

EY Tax Alert

HC holds GST Council cannot determine classification of goods

Executive summary

EY Alerts cover significant tax news, developments and changes in legislation that affect Indian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor.

This tax alert summarizes a recent judgement of Madras High Court (HC)¹ regarding classification of "Flavoured Milk" and whether Goods and Services Tax Council (GST Council) is empowered to determine classification of goods.

GST Council, in its 31st meeting held on 22 December 2018, classified "Flavoured milk" under HSN 2202.

HC observed that:

- ▶ The recommendation of GST Council is not binding on the Government.
- ▶ As long as Customs Tariff Act is adopted for the purpose of interpretation of Notification no. 1/2017-CT(R), classification has to be strictly in accordance with classification under Customs Tariff Act.
- ▶ Determination of classification does not fall within the preserve of GST Council.
- ▶ Classification ought to be independently determined by Assessing officer.
- ▶ The entry "Beverages containing milk" under tariff heading 2202 only includes "beverage" containing plant/ seed based milk.

It cannot include milk secreted from mammary glands of milch animal, dairy animals such as cow, goats, buffalo, etc.

- ▶ Having adopted classification of 'Goods' under Customs Tariff Act, GST Council cannot impose a wrong classification of "Flavoured Milk" as a "Beverage Containing Milk" under heading 2202.

Accordingly, HC held that "Flavoured milk" is classifiable under HSN 0402.

¹ 2023-VIL-789-MAD

Background

- ▶ As per Notification No. 1/2017 - CT (Rate) dated 28 June 2017, goods falling under tariff heading 0402 namely "*Milk and cream, concentrated or containing added sugar or other sweetening matter, including skimmed milk powder, milk food for babies other than condensed milk*" attract tax @ 2.5%.
- ▶ Further, the said notification provides that goods falling under tariff heading 2202 9930 namely "*Beverages containing milk*" attract tax @ 6%.
- ▶ Goods and Services Tax Council (GST Council) in its 31st meeting classified "Flavoured milk" under HSN 2202 and not under Chapter 4.
- ▶ Placing reliance on the aforesaid decision of Council, Authority for Advance Ruling (AAR) in case of *Britannia Industries*² held that "Flavoured milk" is classifiable under tariff heading 2202 9930.

The said ruling was maintained by Appellate Authority for Advance Ruling³ and similar view was taken by AAR in *Sri Chakra Milk Products Ltd*⁴

- ▶ Assessee filed writ petition to quash the decision of GST Council.

Assessee's contentions

- ▶ GST Council can only recommend rate but cannot determine classification of goods or services.
- ▶ The issue is already settled in the context of Central Excise Act, 1944 (CEA) and Central Excise Tariff Act, 1985 (CETA) by series of decision rendered by Tribunal and SCs.
- ▶ Manufacturing and distribution of dairy products are governed by provisions of Food Safety and Standards Act, 2006 (FSS Act) and Food Safety and Standards (Food Product Standards and Food Additives) Regulation 2011 (FSS Regulations).
- ▶ As per the license issued by Tamil Nadu under FSS Act, "Flavoured milk" was classified as a "Dairy product".
- ▶ Since "Flavoured milk" is a "Dairy Product", it has to be naturally classified under heading 0402.
- ▶ Further, in Uttarakhand, authority under FSS Act directed the assessee to modify the product description of "Flavoured milk" under dairy product.

Revenue's contentions

- ▶ Decisions rendered in context of CEA and CETA are totally irrelevant, and ratio rendered therein cannot be imported in context of classification of goods under the Notification in GST regime.

- ▶ GST Council is a constitutional body, and its functions are clearly delineated under Constitution.
- ▶ The function of Council cannot be diluted at behest of assessee to reduce the rate of duty, as being a policy decision taken by GST Council in consultation of all stake holders viz., all the State Government and Union Territories.
- ▶ Sub-clause (6) of Article 279A of the Constitution states that while discharging the functions, GST Council shall be guided by need for a harmonized structure of GST and for development of harmonized national market for goods and services and rate has been fixed accordingly.
- ▶ The SC decision in case of *Amrit Food*⁵ was rendered in the context of first schedule to CETA. W.e.f. 28 February 2005, all the headings in the chapters underwent a sea change in tune with HSN.
- ▶ Sl. No. 11A was inserted *vide* Notification No. 28/2007-CE dated 15 June 2007 which classified "Flavoured milk" under heading 2202 90 30.
- ▶ SC in the case of *Hero Motocorp Ltd*⁶ held that Court cannot interfere with the matters of government, unless such policy is found to be palpably arbitrary and irrational.

