

(AAAR-GUJ) :(2022) 56 TLC(GST) 065

**VADILAL INDUSTRIES LTD.**

IN THE APPELLATE AUTHORITY FOR ADVANCE RULING, GUJARAT

MILIND TORAWANE AND VIVEK RANJAN, MEMBER

GUJ/GAAAR/APPEAL/2022/18

Dated - 26-08-2022

Under Section 100

Subject - Classification of goods

Counsel -

Shri Amal Dave, Advocate for the Applicant.

**JUDGMENT**

At the outset we would like to make it clear that the provisions of the Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act, 2017' and the 'GGST Act, 2017') are in pari materia and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore, unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act, 2017 would also mean reference to the corresponding similar provisions in the GGST Act, 2017.

2. The present appeal has been filed under **Section 100** of the CGST Act, 2017 and the GGST Act, 2017 by M/s. Vadilal Industries Ltd (hereinafter referred to as the Appellant) against the **Advance Ruling No. GUJ/GAAR/R/05/2021 dated 20.01.2021**.

3. The appellant has sought Advance Ruling on the following question

"What would be the classification of 'Flavoured Milk' sold under trade name of Power Sip?"

4. The appellant has submitted that they are engaged in manufacture of goods like Ice Cream, ready to eat food and various milk products. Among other product, they are producing flavored milk under the trade name of "Power Sip". As per the appellant such flavoured milk merits classification under Heading 04029990 of the GST Tariff. The appellant submitted that the process of production of flavored milk is standardization of fresh milk according to the fat contents and heating at certain temperature followed by filtration, pasteurization and homogenization and then mixing of sugar and various flavors and finally bottling.

5. The appellant submitted that adding flavors to milk does not change essential character of milk. The product namely flavoured milk is milk only and is sold, purchased and consumed as milk in trade and amongst consumers. Therefore their product is classifiable under HSN Code 04029990 as the milk. The appellant relied upon the judgment of Punjab and Haryana High Court in case of Food Specialties Ltd V/s UOI [1991 (51) ELT 310 (P & H) which is also affirmed by Supreme Court wherein it was held that Indian Standard specifications for milk powder issued by ISI as well as the standards under Prevention of Food Adulteration Rules, 1955 (PFA Rules) were relevant to decide even under the Central Excise law as to what was skimmed milk or partially/full skimmed milk; as per PFA Rules, product containing fat more than 1.5% and less than 26% is considered to be partially skimmed milk/powder and since fat content in product in question is 2.5% minimum and not greater than 26%, it is partially skimmed milk classifiable under HSN 0402. Appellant also relied upon decision of **CESTAT in case of Mehsana District Co-Operative Milk Producers Unions Ltd [2004 (167) ELT 456]** wherein the Tribunal held that Chapter 4 of the Tariff covered all types of milk/milk powder, whether it was whole, partly skimmed or skimmed. The appellant also submitted that National Dairy Research Institute, Bangalore also confirmed that flavored milk falls under Dairy produce as per the FSSAI, 2006. The appellant also referred to Advance Ruling of Bangalore Authority in case of M/s Karnataka Co-operative Milk Producers Federation Ltd.

6. The Gujarat Authority for Advance Ruling (herein after referred to as 'the GAAR'), vide **Advance Ruling No. GUJ/GAAR/R/05/2021 dated 20.01.2021**, inter-alia observed that as per explanatory notes of HSN 0402, the chapter does not cover beverages of milk flavored with cocoa or other substances; product in question merits classification under Chapter Heading 22029930 which was also confirmed in Agenda of **31st GST Council Meeting** (Volume-2) dated 22.12.2018; case laws relied upon by appellant is not applicable to the facts of present case. The GAAR relied upon the judgement in case of **M/s Ernakulam Reg.Co-op.Milk Products Union Ltd V/s CCE, Kochi [2009 (236) ELT 329 (Tri-Bang)]**, **M/s Kaira Dist.Coop.Milk Producers Union Ltd V/s UOI [2015 (320) ELT 408 (Guj.)]** and on ruling of Tamilnadu Advance Authority in case of **M/s Britannia Industries Ltd [2020 (36) GSTL 582 (AAR-GST-T.N.)]**, **ruling of Andhra Pradesh Advance Authority in case of M/s Trumala Milk Products Pvt Ltd [ELT 2020 (32) GSTL 558 (AAR-GST-A.P.)]**, and ruling of **Andhra Pradesh Advance Authority in case of M/s Shri Chakra Milk Products LLP [ELT 2020 (32) GSTL 206 (AAR-GST-A.P.)]**, .

