

TAMILNADU STATE APPELLATE AUTHORITY FOR ADVANCE RULING
(Constituted under Section 99 of Tamilnadu Goods and Services Tax Act 2017)

A.R.Appeal No.02 /2021/AAAR

Date: 30/06/2021

BEFORE THE BENCH OF

1. Thiru G.V.KRISHNA RAO, MEMBER

2. Thiru M.A. SIDDIQUE, MEMBER

ORDER-in-Appeal No. AAAR/16/2021 (AR)

(Passed by Tamilnadu State Appellate Authority for Advance Ruling under Section 101(1) of the Tamilnadu Goods and Services Tax Act, 2017)

Preamble

1. In terms of Section 102 of the Central Goods & Services Tax Act 2017/Tamilnadu Goods & Services Tax Act 2017("the Act", in Short), this Order may be amended by the Appellate authority so as to rectify any error apparent on the face of the record, if such error is noticed by the Appellate authority on its own accord, or is brought to its notice by the concerned officer, the jurisdictional officer or the applicant within a period of six months from the date of the Order. Provided that no rectification which has the effect of enhancing the tax liability or reducing the amount of admissible input tax credit shall be made, unless the appellant has been given an opportunity of being heard.
2. Under Section 103(1) of the Act, this Advance ruling pronounced by the Appellate Authority under Chapter XVII of the Act shall be binding only
 - (a). On the applicant who had sought it in respect of any matter referred to in sub-section (2) of Section 97 for advance ruling;
 - (b). On the concerned officer or the jurisdictional officer in respect of the applicant.
3. Under Section 103 (2) of the Act, this advance ruling shall be binding unless the law, facts or circumstances supporting the said advance ruling have changed.
4. Under Section 104(1) of the Act, where the Appellate Authority finds that advance ruling pronounced by it under sub-section (1) of Section 101 has been obtained by the appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void sb-initio and thereupon all the provisions of this Act or the rules made thereunder shall apply to the appellant as if such advance ruling has never been made.

Name and address of the appellant	Britannia Industries Limited Prestige Shantiniketan, Tower C, The Business Precint, 16 th & 17 th Floor, Whitefield Main Road, Mahadevapura, Bengaluru, Karnataka
GSTIN or User ID	33AABCB2066P1ZM
Advance Ruling Order against which appeal is filed	Order No.08/AAR/2020 dated 25 th February 2020
Date of filing appeal	16.03.2021
Represented by	Shri. Anandodaya Mishra, Advocate
Jurisdictional Authority-Centre	Chennai North Commissionerate
Jurisdictional Authority -State	Deputy Commissioner(ST)-III, Large Taxpayer Unit, Chennai
Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Yes . Rs. 20,000/- CIN: RBIS21033300103679 dated 12.03.2021

At the outset, we would like to make it clear that the provisions of both the Central Goods and Service Tax Act and the Tamil Nadu Goods and Service Tax Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the Central Goods and Service Tax Act would also mean a reference to the same provisions under the Tamil Nadu Goods and Service Tax Act.

The subject appeal has been filed under Section 100(1) of the Tamilnadu Goods & Services Tax Act 2017/Central Goods & Services Tax Act 2017 (hereinafter referred to 'the Act') by Britannia Industries Limited (hereinafter referred to as 'Appellant'). The appellant is registered under GST vide GSTIN 33AABCB2066P1ZM. The appeal is filed against the Order No.08/ARA/2020 dated 25.02.2020 passed by the Tamilnadu State Authority for Advance ruling on the application for advance ruling filed by the appellant.

2.1 The Appellant has stated that they manufacture / procure and supply UHT Sterilized Flavoured Milk and market it under the brand name '*Britannia Winkin' Cow Thick Shake*' (hereinafter 'the product'). The product is made in multiple flavours and supplied in Tetra Packs. The said product (UHT Sterilized Flavoured

Milk) comprise mainly of milk (about 80 – 90%) and sugar (10 – 12%). The list of ingredients is tabulated below.

S.No.	Ingredients	Purpose
1.	Milk (80 - 90%)	Primary and predominant ingredient
2.	Sugar (10-12%)	As a sweetener
3.	Water	For maintaining consistency of the products
4.	Milk solids	Added with (liquid) milk to maintain consistency
5.	Flavours	These could be either Strawberry Puree, Mango extract, Cocoa, Vanilla (depending on the pack) and are added in small quantities (1% or less) for flavour and colour
6.	Emulsifier and stabilizers	To Emulsify and stabilize (small quantity)
7.	Acidity regulator	To regulate acidity (small quantity)
8.	Iodized salt	For taste and balance

The process of manufacture involves heating (UHT sterilization) and cooling of milk. The ingredients as listed above are added to the milk at different points of the heating /cooling process. Thereafter the milk is filtered and de-aerated / homogenised. The UHT Sterilized Flavoured Milk is thereafter packaged. The applicant has stated that the product is being classified by them under Tariff item 2202 90 30 as 'beverages containing milk'. However, judicial precedents and the relevant GST tariff entries support classification under Chapter 4 of Customs Tariff.

2.2 In view of the above submissions, the Appellant had filed an application before Hon'ble Authority for Advance Ruling, seeking clarification on the following questions:

Whether UHT Sterilized Flavoured Milk is classifiable under Chapter 4 (*Tariff Heading 0402 which covers 'Milk... containing added sugar or other sweetening matter...'* or alternatively, *Tariff Heading 0404 which covers 'Other', i.e. 'products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included'*)

3. The Original Authority has ruled as follows:

UHT Sterilized Flavoured Milk marketed under the brand name 'Britannia Winkin' Cow Thick Shake' by the applicant is not classifiable under the Tariff heading '**0402 /0404**' but classifiable under CTH 22029930.

