon Hand and Body Lotion - greater than 10%
> TUSSY Cleansing Cream - greater than 60%
> TUSSY Lemon Moisturizer - greater than 10%
>
> A.M. REGALA
> Deputy Administrator

As explained by Mrs. Ofelia Marcos Alba in her testimony before this Court (t.s.n., July 20, 1979, pp. 9-15), the research chemist of the Food and Drug Administration who conducted the series of tests on the "Tussy Products" and prepared the draft of the certification above-quoted, Vitamin A as component of the products plays a large part in the normal keratinization of the skin; Palmitate is the salt of Vitamin A; while the medicaments Methyl-p-hydroxy benzoate and Prophyl-p-hydroxy benzoate act as antifungal agents. The medicaments of the "Tussy Lemon Hand and Body Lotion", as elucidated by Mrs. Marcos Alba, are the same as the "Tussy Hand and Body Lotion". Borax or sodium borate as medicament in the "Tussy Cleansing Cream" acts as a mild astringent when used externally, while Allantoin, aside from Vitamin A, Methyl-p-hydroxy benzoate and Prophyl-p-hydroxy benzoate, in "Tussy Lemon Moisturizer", acts as a healing agent that stimulates the growth of healthy tissues of the skin. Menthol in the "Tussy Products" acts as cooling agent and as an antipruritic or counter-irritant, and the saponaceous content thereof reacts with an alkali to produce soap. (t.s.n., July 20, 1979, pp. 13-15.)

The certification commands much respect and weight, since it proceeds from the official of the government called upon to execute and implement the food and drug laws of the country. (Regalado vs. Yulo, 81 Phil. 173; Tan vs. Municipality of Pagbilao, Quezon, L-14284, April 30, 1963, 7 SCRA 887; Commissioner of Internal Revenue vs. P.J. Kiener, L-24754, July 18, 1975, 65 SCRA 142.) Considering the public and official character of the certification, and respondent's failure to dispute or controvert it, we see no reasonable ground to deny to the document the faith and credence normally due thereto. In the recent case of Oro Enterprises, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 3004, April 15, 1983, wherein the factual setting is comparable to that in the case at bar, this Court, speaking through Judge Alex Z. Reyes, made observations in the following words:

> In the case at bar we are not to confuse about a rare addendum to pharmacopoeia in which fact and fabrication become indistinguisable but about the usual attributes animating the meaning of medicinal preparations as legally contemplated for tax purpose. It may not therefore be an oversimplication to state that the finding of the Food and Drug Administration furnishes the best means of its own exposition in terms of tractable data openly laid and fully disclosed and as such deserves the credence that should normally be accorded. Respondent points to no irregularity nor error of the relevance and competence required to bash that patina of legitimacy over the certification.

Further, on the functions and effects of the medicaments and components of the "Tussy Products" on the skin, a well-known practising doctor who specializes in dermatology and a 1964 TOYM awardee in the field of medicine,* testified before this Court, inter alia, that: (t.s.n., December 13, 1979, pp. 29-33.)

(a) Vitamin A, as found in the "Tussy Products", is for the purpose of helping the normal development and growth of superficial skin cells, maintaining proper keratinization of skin which is essential for purposes of protecting the body surface and regulating the hardening of the cells as they emanate and emerge to undergo hardening. It therefore helps in the normal development of skin cells. Vitamin A also improves eyesight, particularly night vision and helps in the

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*Dr. Pablo O. Campos

normal development of skin pores.

(b) Methyl-p-hyroxy benzoate is used as a means of protecting or preventing, or controlling, the growth of both bacteria and fungi.

(c) Prophyl-p-hyroxy benzoate has the same effect.

(d) Borax is an antiseptic, preventing the growth of bacteria, and at the same time an astringent having a drying effect when applied to the skin externally.

(e) Allantoin enhances proper formation of tissues in the granulation process, having a healing effect.

(f) The presence of Vitamin A, Methyl-p-hyroxy benzoate, Prophyl-p-hyroxy benzoate, Allantoin, borax and Palmitate in the "Tussy Products" makes them have curative effects.