6.1 In view of the foregoing, the GAAR ruled as follows:-

“**Ques.** What would be the classification of ‘Flavored Milk’ sold under trade name of Power Sip?

**Ans:** ‘Flavoured Milk’ is classifiable under Tariff Item 2202 99 30 of the First Schedule of the Customs Tariff Act, 1975 as a ‘beverage containing milk’.”

7. Aggrieved by the aforesaid advance ruling, the appellant has filed the present appeal.

7.1 The appellant in the ground of appeal has submitted that the GAAR erred in overlooking the fact that the product in question was milk itself, and not a beverage containing milk or a beverage based on milk. The term ‘milk’ is defined under Note 1 to Chapter 4 and according to statutory definition of milk, flavored milk is milk and correctly classifiable under Chapter 4 of tariff. Flavored milk is even otherwise dairy produce which is most appropriately classifiable under chapter 4 which covers ‘dairy produce’ and therefore, classification of flavored milk under Chapter 22 is not correct which covers beverages other than milk as milk is specifically covered under Chapter 4. Further, Chapter Heading 22029030 covers ‘beverages containing milk’ means only those beverages that contains milk and not milk as such.

7.2 The appellant submitted that the GAAR overlooked the difference between flavored milk (which is almost 100% milk) and products like milkis, swerve etc contain a small percentage of milk and hence they were in the nature of beverages containing milk. The appellant referred to case laws of **M/s Food Specialties Ltd [1991 (51) ELT 310]**, **M/s Dalmia Industries Ltd [1992 (61) ELT 295 (Tri)]** and **UOI V/s M/s Food Specialties Ltd [1998 (97) ELT (SC)]** wherein it was held that milk or milk powder conforming to PFA standards is covered under Chapter 4 of the tariff. The scheme, scope and coverage of Chapter 4 still remains the same and definition of ‘milk’ has also been retained even under the GST Tariff and therefore flavored milk which admittedly standardized milk (i.e. partly skimmed milk) is classifiable under Chapter 4 only.

7.3 The appellant submitted that when GAAR in para 9 of ruling recorded that product in question consisted of standardized milk (i.e. partially skimmed milk) 92% without removal of fat with sugar, color and flavor being around 8%, they had no jurisdiction to still hold that flavored milk is beverage containing milk or beverage based on milk. Therefore, decision of GAAR is wholly illegal and liable to be set aside.

7.4 The appellant submitted that GAAR bypassed the judgement in cases of Mehsana District Co-operative Milk Producers Union Ltd and M/s Food Specialties Ltd on the basis that above judgments pertained to the classification of skimmed milk/partially skimmed milk/fully skimmed milk and the judgement were rendered under other act and could not be considered for deciding classification under GST Tariff which was clearly erroneous finding as both Central Excise Tariff and GST Tariff are based on HSN and comparison of Chapter 4 of both tariffs clearly shows that scope and coverage of the chapter is absolutely similar. The appellant also submitted that in above judgments, classification of milk is decided and if skimmed milk/partially skimmed milk/fully skimmed milk is classifiable under Chapter 4 even if they contains sugar or other sweetening matters as well as flavors, then the product in question is also classifiable under Chapter 4.

7.5 The appellant submitted that GAAR erred in holding that PFA Acts and Rules are not applicable to present case as the purpose of PFA was different as even Hon’ble Supreme Court considered that PFA standards for milk are relevant for classification of milk under Central Excise Tariff.

7.6 The appellant submitted that GAAR erred in holding that product is a ready for consumption drink i.e. beverage with a basis of milk even after agreeing with the appellant’s contention that the product in hand was milk. The products like milkis, swerve etc can be considered as beverages with a basis of milk or beverages containing milk.