4. Aggrieved by the above decision, the Appellant has filed the present appeal.

The grounds of appeal are as follows:

- The product under consideration i.e., flavoured milk is a dairy produce. It is essentially milk added with sugar and permitted additives. The single largest ingredient in the product, in quantity and essence is milk which constitutes more than 80-90% of the product. The other ingredients in the product, i.e Sugar, Cocoa, Vanilla, Salt etc. are added for flavour and sweetening and additives viz. Recodan MS 4683 and ICL-Joha T New are added for stabilizing, buffering, emulsifying and thickening purposes. These additions do not in any manner change the essential nature of the product, i.e. milk. The product is marketed under the brand name 'Winkin' Cow thick shake' to make it more attractive to children who are the target consumers, and hence, the packaging, labelling and marketing of the product as a fun, colourful and tasty drink. At the same time, the drink holds the necessary nutrition to ensure that it is chosen by purchasers (adults) as a preferred choice for consumption. The essential nature and character of the product under consideration is nothing but milk and the Impugned Order deserves to be set-aside on this ground alone.
- Hon'ble CESTAT, Chennai in Cavinkare Private Limited Versus Commissioner of Central Excise [2019 (11) TMI 1054 - CESTAT Chennai] in which the product under consideration was similar to the case at hand, the classification of which was under dispute, relied on the decision in Nestle India Ltd. Vs CCE Ltd., New Delhi [2018 (8) G.S.T.L. 211 (Tri-Del)], affirmed by the Hon'ble Supreme Court, as reported in 2015(324) E.L.T. 418 (S.C.) wherein it was held that the addition of small quantity of artificial flavouring substance & the essential addition of stabilizers does not change the basic characteristics of the product, being milk. It is important to note that the Hon'ble High Court had specifically considered the explanatory notes to Chapter 4 in this decision.
- Ld.AAR ought to have appreciated that in the decision of the Hon'ble High Court in Gujarat Coop. Milk Marketing Federation Ltd. vs. State of U.P. 1(2017 (5) GSTL 351 (AII.)), which was referred to before them, where for the flavoured milk marketed as 'AmulElaichi Shake' and 'Amul Coco Shake' it was inter-alia, held that flavoured milk is a form of milk, and processing of milk, with the addition of permitted flavours, colour and sugar does not alter the nature of milk or its characteristics. It was held that flavoured milk is

covered under the sweep of the term 'milk' and even if sugar or special flavours are added it shall not become a commodity different from milk. The rationale laid down in the said case is mandated and is binding in the present case.

- The Ld. AAR has also failed to appreciate and consider the catena of earlier judicial precedents (detailed hereunder) which squarely support the view that the product is classifiable under Chapter 4. The Impugned Order deserves to be set-aside on this ground alone.
- The position and treatment adopted by the Food Safety and Standards Authority of India, which is the regulator for the Food sector, is of utmost relevance' in determining classification of a product. The Ld. AAR ought to have appreciated that the Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 ('the FSS Regulations') set out the categorisation of foods for prescribing standards and permitted ingredients and additives.
- It is clear that in common parlance and as per the FSSAI, flavoured milk is essentially milk / dairy product, rather than a beverage made from milk. In view of this aforesaid, the Ld. AAR ought to have appreciated that flavoured milk is nothing but milk, rather than a beverage containing milk. The Appellant therefore submits that the product deserves to be classified under Chapter heading 0402.
- At Para No. 6.8 of the Impugned Ruling, the Ld. AAR has held that the Appellant's reliance on the FSSAI Regulations has no relevance in the present case since there is a specific heading covering the said product in the Customs Tariff, which is aligned with the International Convention on the Harmonized Commodity Description and Coding System. The Ld. AAR further relies on the decision pronounced in Hari Khemu Gawali v. Deputy Commissioner of Police &Anr. [AIR 1956 SC 559] to hold that it would not be proper to transplant the provisions of the FSSAI Act, for determining the classification under the coded tariff, when there is no ambiguity.
- The aforesaid observation by the Ld. AAR is fallacious. The Hon'ble Supreme Court in Parle Agro (P) Ltd. v. Commissioner of Commercial Taxes, Trivandrum [2017 (5) TMI 592 - Supreme Court] categorically held that the decision and opinion of the Food Safety Authorities under the Food Safety and Standards Act and Regulations framed therein is a relevant factor for

examining the nature and content of a product for determining its classification.

- This understanding was also referred to/ followed in the CESTAT Larger Bench decision in *Brindavan Beverages Private Limited Vs. CCE & ST [2019 (10) TMI 762 - CESTAT ALLAHABAD (LB)]*. It is a clear and settled legal position that FSSAI regulations are relevant in examining the nature of a product for the purpose of determining its classification and also it is a settled legal position that cognate and complimentary statutes are relevant for the purpose of interpretation. This has also been affirmed by the Hon'ble Supreme Court in the decision in *Parle Agro(supra)*.
- The reliance placed by the Ld. AAR in the decision in *Hari Khemu Gawali(supra)* is wholly misplaced. In the said case, the question before the Apex Court was whether the criminal proceedings shall take place as per provisions under the Code of Criminal Procedure or as per Section 57 of the Bombay Police Act of 1951. While determining the vires of Section 57 in light of Article 9(5) of the Constitution of India, the Hon'ble Apex Court held that "it was not safe to pronounce on provisions of one act with reference to decisions dealing with other acts which may not in pari materia." The aforesaid observation by the Supreme Court in the said decision was in the context of determining the constitutionality of a provision under the Bombay Police Act. Therefore, it is submitted that the reliance on the aforesaid decision by the Ld. AAR is not relevant to the factual matrix or question of law in the present case and is hence wholly misplaced.
- In the present case they do not seek to apply a provision from the FSS Regulations, as much as it seeks to refer to the provisions to better understand the nature of the product as per the government regulator of the concerned product. The question before the Ld. AAR was merely determination of classification of the said product. In this context of determining classification of a product, the Hon'ble Apex Court has held that the FSSAI Regulations are relevant and can be relied on, in the decision in *Parle Agro(supra)*. Therefore, it is submitted that the FSSAI Regulations relied on by them ought to have been considered by the Ld. AAR while passing the Impugned Ruling. The Impugned Ruling is therefore unsustainable.
- Even if flavored milk is considered not to be milk itself, but a product containing milk/milk constituents, it would still be classifiable under

Chapter 4, specifically Entry 0404 90 00. While in terms of the foregoing submissions, the most appropriate classification of the product in question is 0402, without prejudice, if a view is taken that flavoured milk is not milk itself but a product containing milk/milk constituents, the product would still be classifiable under Chapter 4, specifically under entry 0404 90 00 which covers products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included.