That in the manufacture of the "Tussy Products" these medicaments and components were used and maintained all through out the manufacturing process at specific weight, at proper temperature and passed quality control test had been testified to by petitioner's assistant plant manager and shown in Exhibits "G" to "V".

Since petitioner's "Tussy Products", by virtue of their medicaments, functions and therapeutic uses, are used in the treatment and prevention of skin problems, it seems clear beyond doubt that the controverted products in the words again of Judge Alex Z. Reyes in Oro Enterprises, "fit into an appropriate legal cubbyhole for medicinal preparations aptly characterized in an analogous case, 'As used in the Tariff Act of March 3, 1883 (C.121, Schedule 2, 22 Sta. 494) these medicinal preparations mean such articles, as are of use or believed by the prescriber or user fairly and honestly to be of use, in curing or alleviating or palliating or preventing some disease or affection of the human body.' (La Tondeña, Inc. vs. Collector of Internal Revenue and CTA, L-14336, April 30, 1964, 10 SCRA 713.)". In La Tondeña, the Supreme Court had occasion to define the term "medicinal preparations" as follows:

> "Medicinal preparations" consists of two words, 'medicinal' and 'preparation.' 'Medicinal' means curative or alleviative used for the cure or alleviation of body disorders (Words and Phrases, Vol. 264 p. 616). 'Preparations' are those which are prepared or something equipped or compounded for particular purposes (Words and Phrases, Vol. 33, p. 350). Medicinal preparations are therefore descriptive of and refer to substances used in medicine and prepared for the use of the apothecary or the physician to be administered as a remedy for diseases. As used in the Tariff Act of March 3, 1883, these medicinal preparations mean such articles as are believed by the prescriber or user fairly and honestly to be of use in curing or alleviating or palliating or preventing some disease or affliction of the human body."

> "This court shall avoid confusing itself with terms that have been well and clearly defined. It shall not hesitate to state that petitioner's products, especially rubbing alcohol are medicinal preparations. The rubbing alcohol which is essentially denatured ethyl alcohol is used as an antiseptic to inhibit the growth of bacteria."

The net result therefore is that petitioner's "Tussy Products" are not toilet articles or preparations within the purview of Section 184(b) of the 1939 National Internal Revenue Code. Accordingly, such products are not subject to the 70% sales tax prescribed therein but to the 7% sales tax under Section 186 of the same Code. Section 186 provides that "articles not enumerated in sections 184, 184-A, 185, 185-A, 185-B and 186-B", are ordinary articles which are subject to the sales tax of 7%.

Worthwhile noting in this connection are the following rulings of respondent on similar products which are used, just like the "Tussy Products" under consideration, in the treatment and prevention of skin problems:

(1) Yang Fai Su Medicated Powder Cream, B-Moon, Medicated Powder Cream and Ennas E-Moon Medicinal Face Cream, which are registered with the Food and Drug Administration and certified to by said office to contain salycylic acid and resorcinal which act as keratolytic and antifungal agents and that they

are indicated for dematitis, pruritus and acne treatment, are subject to 7% sales tax pursuant to Section 186 of the Tax Code (BIR Ruling March 26, 1974, Exhibit "E-4"; Formal Offer Petitioner's Evidence, p. 3).

(2) Yardley Liquid Hair Control which contains Irgasan DP-300, a bactericide and fungicide as certified by the Food and Drug Administration is subject also to 7% sales tax (BIR Ruling, April 30, 1976, Exhibit "E-6"; ibid., p. 3)

(3) B-Moon Medicinal Cream and Sun Tung Medicated Pomade which are Food and Drug Administration registered and certified to as containing medicaments which are anti-pruritic, keratolytic and anti-bacterial agents, and containing also 19.54% and 20.10% saponaceous matter, are subject to 7% sales tax prescribed in Section 186 of the Tax Code (BIR Ruling, September 8, 1976, Exhibit "E-8", ibid., p. 3)

(4) Hanson Herbal Shampoo and Hanson Super Fresh Shampoo, changed to Morning Dew Herbal Shampoo and Morning Dew Super Fresh Shampoo containing more than 5% saponaceous matter and therefore partaking the nature of soap and intended solely for cleansing, are taxable at the rate of 7% sales tax prescribed in Section 186 of the Tax Code. (BIR Ruling,

December 6, 1976, Exhibit "E-9"; ibid., p. 3)

(5) and other rulings of the Office of the Respondent to the effect that medicinal preparations and/or those products containing more than 5% sapo-naceous matter are subject to 7% sales tax (Exhibits "E", "E-1", "E-2", "E-3", "E-5" and "E-7"; ibid., p. 3).

