

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 7114 of 2022**

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**J K FOODS INDUSTRIES
Versus
UNION OF INDIA**

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**Appearance:
UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2
for the Respondent(s) No. 1,2,3,4**

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**CORAM:HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE****Date : 13/04/2022****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. By this writ application under Article 226 of the Constitution of India, the writ applicants have prayed for the following reliefs:

"A. This Hon'ble Court may be pleased to strike down and declare Section 103(1)(b) of the GST Acts as being grossly discriminatory, manifestly arbitrary and violating Articles 14 as well as 19(1)(g) of the Constitution of India;

B. This Hon'ble Court may be pleased to declare that the advance ruling appellate orders passed in the case of other taxable persons having identical facts and circumstances are binding on all authorities who are subordinate to the Chief Commissioners of CGST and SGST which constitute the advance ruling appellate authority;

C. This Hon'ble Court may be pleased to issue a writ of mandamus or writ in the nature of mandamus or any other appropriate writ or order quashing and setting aside impugned show cause notice dated 28.02.2022 along with Form GST DRC – 01 dated 07.03.2022 (annexed at Annexure A) as being wholly without jurisdiction, arbitrary and illegal;

D. This Hon'ble Court may be pleased to declare that products of the Petitioners being papad of different shapes and sizes are classifiable under Entry No.96 of the exemption notification no. 2/2017 – Central Tax (Rate) dated 28.06.2017 and hence exempt from tax under the GST Acts;

E. In any case this Hon'ble Court may be pleased to hold and declare that initiation of proceedings against the Petitioners under Section 74 of the GST Acts is wholly without jurisdiction, arbitrary and illegal;

F. Pending notice, admission and final hearing of this petition, this Hon'ble Court may be pleased to stay further proceedings pursuant to impugned show cause notice dated 28.02.2022 along with Form GST DRC – 01 dated 07.03.2022 (annexed at Annexure A);

G. Ex parte interim relief in terms of prayer F may kindly be granted;

H. Such further relief(s) as deemed fit in the facts and circumstances of the case may kindly be granted in the interest of justice for which act of kindness your petitioners shall forever pray."

2. It appears from the materials on record that the writ applicant No.1 is a Partnership Firm engaged in the business of manufacture of unfried fryums of different shapes and sizes. It is the case of the writ applicants that bona fide, they believed that the product they are manufacturing is nothing but "Papad" in its literal sense and in such circumstances, they claimed exemption by classifying the products under the HSN 1905. The Office of the Directorate General of Goods and Services Tax Intelligence, Surat Zonal Unit, is of the view that the product manufactured by the writ applicants, cannot be compared and put at par with Papad.

3. In such circumstances referred to above, a show cause notice came to be issued by the Joint Director, Directorate General of GST Intelligence, Surat Zonal Unit, dated 28.02.2022 calling upon the writ applicants to show cause as to why;

(i) Integrated Goods and Services Tax (IGST) amounting to Rs.6,17,51,869/-, Central Goods and Services Tax (CGST) amounting to Rs.27,46,174/-, State

Goods and Services Tax (SGST) amounting to Rs.27,46,174/- for the period from July, 2017 to March, 2020, as per Annexure - A of this notice, should not be demanded and recovered from them under Section 74 of the CGST Act, 2017 read with Section 20 of IGST Act, 2017 and read with Section 74 of the Gujarat GST Act, 2017.

(ii) Interest at the applicable rate on the GST (IGST+CGST+SGST) mentioned at (i) above should not be demanded and recovered from them under Section 50 read with section 74 of the CGST Act, 2017, read with Section 20 of IGST Act, 2017 and Section 50 read with Section 74 of the Gujarat GST Act, 2017.

(iii) Penalty, equivalent to total GST (IGST+CGST+SGST) amount, should not be imposed on them under Section 74 of the CGST Act, 2017 read with Section 20 of IGST Act, 2017 and read with Section 74 of the Gujarat GST Act, 2017.

4. It is the aforesaid show cause notice which is the subject matter of challenge before us. Ordinarily, we would have declined to entertain this writ application at the stage of a show cause notice. However, there is something which Mr. Sheth, the learned counsel, has pointed out to us which has persuaded us to issue Notice and call upon the other side to respond.

5. Mr. Sheth, has invited the attention of this Court to one order passed by the Gujarat Appellate Authority for Advance Ruling, Ahmedabad, in the case of one ***M/s Piyush Jayantilal Dobaria***, having its place of business at Rajkot. The Gujarat Appellate Authority for Advance Ruling was called upon to answer the following question:

“Under which tariff heading Papad of different shapes and sizes manufactured/supplied by the appellant would attract CGST and SGST ?”