- The Ld. AAR ought to have appreciated the decision in Nestle India Limited vs. Commissioner of Central Excise [2017 (6) GSTL 483 (Tri. — Del.)] wherein it was held that Nutritious Milk, a product made up of milk predominantly and small quantity of artificial flavouring substance is classifiable under 0404 90 00 as a product consisting of natural milk constituents. It was also held that the addition of small quantities of other substances will not change the essential character of the product and the product will remain nutritious milk only.
- Therefore, in light of the above facts and submissions, the Ld. AAR ought to have held that the product (flavoured milk) is most appropriately classifiable under Chapter 4, specifically Tariff Entry 0402 99 90, or alternatively, Tariff Entry 0404 90 00.

UHT Sterilized Flavoured Milk is covered under Chapter 4 in terms of the General Rules of Interpretation

- As per the General Rules for interpretation, the classification is to be determined, as a first recourse, according to the description of goods mentioned in the tariff headings or the Section Notes or Chapter Notes contained in the Schedule. The Rules further provide that when goods are prima facie covered under two or more headings, classification shall be effected such that a specific entry will prevail over a general entry.
- As set-out hereinabove, nature / essential character and common parlance understanding of UHT Sterilized Flavoured Milk is Milk, considering that milk constitutes 90% of the said product. Accordingly, as milk is specifically covered under the description of Heading 0402, the product will fall for classification under the said heading.
- The product in question is classifiable under Chapter 4 as milk and does not merit classification under Chapter 22 as 'beverage containing milk'. The more specific classification is under Chapter 4, and by application of Rule

3(a) of the General Rules, goods if classifiable under two or more headings, the entry which provides the more specific description will cover the product in question.

- Thus, even if flavoured milk is classifiable under two or more headings i.e. under Chapter 4 and Chapter 22, then as per the General Rules, the most specific description shall be preferred over general description.
- The product in the present case is commonly known and understood as 'flavoured milk', as it is essentially a form of milk rather than a derivative of milk or milk product. It does not lose its basic characteristics and nutritive value merely by the process of heating and cooling or by addition of sugars or flavour. Therefore, the entry most specifically applicable is under Chapter 4.
- Rule 3(b) of the General Rules which is applicable in the event that classification cannot be determined under Rule 3(a) inter alia states that mixture and composite goods consisting of different materials shall be classified as if they consist of the material or component which gives them their essential character.
- The general explanatory notes for Chapter 4 under the Harmonized Commodity Description and Coding System ('HSN') specifies as follows:
 - "(1) Dairy products:
 - (A) Milk, i.e. full cream milk and partially or completely skimmed milk.
 - (E) Products consisting of natural milk constituents, not elsewhere specified or included.
- The products mentioned at items (A) to (E) above may contain, in addition to natural milk constituents (e. g., milk enriched in vitamins or mineral salts), small quantities of stabilizing agents which serve to maintain the natural consistency of the product during transport in liquid state (disodium phosphate, trisodium citrate and calcium chloride, for instance) as well as very small quantities of anti-oxidants or of vitamins not normally found in the product. Certain of these products may also contain small quantities of chemicals (e.g., sodium bicarbonate) necessary for their processing..."
- It is, therefore, evident from the above that Chapter 4 permits addition of certain other ingredients which could either work as stabilizers, sweeteners or flavouring agents. Therefore, flavoured milk is classifiable under Chapter 4 even if they contain any of the aforementioned additives. This is in line with the position under the FSS Regulations as well.

- The present issue is no longer res integra and stands squarely covered in favour of the Appellant by the decision rendered by the Hon'ble Tribunal Chennai. They did not have occasion to refer to and rely on this decision since it was passed only after the submissions were made by the Appellant before the Ld. AAR. The Impugned Ruling therefore did not consider the decision in Cavinkare(supra), and to this extent is per incuriam. The Impugned Ruling is therefore liable to be set aside on this ground alone.
- It is settled law that the basic characteristic of a product does not change by the mere addition of ingredients for flavouring, enhancing shelf-life etc. Reliance in this regard is placed on the judgement of the Hon'ble Supreme Court in Commissioner of Central Excise vs. Amrit Food [2015 (324) ELT 418 (SC)]. Although the above judgement was passed in context of the tariff as it read in 1998, the essence of the judgement is that mere addition of additives and ingredients to milk as a sweetener, flavouring agent, stabilizer etc. will not change the nature of the product if the product per se is milk which falls within the scope of Chapter 4 of the Tariff.
- It is further essential to note that in terms of the Tariff as it reads today, Chapter 2202 seeks to include products such as mineral waters, aerated waters and non-alcoholic beverages. It is clear that under the entry for 'beverages containing milk', the legislature seeks to cover beverages in which milk is one amongst various other ingredients, such as tea, coffee etc. and not products where the predominant ingredient and nature is that of milk. In all these cases, in common parlance the products are known in their generic name such as coffee, tea though they contain milk powder. For this purpose, on application of the principle of "Ejusdem Generis", either milk is absent or would be a negligible portion of the preparations like Fruit pulp, soya milk drinks, beverages containing milk etc, while Winkin 'Cow is a product, which is substantially and predominantly only milk.
- In Nestle India Limited vs. Commissioner of Central Excise [2001 (132) ELT 134 (Tri. Del)] wherein it was held that 'Milkmaid Kesar Kulfi Mix' (consisting of 57.5% of dairy powder), 'Milkmaid Shahi Rabri Mix' (consisting of 57.5% of dairy powder) and 'Milkmaid Kalakand Mix' (consisting of 68.8% of dairy powder) were classifiable under Chapter 4. In the present case, milk constitutes over 80-90% of the product and the product is in liquid state, i.e. natural milk form. It is not even reduced to powder. In another case of Nestle India Limited vs. Commissioner of Central

Excise [2018 (8) GSTL 211], it was held that the mere addition of artificial flavouring does not change essential nature of product.