HC ruling

- ▶ The function of GST Council is not to determine the classification under the Customs Tariff Act.
- ▶ The recommendation of GST Council is not binding on Government⁷.
- ▶ Classification ought to be independently determined by Assessing officer.
- ▶ As per explanation (iii) to Notification No. 1/2017-Central Tax (Rate) dated 28 June 2017 Tariff item", "sub-heading" "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975.
- ▶ Further, as per explanation (iv) to the said notification, the Rules for the Interpretation of the First Schedule to the Customs Tariff Act, 1975, including Section and Chapter Notes and General Explanatory Notes shall, so far as may be, apply to the interpretation of the notification.
- ▶ Since no standalone enactment has been contemplated under GST regime, for rates and for classification of the "goods" and "service", the Parliament and State Legislatures have left it to the wisdom of respective Governments to fix rate of tax under Section 9(1) of respective GST enactments on the recommendations of GST Council.

² 2020 36 (GSTL) 582

³ 2022 (56) GSTL 36

⁴ 2020 (32) GSTL 206

⁵ 2015 (324) ELT 418 (SC)

⁶ 2022 (66) GSTL 129 (SC)

⁷ 2022 (10) SCC 700

- Since the SC decision in case of Amrit Food was rendered in the context of the tariff entry as it stood prior to the amendment of the tariff in 2005, the tests laid down by the SC cannot be imported for determining the classification of "Flavoured Milk" after the amendment to the First Schedule to Central Excise Tariff Act, 1985.
- Heading 2202 can be divided into two parts:
 - (i) Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured; and
 - (ii) Other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009.
- Note 3 to Chapter 22 defines the expression "Non-alcoholic beverage" as beverages of an alcoholic strength by volume not exceeding 0.5 vol.
- The expression "Beverages containing milk" in sub heading 2202 99 can be identified only as specie of "Other non-alcoholic beverage".
- Hence, "Beverages containing milk" has to necessarily contain alcohol of the specified strength in Chapter Note 3.
- In case of *Prabhudas Damodar Kotecha V. Manhabala Jeram Damodar*⁸, SC held that words must take color from words with which they are associated.
- By applying the principle of "*Nosciter – a sociis*", the expression "Beverage containing milk" in sub heading 2202 99 30 can include only such beverage containing plant/seed-based milk which incidentally contain alcohol of specified strength by volume not exceeding 0.5 vol.

It cannot include milk secreted from mammary glands of milch animal, dairy animals such as cow, goats, buffalo, etc.

- Regulation 2.1.3 of FSS Regulations, 2011 prescribes standard for "Flavoured milk" i.e., milk made out of milch animal such as cattle milk.
- The notification issued under CEA which classified "Flavoured milk" / "Flavoured milk of animal origin" as "Beverage Containing Milk" were erroneous.

Just because such classification was not contested by assessee and it benefitted from the same, would not mean that "Flavoured milk" fall under heading 2202.

- Having adopted classification of 'Goods' under First Schedule to Customs Tariff Act, GST Council cannot impose a wrong classification of "Flavoured Milk" as a "Beverage Containing Milk" under Sub Heading 2202 90 30.
- As long as Customs Tariff Act is adopted for purpose of interpretation of Notification, classification has to be strictly in accordance with classification under Customs Tariff Act.

- In view of the above, "Flavoured Milk" has to be classified only under heading 0402.
- It is open for Government to issue fresh notification tweaking GST rate of "Flavoured milk" based on recommendations of the GST Council or by itself.