6. It appears that the Appellate Authority for Advance Ruling while answering the aforesaid question also observed something relating to the unfried fryums. We quote few relevant observations made by the Appellate Authority in its order as under:

“39. We find that the appellant contends that their impugned product falls under the entry No. 96 of Not. No. 02/2017-CT (rate) dated 28.06.2017 which attracts NIL rate of GST. The relevant entry No. 96 of Not. No. 2/2017-CT (Rate) dated 28.06.2017 is reproduced as under:

<i>Sr.No.</i>	<i>Chapter/Heading/Sub-heading/Tariff item</i>	<i>Description of Goods</i>
<i>96.</i>	<i>1905</i>	<i>Papad, by whatever name it is known, except when served for consumption</i>

*40.1 From the above entry, it can be deduced that all types of "Papad" which are popular in trade/common parlance are covered under the said entry. As we have already discussed in the above para that term "Papad" has not been defined in GST Act, 2017, therefore, we take the recourse of trade/common parlance test so that Papad can be defined. In the matters of classification of goods under taxation statutes, all the judicial forums, including the Apex Court, have stressed upon the importance of the identity of the goods in common parlance and there is a plethora of case laws which hold that for classification of goods under statutes for taxation of commercial supplies thereof, the primary test is their identity in the market, or in other words, their common parlance in the market. The Hon'ble Supreme Court in the case of **CCE, New Delhi v. Connaught Plaza Restaurant (P) Ltd. [2012 (286) E.L.T. 321 (S.C.)]** has held that,*

"Classification - Common parlance test - It is extension of general principle of interpretation of statutes for deciphering mind of law maker - It is attempt to discover intention of legislature from language used by it, keeping in mind, that language is at best imperfect instrument for expression of actual human thoughts - In absence of statutory definition in precise terms, it is construction of words, entries and items in taxing statutes in terms of their commercial or trade understanding, or according to their popular meaning - It operates on standard of average reasonable person who is

not expected to be aware of technical details of goods - It is construction in sense that people conversant with subject-matter of statute, attribute to it - Rigid interpretation in terms of scientific and technical meanings is to be avoided - However, when legislature has provided a statutory definition of particular entry, word or item in specific, scientific or technical terms, then, interpretation ought to be in accordance with that meaning and not according to common parlance. [paras 18, 31, 34]"

40.2 The Hon'ble Supreme Court of India in case of CCE, Nagpur v. Shree Baidyanath Ayurved Bhawan Ltd. [2009 (237) E.L.T. 225 (SC)] has held that, Common parlance test continues to be one of the determinative tests for classification of a product whether medicament or cosmetic. What is important to be seen is how the consumer looks at a product and what is his perception in respect of such product. The user's understanding is a strong factor in determination of classification of the products".

40.3 We find that the appellant has submitted that the impugned product of different shapes and sizes PAPAD are known by different nomenclature in different parts of the country whereby more common nomenclature used is FRYUMS though FRYUMS is a registered brand name of TTK Healthcare Ltd. and not the name of any of product of PAPAD. Whereas the GAAR in his ruling has held that the different shapes and sizes like round, square, semi-circle, hollow circle with bars in between or square with bars in between intersecting each other or shape of any instrument, equipment, vehicle, aircraft, animal type Papad are known in the market as "Fryums" and not "PAPAD"; that Papad is a distinct commodity and it cannot be equated with the Fryums. We have visited the website of M/s. TTK Foods (<http://ttkfoods.com/products>) and found that the company manufactures ready to fry extruded products (papads) and sells under the brand name Fryum's. Therefore, it can be said that "Fryums" is brand name of a company and not the generic name of the impugned product, therefore it would not be logical to hold that the appellant's product is "Fryums". However, in general public, "Fryums" is popular word for different shapes different shapes and sizes like round, square, semi-circle, hollow circle with bars in between or square with bars in between intersecting each other or shape of any instrument, equipment, vehicle, aircraft, animal type Papad. Similarly, calling product in question of different shapes and sizes by Fryums does not change the basic character of the product and the product in question remains papad. We accept that traditionally PAPAD is round shaped but the PAPAD is ready cook product and can be consumed after roasting or frying in oil and consumed as snacks with the Indian meal or soup. Similarly, the product in question of different shape and size is a ready to cook product and can be consumed after roasting or frying in oil and consumed as snack. Further cereal flour of Chapter 10 and 11 of Customs Tariff Act, 1975 are the ingredients of both the product. Both the products i.e. "PAPAD" and product in question are same except they are known by different name in general public i.e. as "PAPAD" and "Fryums".

7. Thus, prima facie, it appears that the Appellate Authority took the view that the Papad are known in the market as “fryums” and not “Papad”. The observations or the view taken by the Appellate Authority for Advance Ruling, as above, will have some bearing on this litigation.

8. We also take notice of the fact that there is a further challenge to the constitutional validity of Section 103(1)(b) of the GST Act on the ground that the same is manifestly arbitrary and violative of Articles 14 and 19(1)(g) respectively of the Constitution. The constitutional validity of Section 103(1) (b) of the Act is already made a subject matter of challenge in the case of *J.K. Papad Industries vs. Union of India*, Special Civil Application No.16172 of 2021. In the said writ application, a Co-ordinate Bench of this Court has issued Notice and the matter is to come up on 08.06.2022 for hearing.

9. Let **Notice** be issued to the respondents, returnable on **15.06.2022**.

10. Let there be an ad-interim order in terms of paragraph 25(F). Direct service is permitted.

11. To be heard along with Special Civil Application No.16172 of 2021.

12. Let **Notice** be also issued to the learned Attorney General of India as there is a challenge to one of the provisions of the GST Act.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE, J)

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