- Furthermore, in Danone Foods and Beverages [2012 (280) E.L.T. 563], the Advance Ruling Authority held as follows:

"It is, therefore, clear that Heading 0403 permits addition of certain other ingredients which could be either stabilizers or sweeteners or flavouring agents. Therefore, dairy products classifiable under Heading 0403 of CETA continue to remain classifiable under this heading even if they contain any of the aforementioned additives. "Yum Creamy" is made by mixing sugar, flavour, vitamins, wheat and rice flour with cow's milk. Since the stabilizers, sweeteners etc. are permissible additives as mentioned in the relevant HSN Notes, the product "Yum Creamy" will be correctly classified under Heading 04039090 of CETA."

- The product under consideration is much akin to Danone's Yum Creamy and is hence, classifiable under Chapter 4. In Commissioner of Sales Tax vs. Neera Drinks [1999 UPTC 1130], the Hon'ble High Court inter alia held that sweetened milk and badam milk sold in bottles with caps do not change the classification of the product which is basically milk.
- Thus, in view of the above-mentioned settled jurisprudence, it is clear that flavoured milk merits classification under Chapter 4 as Other Milk, and not under any other heading including under Chapter 22.
- The Ld. AAR has held that the said product under consideration merits classification under the entry 2202 9930 'beverages containing milk'. The said product being UHT Sterilized flavoured milk, is essentially 'milk' and not 'a beverage containing milk' and thus merits classification under Chapter 4 and not Chapter 22. Further, as per well settled law, in the HSN, the earlier chapters cover more basic / natural products and the later products feature more processed products. As already submitted, the said product is essentially milk and is thus a natural origin product. The product is appropriately classifiable under Chapter 4 than Chapter 22. In this regard, reliance is placed on the decision in Mauri Yeast India Private Limited Vs. State of U.P. [2008 (4) TMI 101 — Supreme Court and Samsung India Electronic Pvt. Ltd. Vs. State of Gujarat [2020 (2) TMI 1247 — Gujarat High Court.

- In terms of well settled law in a catena of judgments including in Cavinkare (supra), addition of a small quantity of artificial flavorings does not change the essential nature of the product and the product continues to be classified under Chapter 4.
- The Impugned Ruling seeks to make a reference to HSN explanatory notes to contend that "beverages consisting of milk flavoured with cocoa or other substances" fall under HS 2202 as per the said explanatory notes and the said reference is misconceived and is without any basis in fact or law. Factually, the product under consideration is milk / produce of animal origin and this is also accepted vide a catena of judgments on identical products. Given this factual and legal position, reference to "beverage consisting of milk" under the HSN explanatory notes is not relevant to the present case, in as much as the product at hand is essentially milk / milk product falling under chapter 4.
- Even assuming without accepting that said HSN explanatory note is relevant to the product at hand, they submit and highlight the decision in Collector of Customs, Bombay vs. HICO Products Ltd [1984 (8) TMI 324 - CEGAT New Delhi] wherein it was held that HSN Explanatory Notes do not have legal force and that for legal purposes, classification has to be determined in according to the Headings read with the relevant Section and Chapter Notes. It was further held that in case the HSN explanatory notes do not accord with the classification determined on the basis of the Chapter Headings read with relevant Section and Chapter Notes, then the latter shall prevail.
- They have placed reliance in the case of Texspan Vs. Collector of Customs [1989 (11) Thill 169 - CEGAT, New Delhi], which relied on the ratio laid down in Hico Products(supra) and held that HSN Explanatory Notes do not have legal force and that the relevant Tariff Headings along with Section and Chapter Notes will prevail over HSN Explanatory Notes in case of a contradiction and on Hindustan Motors Ltd. Vs, Commissioner of Customs, Calcutta [1999 (1) TMI 222 - CEGAT, Calcutta where it was held that HSN Explanatory Notes are not binding and cannot prevail over a Tariff description.
- Ld. AAR is incorrect in holding that the said product is classifiable under Chapter 22 and not under Chapter 4 on the basis of HSN Explanatory Notes mentioned at Para No. 6.5 of the Impugned Ruling. As is clear from the aforesaid judicial precedents relied on, HSN Explanatory Notes cannot

prevail over a Tariff Heading and relevant Section and Chapter Notes, to determine classification of a product and the former is not legally binding as well. In the present case, the said product is classifiable under Chapter 4 in terms of the Tariff Headings itself. Therefore, the AAR's reliance on the HSN Explanatory Notes while rejecting the plain reading of the Tariff Entry is unfounded and unsustainable.