7.7 The appellant submitted that milk is defined under Note 1 of Chapter 4 as full cream or partially or completely skimmed milk and the product in question is admittedly standardized milk which is classifiable under Heading 0402. Flavored milk is specifically covered under Para A.11.01.05 of the Prevention of Food Adulteration Rules which is relevant for classifying milk under Chapter 4 of tariff as held by Hon’ble Supreme Court. The appellant also submitted that Power Sip is known as milk in common parlance and the people selling, purchasing and consuming it identifies it as milk and not as beverages containing milk.

8. During the course of personal hearing held on 28.07.2022, the advocate for the appellant reiterated the submissions made in the appeal dated 07.04.2021. He further submitted that the Hon’ble Supreme Court of India in the case of Union of India Vs. Mohit Minerals Pvt. Ltd., vide its judgment dated 19.05.2022 had observed that the GST Council’s recommendations are not binding and those have only persuasive value. He added that they had relied upon the judgment of Hon’ble High Court at Allahabad in the case of **Gujarat Co-op. Milk Marketing Federation Ltd., Vs. State of UP** wherein flavoured milk has been upheld as Milk however GAAR has not given any findings on the same. He submitted that product sold by the appellant is milk and not a beverage.

#### **FINDINGS :-**

9. We have carefully gone through and considered the appeal and written submissions filed by the appellant, submissions made at the time of personal hearing, Advance Ruling given by the GAAR and other material available on record.

10. The main issue here is to decide the classification of the product viz. flavored milk produced from standardization of fresh milk according to the fat contents and then heating at certain temperature followed by filtration, pasteurization and homogenization and then mixing of sugar and various flavors and finally bottling.

11. The appellant, have in their submission stated that their product i.e. flavored milk is milk itself (consisting of 92% of milk and 8% of sugar, flavor etc.) not beverages containing milk and is classifiable under Chapter 0402 instead under Chapter 2202 as held by GAAR.

12. We find that the classification of goods under GST regime has to be done in accordance with the Customs Tariff Act, 1975, which in turn is based on Harmonized System of Nomenclature, popularly known as 'FISN'. The rules of interpretation, section notes and chapter notes as specified under the Customs Tariff Act, 1975 are also applicable for classification of Goods under GST regime. However, once an item is classified in accordance with the Customs Tariff Act, 1975, the rate of tax applicable would be arrived at on the basis of notifications issued under GST by the respective Governments.

13. The appellant have claimed that flavored milk is classifiable under Chapter Heading 0402 of Customs Tariff Act, 1975 which is elaborated below:

#### CHAPTER 04

<b>0402</b>	<b>-MILK AND CREAM, CONCENTRATED OR CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER</b>
0402 10	In powder, granules or other solid forms, of a fat content, by weight not exceeding 1.5%:
0402 10 10	Skimmed Milk
0402 10 20	Milk food for babies
0402 10 90	Other
	-In powder, granules or other solid forms, of a fat content, by weight exceeding 1.5%:
0402 21 00	Not containing added sugar or other sweetening matter
0402 29	Other:
0402 29 10	Whole Milk
0402 29 20	Milk for babies
0402 29 90	Other
	Other:
0402 91	Not containing added sugar or other sweetening matter:
0402 91 10	Condensed milk
0402 91 90	Other
0402 99	Other:
0402 99 10	Whole milk
0402 99 20	Condensed milk
0402 99 90	Other

Chapter Note 1 to Chapter 4 of the Customs Tariff Act, 1975 reads as under:

1. The expression "milk" means full cream milk or partially or completely skimmed milk.

The relevant explanatory note of Customs Tariff Heading 0402 as per HSN is given below:

This heading covers milk (as defined in Note 1 to this Chapter) and cream, concentrated (for example, evaporated) or containing added sugar or other sweetening matter, whether liquid, paste or solid (in blocks, powder or granules) and whether or not preserved or reconstituted.

Milk powder may contain small quantities of starch (not exceeding 5% by weight) added, in particular, to maintain the reconstituted milk in its normal physical state.

The Heading does not cover:

(a) Curdled, fermented or acidified milk or cream (heading 04.03).

**(b) Beverages consisting of milk flavoured with cocoa or other substances (heading 22.02).**

Sub-heading Explanatory Note:

Sub-Headings 0402.10, 0402.21 and 0402.29:

These sub-headings do not cover concentrated milk or cream in the form of paste (sub-headings 0402.91 and 0402.99).