To our mind, these rulings have strong persuasive force, especially where the law-making authority, with full knowledge of such interpretation, has reenacted the provisions of Section 184(b) and Section 186 of the 1939 National Internal Revenue Code into Sections 194(b) and Section 199 of the 1977 National Internal Revenue Code without sub-stantial changes. The view has often been expressed that reenactment of a law without substantial amend-ment after it had long been enforced by administrative officials charged with its enforcement is tantamount to legislative approval of the administrative inter-pretation. (Asturias Sugar Central vs. Commissioner of Internal Revenue, L-19337, Sept. 30, 1969, 29 SCRA 617; Commissioner of Internal Revenue vs. Ledesma, L-17509, Jan. 30, 1970, 31 SCRA 95; Inter-Provincial Autobus vs. Collector of Internal Revenue, 98 Phil. 290; Mindanao Bus Co. vs. Collector of Internal

Revenue, L-14078, Feb. 24, 1961, 1 SCRA 538.) Far be it from a theoretical gobbledygook the rulings lend settling eloquence to the precise issue raised in the case at bar. (Oro Enterprises, Inc. vs. Commissioner of Internal Revenue, supra.)

In an effort to discredit the medicinal functions and therapeutic uses of petitioner's "Tussy Products", respondent would however find comfort in the labels of the products which present and describe them as lotions, moisturizers and cleansing creams instead of names and descriptions indicating their medicinal characteristics. Nevertheless, to quote once more the observations of Judge Alex Z. Reyes on this point in Oro Enterprises:

> The apparent quibble on the descriptive term, "lotion" as creating the impression and evoking the connotation that the preparation is cosmetic, does not change the basic fact that the controverted product by nature, formulation and purpose, as found and certified, is medicinal. "What's in a name?, that which we call a rose, by any other name would smell as sweet!" We do not think the certification is a mere cosmetic effort to disguise the true nature and character of the questioned product. We therefore feel compelled to affirm its import and force lest it be suffered to petrify in futility.

At any rate, as explained by petitioner in his letter dated January 13, 1978 to respondent requesting a tax credit/refund of the amount involved in this case, "these names are marketing strategies designed to attract more the buying public that if they are to be called by medical names" (p. 28, BIR records.) And a medicinal preparation does not lose its character as such because it is sold over the counter to the public generally, rather than to druggist, physician and medical institution to be administered hyperdermically by physicians. (Vital Corp. vs. Knox Co., Crest. & App. 143 F, 2d 883, 888.)

Having reached the conclusion that the "Tussy Products" involved in this case should be classified as "medicinal preparations" subject to the 7% sales tax prescribed in Section 186 of the Tax Code, instead of the 70% sales tax paid by petitioner under Section 184(b), petitioner is therefore entitled to the refund or tax credit of the amount of ₱509,825.00, representing the difference between the 70% and the 7% sales tax for the period starting the 4th quarter of 1975 to the 4th quarter of 1976, the written claim for refund or tax credit thereof having been properly filed with respondent and the suit for recovery seasonably instituted with this Court in accordance with the then Section 306 of the National Internal Revenue Code.

WHEREFORE, respondent Commissioner of Internal Revenue is hereby ordered to grant a tax credit in favor of petitioner Winthrop-Stearns, Inc. the amount of ₱509,825.00. Without pronouncement as to costs.

SO ORDERED.

Quezon City, Metro Manila, May 30, 1983.

Amante Filler

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

Alex Z. Reyes

ALEX Z. REYES
Associate Judge