- The Ld. AAR has also held at Para No. 6.6 of the Impugned Ruling that the said product is classifiable under Chapter 22 as per Rule 1 of General Rules of Interpretation of Tariff. It is submitted that this is wholly erroneous and not sustainable. The classification of goods under the Customs Tariff is governed by 'General Rules for the Interpretation of Import tariff' ("GRI") which are fashioned on 'General Rules for the Interpretation of the Harmonized System'. In terms of Rule 1 of the GRI, the classification of goods is to be determined according to the terms of the headings of the Tariff Schedule and any related Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1 and if the Section Notes and Chapter Notes do not otherwise require, the remaining GRI's may then be applied. In this regard, reliance is placed in the decision in Modi Xerox Ltd. Vs. Collector of Customs, New Delhi/Bombay [1997 (12) TMI 642 - CEGAT New Delhi]
- In the present case, the product can be classified under Chapter 4 in accordance with GRI 1 in terms of the headings of the Tariff Schedule itself. The said product is essentially 'milk' and thus the product in question is classifiable under Chapter 4 on the basis of the Chapter heading itself. Hence, there is no requirement to seek to classify the said product in accordance with the explanatory notes under Heading 2202.
- Judicial precedents relied on by them shall prevail over the interpretation sought to be adopted by referring to HSN explanatory note by the Ld. AAR. Without prejudice, it is submitted that even assuming that there are two views possible, it is a well settled legal position that one favourable to the assessee in matters of taxation has to be preferred.
- The Impugned Order seeks to refer to certain recommendations of the Fitment Committee as mentioned in Agenda of 31st GST Council Meeting to conclude that Flavoured milk is classifiable under Tariff Entry 2202. Annexure-III to the Agenda for the 31st meeting of the GST Council mentions the list of goods not recommended for change in GST rate. SI. No. 18 to

Annexure-III provides that the Fitment Committee does not recommend issuance of clarification that the proposed rate of 'flavoured milk' be 12%. The Ld. AAR has relied on this recommendation of the Fitment Committee to hold that 'flavoured milk' is classifiable under Chapter 22 only. The AAR has however failed to appreciate that the aforesaid recommendation of the Fitment Committee has not fructified into a decision by the GST Council. Reference in this regard is made to Paras 14.42, 14.43, 14.44 at Page No. 27 to the Minutes of Meeting of the 31st GST Council Meeting. It has been stated nowhere in the Minutes of Meeting that the GST Council either accepts or rejects this particular recommendation of the Fitment Committee. In fact, at Para 14.42, it has been recorded that the Hon'ble Chairperson has stated that any other request for reconsideration of change in GST rate could be sent in writing for reconsideration, thereby, leaving it open-ended. On the other hand, at Para No. 14.41 at Page No. 27 of the Minutes of Meeting, wherein it has been clearly recorded that the council agreed to the proposals contained in S.Nos. 1 to 19 of Annexure-11, recommended by Fitment Committee in its meeting of 14th and 15th December, 2018," Reference is also made to Para No. 14.29 at Page No. 24 of the Minutes of Meeting, wherein the GST Council has expressly agreed to the Fitment Committee recommendations. It is thus submitted that the GST Council has not pronounced a decision regarding the tariff rate applicable to the said product. Therefore, the Id. AAR is incorrect in relying on the Fitment Committee recommendation, when it has not been expressly agreed to by the GST Council.

- The reference to the Fitment Committee recommendations and statements made therein in the context of change of GST rate cannot be a basis to decide the classification of goods at hand. Thus, the said recommendation is essentially in the context of change in GST rate and has not been issued in the context of the product under consideration. The characteristics of the product at hand (being essentially milk), ingredients thereof, etc. are not referred or considered therein.
- In any case, it is settled law inter-alia in *Kalyani Packaging Industry v. Union of India* [2004 (168) E.L.T. 145 (S.C)] that Departmental circulars cannot prevail over law laid down by a Court. Reliance in this regard is also placed on the judgment in *Commissioner of C.Ex., Bolpur v. Ratan Melting & Wire Industries* [2008 (231) E.L.T. 22 (S.C.)] where a similar position was taken.

- It is submitted that the said product, i.e. flavoured milk, merits classification under Chapter 4 as it constitutes 90% milk and the product is essentially milk only. It is submitted that even products that contain less than 90% of milk are being classified under Chapter 4, as elaborated hereunder.
- In *Nestle India Ltd. v. CCE, New Delhi* [2001 (3) TMI 157- CEGAT. New Delhi] (supra), the products in question were Nestle Milkmaid Kalakand Mix (containing dairy powder of 68.8%), Nestle milkmaid rabri mix (containing dairy powder of 57.5%) and nestle milkmaid kulfi mix (containing dairy powder of 57.5%). These products thus contained much lesser than 90% of milk. However, it was held by the Hon'ble Tribunal that they are to be classified under Chapter 4. This decision was affirmed by the Supreme Court as reported in 2015 (324) E.L.T. 418 (S.C.).
- Similarly, in *M/s. Danone Foods and Beverages* (supra), the product in question was fermented milk containing 83.04% of cow milk. It was held in this case that the product merits classification under Chapter 4.
- Further, reliance is also placed in on *Amrit Food* (supra), in which the products under question were milkshake mix and soft serve mix. The products constituted of milk, to which sugar, glucose and milk powder were added. It was held that the products were to be classified under Chapter 4 only. The ratio of this decision was relied upon by the Tribunal in the case of *M/s. Fun Foods Pvt. Ltd.*(supra) in which it was held that milkshake mixes are classifiable under Chapter 4. In the present case, the said product contains 90% milk, to which substances like sugar, flavouring agents, etc. are added. Thus, the said product also merits classification under Chapter 4 only.
- It is thus submitted that even products that constitute less than 90% milk have been classified under Chapter 4, as can be seen from the aforesaid judicial decisions. In the present case, it is an admitted fact that the product, i.e. flavoured milk constitutes 90% milk and that the product is essentially milk only. Addition of a miniscule quantity of flavouring substance does not alter the essential character of the product, as has been held in the various judicial precedents cited above. Therefore, on the basis of the aforesaid grounds, the product UHT Sterilized Flavoured Milk deserves to be classified under Chapter 4 and not Chapter 22. The Impugned Ruling

is consequently erroneous, arbitrary and without appreciation of the true nature of the product, and deserves to be set aside.