13.1 From the explanatory notes, which is a guide to understand the scope of the entries, it is seen that above heading covers milk as defined in Note 1 to this chapter and means full cream milk or partially/completely skimmed milk. Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 (FSSAI) defines full cream milk, skimmed milk, standardized milk and toned milk as under:

1.2.6 **Full Cream Milk** means milk or a combination of buffalo or cow milk or a product prepared by combination of both that has been standardised to fat and solids-not fat percentage, given in the table below in 2.1.1:1, by adjustment/addition of milk solids, Full Cream Milk shall be pasteurised. It shall show a negative phosphatase test. It shall be packed in clean, sound and sanitary containers properly sealed so as to prevent contamination.

**1.2.19. SKIMMED MILK** means the product prepared from milk from which almost all the milk fat has been removed mechanically.

**1.2.21 STANDARDISED MILK** means cow milk or buffalo milk or sheep milk or goat milk or a combination of any of these milk that has been standardised to fat and solids-not-fat percentage given in the table below in 2.1.1:1 by the adjustment of milk solids. Standardised milk shall be pasteurised and shall show a negative Phosphatase Test.

**1.2.24 TONED MILK** means the product prepared by a mixture of cow or buffalo milk or both with fresh skimmed milk; or by admixture of cow or buffalo milk or both that has been standardised to fat and solids-not-fat percentage given in the table below in 2.1.1:1 by adjustment of milk solids. It shall be pasteurised and shall show a negative Phosphatase Test. When fat or dry non-fat-milk solids are used, it shall be ensured that the product remains homogeneous and no deposition of solids takes place on standing.

In the present case, as per the product labels submitted by appellant, the Milk constituent is 'Double Toned Milk' which are not 'Full Cream Milk' or 'Skimmed Milk' as per above definitions and Chapter Note 1 explaining the scope of Heading 0402 and therefore are undoubtedly excluded from the purview of Tariff Heading 0402. Therefore, irrespective of the contentions that the product remains 'Milk' even with added flavours, it is clearly established that the 'Milk' referred to in this Tariff heading and the products of the appellant are not the same and on this ground alone the products in hand are not covered under Tariff Heading 0402.

13.2 Furthermore, the relevant explanatory notes of CTH 0402 of the HSN clearly state that beverages consisting of milk flavoured with cocoa or other substances is specifically excluded from this chapter heading.

14. The GAAR held that flavored milk is classifiable under CTH 2202 99 30. The relevant chapter notes, tariff entry and HSN Explanatory note is given below:

## CHAPTER 22

### Beverages, spirits and vinegar

2202	- WATERS, INCLUDING MINERAL WATERS AND AERATED WATERS, CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER OR FLAVOURED, AND OTHER NON-ALCOHOLIC BEVERAGES, NOT INCLUDING FRUIT OR VEGETABLE JUICES OF HEADING 2009
2202 10 90	Other
	Other:
2202 91 00	Non-alcoholic beer
2202 99	Other:

2202 99 10	Soya milk drinks, whether or not sweetened or flavoured
2202 99 20	Fruit pulp or fruit juice based drink
<b>2202 99 30</b>	<b>Beverage containing milk</b>
2202 99 90	Other

The explanatory notes as per HSN is as below:

(A)...

(B) Other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009

This group includes, inter alia:

(1) Tamarind nectar rendered ready for consumption as a beverage by the addition of water and sugar and straining.

**(2) Certain other beverages ready for consumption, such as those with a basis of milk and cocoa.**

A perusal of the above tariff entries, and explanatory notes of the HSN indicates that beverages with a basis of milk and cocoa which are ready for consumption is covered under tariff item 2209 99 30 as beverage containing milk. Furthermore, on conjoint reading of Chapter heading 0402 and 2202 and relevant explanatory notes, it is clear that milk flavoured with cocoa or other substances are specifically excluded from Chapter heading 0402 and included under Chapter heading 2202.