Comments

- a. The ruling emphasizes on the important principle that classification of goods under GST needs to be done in accordance with the classification under Customs tariff Act and GST Council is not empowered to determine the same. It can only recommend the rate of tax on the goods.
- b. The businesses may need to assess the validity of clarifications made by GST Council and CBIC on classification of goods.
- c. In light of the decision, the taxpayers may also need to evaluate whether GST Council along with CBIC can, through Circulars, classify an activity as goods or services (e.g., sale of ice-cream as supply of goods and not restaurant service).

⁸ 2013 (15) SCC 358

Our offices

Ahmedabad

22nd Floor, B Wing, Privilon
Ambli BRT Road, Behind Iskcon
Temple, Off SG Highway
Ahmedabad - 380 059
Tel: + 91 79 6608 3800

Bengaluru

12th & 13th floor
"UB City", Canberra Block
No. 24, Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 6727 5000

Ground Floor, 'A' wing

Divyasree Chambers
11, O'Shaughnessy Road
Langford Gardens
Bengaluru - 560 025
Tel: + 91 80 6727 5000

Chandigarh

Elante offices, Unit No. B-613 & 614
6th Floor, Plot No- 178-178A
Industrial & Business Park, Phase-I
Chandigarh - 160 002
Tel: + 91 172 6717800

Chennai

Tidel Park, 6th & 7th Floor
A Block, No.4, Rajiv Gandhi Salai
Taramani, Chennai - 600 113
Tel: + 91 44 6654 8100

Delhi NCR

Ground Floor
67, Institutional Area
Sector 44, Gurugram - 122 003
Haryana
Tel: +91 124 443 4000

3rd & 6th Floor, Worldmark-1
IGI Airport Hospitality District
Aerocity, New Delhi - 110 037
Tel: + 91 11 4731 8000

4th & 5th Floor, Plot No 2B
Tower 2, Sector 126
Gautam Budh Nagar, U.P.
Noida - 201 304
Tel: + 91 120 671 7000

Hyderabad

THE SKYVIEW 10
18th Floor, "SOUTH LOBBY"
Survey No 83/1, Raidurgam
Hyderabad - 500 032
Tel: + 91 40 6736 2000

Jamshedpur

1st Floor, Fairdeal Complex
Holding No. 7, SB Shop Area
Bistupur, Jamshedpur - 831 001
East Singhbhum Jharkhand
Tel: + 91 657 663 1000

Kochi

9th Floor, ABAD Nucleus
NH-49, Maradu PO
Kochi - 682 304
Tel: + 91 484 433 4000

Kolkata

22 Camac Street
3rd Floor, Block 'C'
Kolkata - 700 016
Tel: + 91 33 6615 3400

Mumbai

14th Floor, The Ruby
29 Senapati Bapat Marg
Dadar (W), Mumbai - 400 028
Tel: + 91 22 6192 0000

5th Floor, Block B-2

Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E)
Mumbai - 400 063
Tel: + 91 22 6192 0000

Pune

C-401, 4th floor
Panchshil Tech Park, Yerwada
(Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 4912 6000

Ernst & Young LLP

EY | Building a better working world

About EY

EY exists to build a better working world, helping to create long-term value for clients, people and society and build trust in the capital markets.

Enabled by data and technology, diverse EY teams in over 150 countries provide trust through assurance and help clients grow, transform and operate.

Working across assurance, consulting, law, strategy, tax and transactions, EY teams ask better questions to find new answers for the complex issues facing our world today.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. EYG member firms do not practice law where prohibited by local laws. For more information about our organization, please visit ey.com.

Ernst & Young LLP is one of the Indian client serving member firms of EYGM Limited. For more information about our organization, please visit www.ey.com/en_in.

Ernst & Young LLP is a Limited Liability Partnership, registered under the Limited Liability Partnership Act, 2008 in India, having its registered office at 9th Floor, Golf View Corporate Tower B, Sector 42, Golf Course Road, Gurugram, Haryana - 122 002.

© 2023 Ernst & Young LLP. Published in India.
All Rights Reserved.

This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. Neither EYGM Limited nor any other member of the global Ernst & Young organization can accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication. On any specific



Download the EY India Tax Insights App

ey.com/en_in

@EY_India EY EY India EY Careers India @ey_indiacareers