PERSONAL HEARING:

5.1 Due to the prevailing PANDEMIC situation and in order not to delay the proceedings, the appellant was addressed through the Email Address mentioned in the application to seek their willingness to participate in a virtual Personal Hearing in Digital media vide e-mail dated 22nd March 2021. The appellant provided their consent to be heard through digital means towards end of April 2021 or later. Accordingly, the hearing was held virtually on 15th June 2021.

5.2 Shri. Anandodaya Mishra, Advocate and authorized representative appeared for the hearing virtually. He reiterated the written submissions. He emphasized that:

- (1) their product is made up of 80-90% of Milk and is only "Milk"
- (2) GST Council has not clarified the classification of the product as mentioned in the impugned order
- (3) Non-Reliance of FSSAI regulation by the lower authority is not correct

He stated that their product is a new product launched post-GST and as an abundant caution they classified it under Chapter 22 of Customs Tariff. He relied on a catena of decisions and requested to permit them to furnish a written submission which was allowed. The authorized representative was asked to furnish invoice copy and rulings supporting similar product under CTH 0402/0404.

5.3 The appellant furnished their written submissions dated 24.06.2021 through e-mail. In the submissions, they had furnished the background, concept of Flavoured Milk, issues involved, judicial precedents in detail along with the copies of all the case laws relied upon by them, copy of the FSSAI Certificate and copies of the labels of their products. They have not furnished any invoice copy supporting similar product under CTH 0402/0404.

5.4 On the issues involved, the following are stated:

- Whether the product is 'beverage containing milk' or 'milk and milk product'?

- The product is a dairy produce of which the primary and predominant ingredient is milk and additions such as sweetening and flavours do not affect the nature of basic ingredient, 'Milk' lose its characteristics
- According to Schedule-II of the Food Safety and Standards Act, 2006 and clause (f) of Paragraph 2 of the Milk and Milk Products Order, 1992; milk is defined to include flavoured milk;
- The product is milk based and not water based drink and hence Tariff heading 2202 dealing with water based beverages and other non-alcoholic beverages will not be applicable to it
- The more specific classification exists under Chapter 4 of the Customs Tariff and by application of Rule 3(a) of the GRI, goods if classifiable under two or more headings, the entry which provides the more specific description will cover the product
- Chapter 4 does not have any categorical exclusions for Flavoured Milk and thus, there is no reason for resorting to Chapter 22
- Rule 3(b) of the GRI states that mixture and composite goods consisting of different materials shall be classified as if they consist of the material or component which gives them their essential character. The flavoured milk is a milk based product and does not lose its characteristics when sugar or flavor is added to it and therefore the product merits classification under tariff heading 0402
- What is the difference between 'beverage containing milk' and 'milk and milk product and when a product is 'beverage containing milk' and 'milk and milk product'?
- As per the Oxford dictionary, a beverage is 'any type of drink except water'
- Para 2.10 of the FSSAI Regulations, 2011, i.e., Beverages (other than Dairy and Fruits & Vegetables based) includes 2.10.6- Beverages Non-Alcoholic-Carbonated is mentioned; Tariff heading 2202 covers non-alcoholic beverages
- Non-alcoholic beverages as under 2.10.6 of the FSSAI regulation does not include milk in any form; Since there is no component of milk as per the FSSAI regulations, the product cannot be classified under the heading 2202 that provides for non-alcoholic beverages
- Under the entry 22029930, the intent of the legislature is to cover beverages in which milk is one amongst various other ingredients,

such as tea, coffee, etc and not products where the predominant ingredient and nature is that of milk

- Flavoured Toned milk, as per FSSAI regulations, means the product prepared from milk or other products derived from milk, or both, and edible flavourings with or without addition of sugar, nutritive sweeteners, other non-diary ingredients including stabilizers and food colours
- Therefore the product in the present case is flavoured milk and comes under the ambit of Milk Product as per the FSSAI Regulations, 2011 and in accordance with Chapter 4 of the Customs Tariff as the Tariff Heading 0402 covers 'Milk and cream, concentrated or containing added sugar or other sweetening matter', the product merits classification under tariff heading 0402
- What is flavor? To what extent flavor can be used so that it does not change the nature of the original product?
 - FSSAI has classified flavours into three categories:- Natural Flavouring substances and Natural Flavours; Flavouring substances that are Nature-identical; Substances of Artificial Flavours
 - Flavours can be added to the food in accordance with Good Manufacturing Practices (GMP) Guidelines
 - Chapter 4 of the Customs Tariff permits addition of certain other ingredients which could either work as stabilizers, sweeteners or flavouring agents. Therefore, flavoured milk is classifiable under Chapter 4 even if it contains any additives
- Manufacturing process of the product
 - The process of manufacturing the product includes heating of milk, adding stabilizers, adding flavor, blending the flavor, adjusting the pH balance so that the pH of the product is neutral, further processing and filling and finally packaging and storage. As per FSSAI, flavoured milk is subject to heating as a part of its manufacturing process
 - As per Note 1 of Chapter 4, milk means full cream milk or partially or completely skimmed milk, referring to the note 4 of Chapter Notes. Therefore, the product comes under the ambit of Milk and Milk product as under Chapter 4 and not under Chapter 22

- Chapter Notes 4 (b) excludes only products obtained from milk by replacing one or more of its natural constituents and their product do not fall under this category
- The product would not have fallen into the category of Tariff heading 0402 under Chapter 4 when water would have been removed from cow's milk referred as condensed milk but in the present case, the water content is present and has not been removed thereby acting as supportive ingredient with cow's milk
- The base content of beverage is water which is dominating ingredient on the other hand water is sub part of the Product which maintains consistency and here Milk is the base content, i.e., the dominating ingredient which makes it milk product or dairy produce. Hence, the flavoured milk cannot be classified as condensed milk and is to be classified under Tariff heading 0402
- The product is classifiable under Entry 04029990
 - As per the description and ingredients, the product is toned milk with added sugar and flavor
 - CTH 0402 talks about 'Milk and Cream, concentrated or containing added sugar or other sweetening matter'; their product is Milk with added sugar and flavours, therefore it would be categorized under Chapter 4 in the CTH 0402
 - As per the specific entry, the product falls under the Entry 0402 99 90, i.e., others as the Product is neither skimmed milk, milk food for babies, whole milk or condensed milk but toned milk with added flavours that would classify the Product under the Entry 0402 99 90