15. The Customs Tariff adopted for the purposes of GST is aligned to HSN and the arrangement of the products in the Tariff has been done in a schematic manner. The initial Sections/Chapters contain live animals, not processed goods and the later Chapters contain the processed goods. i.e., Section I covers 'Live Animals and Animal Produce' in which Chapter 4 covers 'Dairy produce; birds' eggs; natural honey; edible products of animal origin, not elsewhere specified or included' and Section IV of the Customs Tariff covers 'Prepared Foodstuffs, Beverages, Spirits And Vinegar, Tobacco And Manufactured Tobacco Substitutes' in which Chapter 22 covers 'Beverages, spirits and vinegar'. From the classification scheme adopted in the Tariff, it can be seen that products in their natural state are classified in the initial chapters and when such products undergoes processes, they are classified in the later chapters. In the present case, flavoured milk is not the natural form of milk but obtained after application of specific processes on the milk, as explained in Para 10.

16. The appellant submitted that GAAR erroneously classified flavoured milk under Chapter 22 which basically covers beverages other than milk, as milk is specifically covered under Chapter 4 of the tariff. This interpretation of appellant is not correct as 'beverage containing milk' is specifically covered under tariff item 2209 99 30 of Chapter 22.

17. The appellant submitted that GAAR erred in ignoring the judgments in cases of Mehsana District Cooperative Milk Producers Union Ltd and M/s Food Specialities Ltd on the basis that such judgments were with regard to classification of fully/partially skimmed milk/milk powder and that the judgments rendered under other act could not be considered for deciding classification under GST Tariff. The said contention of the appellant is not valid and legal. With regard to the judgment in case of **Mehsana District Cooperative Milk Producers Union Ltd [2004 (167) ELT 456 (Tri.-Del.)]**, we find that this case was with regard to classification of skimmed milk powder under heading 0401.13 and with regard to judgment of **Hon'ble Punjab & Haryana High Court in case of M/s Food Specialities Ltd [1991 (51) ELT 310 (P&H)]**, we find that this judgment is not applicable to present case as the issue to decide was the nature of skimmed milk or partially/full skimmed milk whereas in the present case the issue is to decide the classification of beverage containing milk.

18. Further the appellant in support of their contentions has relied upon the following judgments:

**i) Dalmia Industries Ltd. [1992(61) ELT 295 (Tribunal)]**

**ii) UOI Vs. Food Specialities Ltd. [1998 (97) ELT 402 (SC)]**

**iii) Gujarat Co-op. Milk Marketing Federation Ltd. [2017 (5) GSTL 351]**

We find the above case laws are not applicable to the present case of the appellant for the reasons enumerated below:

In the case of Dalmia Industries Ltd., the Tribunal held that, Partially skimmed milk powder and skimmed milk powder are different products inasmuch as, the expression skimmed milk powder means completely skimmed milk powder. The product is essentially partially skimmed milk which was sweetened and to which certain additives like vitamins, minerals were added. The product is thus classifiable under sub-heading 0401.19. The said decision of Tribunal was overruled by **Larger Bench of Tribunal in the case of Abbott India Ltd Vs. CCE, Goa [2009 (236) ELT 663 (Tri.-LB)]**. In any case, these judgments were delivered in the context of old Central Excise Tariff, which had only upto 6 digit entries, unlike the present 8 digit entry (upto tariff item level); further there have been many other changes in the tariff, such as chapter Note 4 to Chapter 4 referred to in these judgments is no longer existing in the Customs Tariff. The case thus does not have any relevance to the present issue as the product involved, and facts of the case and tariff structure are different. Further the Customs Tariff and HSN are presently aligned.

In the case of **UOI Vs. Food Specialities Ltd.**, the Hon'ble Supreme Court of India while dismissing the appeal filed by the department held that "The submission of the learned Additional Solicitor General is that the expression 'skimmed milk' also includes 'partially skimmed milk' and for this reason the product should be classified under Heading 0401.13. In the impugned judgment the view taken is that 'partially skimmed milk powder' is a separate marketable commodity from 'skimmed milk powder' and, therefore, it has to be classified under the Heading 0401.19 and not 0401.13 as claimed by the Revenue. In the impugned judgment, detailed reasons are given for rejecting the Revenue's contentions. Apart from referring to the fact that partially or completely skimmed milk are mentioned as separate products in the main heading itself, it has been pointed out with reference to ISI specification as well as Prevention of Food Adulteration Rules and the International Standard that 'partially skimmed milk powder' is different from 'skimmed milk powder' and is so recognised therein. Nothing is shown to us against this material to suggest that a different view is preferable for any reason. There is, thus, no ground to interfere in the appeals." The case does not have any relevance to the present case as the product and facts of the case are different.