5.5 The appellant has relied on the following judicial precedents:

- Addition of small quantity of flavor does not take milk/milk products outside purview of Chapter 4
 - Cavinkare Private Limited Vs. Commissioner of Central Excise [2019(11)TMI 1054 – CESTAT Chennai]
 - Nestle India Ltd Vs. CCE New Delhi [2018 (8) G.S.T.L. 211(Tri. – Del.)]
- The product in question is essentially milk and deserves to be classified under Chapter 4
 - Gujarat Coop. Milk Marketing Federeation Ltd Vs. State of U.P.[2017(5) GSTL 351 (All.)]

- Karnataka Co-operative Milk Producers Federation Ltd [(2020)79GST 11(AAR)]
- Deputy Commissioner of Sales Tax (Law), Board of Revenue, Ernakulam Vs. PIO Food Packers [AIR 1980 SC 1227]
- Applicability of FSSAI Act & Regulations
 - ParleAgro (P) Ltd Vs. Commissioner of Commercial Taxes, Trivandrum [2017 (5) TMI 592-SC]
 - Brindavan Beverages Private Limited Vs. CCE & ST [2019 (10) TMI 762-CESTAT Allahabad (LB)]
- Flavoured Milk is classified under Chapter 4
 - Commissioner of Central Excise Vs. Amrit Food [2015 (324) ELT 418 (SC)]
 - Fun foods Pvt Ltd Vs. Commissioner of Central Excise, Jaipur – I [2017 (348) ELT 357 (Tri- Del)]
 - Nestle India Limited Vs. Commissioner of Central Excise [2001 (132) ELT 134 (Tri Del)]
 - Danone Foods and Beverages (I) Pvt Ltd Vs. The Commissioner of Central Excise [2012 (280) E.L.T. 563]
 - Commissioner of Sales Tax Vs. Neera Drinks [1999 UPTC 1130]
- Specific Entry to be relied on rather than Generic Entry
 - Mauri Yeast India Private Limited vs. State of U.P. [2008 (4) TMI 101-S.C]
 - Samsung India Electronic Pvt. Ltd Vs. State of Gujarat [2020(2) TMI 1247-Gujarat High Court]
- HSN Explanatory Notes are not binding and cannot prevail over a Tariff description
 - Collector of Customs, Bombay Vs. HICO Products Ltd [1984 (8) TMI 324 – CEGAT New Delhi]
 - Texspan Vs. Collector of Customs [1989 (11) TMI 169 – CEGAT New Delhi]
 - Hindustan Motors Ltd Vs. Commissioner of Customs, Calcutta [1999 (1) TMI 222- CEGAT, Calcutta]
- Goods cannot be classified solely on the basis of GRI
 - Modi Xerox Ltd Vs. Collector of Customs, New Delhi /Bombay [1997(12) TMI 642 – CEGAT New Delhi]
- Departmental circulars cannot prevail over law laid down by a court

- Kalyani Packaging Industry Vs. Union of India [2004 (168) E.L.T. 145 (S.C.)]
- C.Ex. Bolpur Vs. Ratan Melting & Wire Industries [2008 (231) E.L.T 22 (S.C.)]

DISCUSSIONS:

6. We have carefully considered the submissions of the Appellant, the impugned Order and the applicable statutory provisions. We find the issue before us for decision is whether the product 'Flavoured Milk' manufactured/procured and supplied by the appellant as 'Britannia Winking Cow Thick Shake' in various flavours in tetra packs/bottles is classifiable under Chapter 4 of the Customs Tariff, i.e., "Dairy produce;birds' eggs; natural honey; edible products of animal origin, not elsewhere specified or included", more specifically under CTH 0402 as claimed by the appellant or under Chapter 22 of the Customs Tariff, i.e., "Beverages, spirits and vinegar", more specifically under CTH 2202 9930 as decided by the Lower Authority.

7.1 From the submissions, we find that the manufacturing process of the product involves heating (UHT sterilization) and cooling of milk, to which the constituents are added at different points of the heating/cooling process, filtered and de-aerated/homogenised and thereafter packaged. The product is made in multiple flavours –strawberry(strawbericious), Mango(mangolicious),Vanilla(vanillicious) and chocolate(chocolicious)(hereinafter referred to as the 'Products'). As per the label, the constituent of the products is tabulated below:

S.No.	Winkin' Cow – Thick shakes	Constituent
1.	Strawbericious	Standardised Milk(89%), Sugar, Water, Emulsifier and Stabilizers, Strawberry Puree(0.1%), Acidity Regulator
2.	Mangolicious	Standardised Milk(89%), Sugar, Water, Emulsifier and Stabilizers, Alphonso mango Puree(0.1%), Acidity Regulator
3.	Chocolicious	Toned Milk(87%), Sugar, Water, Milk solids, Emulsifier and Stabilizers, Cocoa powder(1%), Acidity Regulator
4.	Vanillicious	Standardised Milk(89%), Sugar, Water, Emulsifier and Stabilizers, Acidity Regulator, Natural and Artificial Vanilla(0.1%)

From the above, it is seen that Standardised milk/Toned Milk are sterilised using the UHT process to which sugar, water, Emulsifier and stabilizers, flavours, Acidity regulator and Milk solids in the case of Toned Milk. The products are 'ready to drink' and are marketed as 'Thick shakes' with a shelf life of 6 months in tetra packs.