In the case of **Gujarat Co-op. Milk Marketing Federation Ltd., the Hon'ble High Court at Allahabad** had given decision in a VAT case interpreting the scope of exemption benefit given to Milk and Milk products under VAT laws applicable in the State of UP. The same is not relevant in the present case where classification is to be decided in terms of the Customs Tariff, aligned with HSN adopted for classification under GST.

19. The appellant submitted that their product i.e. flavoured milk is milk itself and GAAR erred in classifying it as beverage with a basis of milk or beverage containing milk as milkis, swerve, vio etc (which, apart from milk constitute filtered/carbonated water, citric acid, sugar, flavour, corn syrup, phosphoric acid etc.) can be considered beverages. In this connection, we find that the National Dairy Development Board as seen on their web page <https://www.nddb.coop/services/ppd/dairyproducts/beverages> holds 'Flavoured Milk' as a Dairy based Beverage. The same is given as under:

#### **Dairy based Beverages**

##### **MILK BEVERAGE WITH RAGI**

A preparation of ragi (finger millet) in milk is a refreshing and satiating drink for older infants, growing kids and adults. NDDB has developed a simple technology for manufacturing milk beverage with ragi for commercial production at the dairy plants. The pasteurised variant of product can be packed using pouch filling machine used for milk. The sterilised variant has a shelf life of 45 days at ambient temperature.

##### **WHEY-BASED DRINK**

Liquid obtained during production of shrikhand, paneer, chhana and cheese is called whey. Whey contains 5.5-7.0 percent total solids consisting of lactose, milk protein, minerals and water-soluble vitamins. In India, at present, most of the whey is usually drained off causing great loss of valuable nutrients and adding to the problem of environmental pollution.

Two variants of refreshing whey-based beverages which can be useful to dairies generating whey:

Maska whey beverage: This product has been developed using combination of shrikhand (maska) whey, mango pulp and other additives.

Whey-based beverage with spices: It has been developed using combination of Cheese/Paneer whey and Indian spices. Manufacturing process for lactose hydrolysed variant is also available.

Manufacturing of whey beverages at a dairy plant requires pasteurisation and packaging facilities only. It can also be manufactured using the existing infrastructure for lassi/chhach, where available. The pasteurised product has a shelf life of 10 days at 8°C or below when packed in polyfilm.

##### **FLAVOURED MILK**

Flavoured milk has sugar, flavouring and colouring added to make it tastier to consume. It is generally manufactured by in-bottle sterilisation or Ultra High Temperature (UHT) processing with aseptic packaging.

For larger volumes, some capital investment for specific equipment such as automatic bottle-filler-cum-sealer and rotary bottle steriliser or aseptic processing and packaging unit may be required. If a dairy plant has infrastructure for UHT milk processing, the same can also be used for flavoured milk. The product does not contain any added preservative and has a shelf life of 6 months when sterilised in glass bottles or UHT processed and aseptically packed.

NDDB is a nodal agency in the Dairy products and the 'Flavoured Milk' is categorized as Beverage as can be seen above. Further, Beverage as per the Oxford dictionary definition is 'any type of drink except water'. Thus, it becomes evident that the product in hand is a Beverage containing milk, classifiable under tariff item 2202 99 30.

20. We find that in similar facts of case the **Appellate Authority for Advance Ruling, Tamil Nadu, vide its Order in Appeal No. AAAR/16/2021 (AR) dated 30.06.2021 in the case of M/s. Britannia Industries Ltd.**, held that flavoured milk is not classifiable under Tariff Heading 0402/0404 but classifiable under CTH 2202 99 30.

21. In view of the foregoing, we reject the appeal filed by appellant **M/s Vadilal Industries Ltd and uphold the Advance Ruling No. GUJ/GAAR/R/05/2021 dated 20.01.2021** of the Gujarat Authority for Advance Ruling.