7.2 The appellants are aggrieved that when the Lower authority has found that the products are a 'form of milk', there is no finding by the Authority that - milk loses its identity; a new product comes into existence and it is not milk anymore; new product cannot be called as Toned Milk or Thick Shakes or Flavoured Milk Shake; Milk is subsided by other products say water, additives, sugar, flavours so that it cannot be bought, sold, displayed, marked, consumed as Milk; for excluding it from classifying under Chapter 4, more particularly CTH 0402. The main contentions of the appellants are

- The product is a milk from start to end, until it is consumed;
- The product is a Milk Product and not a beverage as per FSSAI Regulations and accordingly, should be classified as Milk product for the purposes of 'Taxation' also
- FSSAI being food regulator, the regulations are to be applied to the products to ascertain the essential characteristics of the product;
- GST council minutes relied upon in the impugned order do not clarify the classification; even so circulars are not binding on the appellants; Judicial findings are to be preferred to the circulars;
- Classifying based on GRI alone and relying the HSN Explanatory notes alone for classification is not correct

7.3 We find that the short issue to be decided is whether the ready to drink flavoured milk sold in tetra packs by the appellants is to be classified as 'Milk product' as is said to be classified in the FSSAI Regulation 2011 and therefore should cover under CTH 0402 or whether the products are excluded under CTH 0402 as held by the lower authority and therefore are to be classified under CTH 2202. Before proceeding to decide, the categorization under FSSAI regulation 2011 and the relevant Chapters under Customs Tariff are examined as under.

8.1 Under FSSAI Regulation 2011, the food products are categorized by specific products, i.e, 2.1-Diary products and Analogues; 2.2 Fats, Oils and Fat Emulsions;

2.3-Fruit & Vegetable Products; 2.4 – Cereal and Cereal Products; 2.5 –Meat and Meat Products; and so on....and Regulation 2.10 Beverages excluding dairy and Fruits & Vegetables based products. Under 2.1-Dairy products and Analogues, the regulation gives the standards for the various dairy products as follows:

Regulation 2.1-DAIRY PRODUCTS AND ANALOGUES;

2.1.1 gives the general standards of Milk and Milk Products;

2.1.2 gives the standards of 'Milk'- 'Species Identified Milk', 'Mixed Milk', "Full Cream Milk, Standardised Milk, Toned Milk, Double Toned Milk, or Skimmed Milk", Low Lactose or Lactose free milk;

2.1.3 gives the standards for Flavoured Milk;

and under regulation 2.10, the standards for 2.10 BEVERAGES, (Other than Dairy and Fruits & Vegetables based) is given. Thus, it is evident that 'Beverages' which are 'ready to drink' drinks except water, when based on Dairy products, Fruits & Vegetable, the standards for the same are given under '2.1 -Dairy Products', '2.3 – Fruits & Vegetable products' and not under 2.10 which provides the standards for Beverages other than Dairy, Fruits & Vegetable based. This does not mean that there are no beverages which are dairy, Fruit & Vegetable based. If that is the case, there is no requirement for an exclusion to be specified, while stating the standards at Regulation 2.10, i.e. as 'Beverages excluding dairy and Fruit & Vegetables'. Thus, it is conclusive that FSSAI regulations gives the standards of beverages other than Dairy and Fruit & Vegetables at 2.10 and the beverages based on Dairy, Fruits and Vegetables stands covered under Regulation 2.1 and 2.3 respectively.

8.2 Customs Tariff adopted for the purposes of GST is aligned to HSN and the classification of the products in the Tariff is in a sequence. The initial Sections/Chapters contain Live animals, not so processed goods and the latter parts 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'; Section IV covers 'PREPARED FOODSTUFFS, BEVERAGES, SPIRITS AND VINEGAR, TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES' in which Chapter 22 covers 'Beverages, spirits and vinegar'. From the arrangement of Tariff, it can be seen that products in their natural state are classified in the initial chapters and when the same products undergoes certain process, they are classified in the later chapters.

8.3 It is the contention of the appellant that the product in hand remains a 'Milk' until consumption and that addition of flavors, sweeteners, stabilizers to it do not change the basic characteristics of the product and therefore merits classification under Chapter 0402 only, more specifically under 04029990 and there is no specific exclusion in the chapter notes. In terms of explanation (iii) and (iv) to Notification No. 1/2017 - Central Tax (Rate) dt. 28-06-2017, tariff heading, 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 and the rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975, including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall be applied for the interpretation and classification of goods. The Heading 0402 of the Customs Tariff is as under:

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

From the above, it is seen that CTH 0402 covers Milk and Cream, concentrated or containing Added Sugar or other sweetening matter; Heading 0402 10 and 0402 20 covers products 'In powder, granules or other solid forms...' and Heading 0402 99 90, which is Other-Other-Other is claimed to cover the appellants' products. The explanatory notes as per the HSN to the Tariff heading 0402 is as below:

04.02 - Milk and cream, concentrated or containing added sugar or other sweetening matter (+).

0402.10 - In powder, granules or other solid forms, of a fat content, by weight, not exceeding 1.5 %

- In powder, granules or other solid forms, of a fat content, by weight, exceeding 1.5 % :

0402.21 -- Not containing added sugar or other sweetening matter

0402.29 -- Other

- Other :

0402.91 -- Not containing added sugar or other sweetening matter

0402.99 -- Other

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**).

From the Explanatory notes, which is a reasonable guide to understand the scope of the entries, it is seen that this heading covers milk as defined in Note 1 to this Chapter. Chapter Note 1 of Chapter 4 reads as follows:

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

Thus Tariff heading 0402, covers milk as defined in Note 1 of the Chapter, i.e., full cream milk, partially or completely skimmed milk are only covered as 'Milk' under the heading 0402.

8.4 FOOD SAFETY AND STANDARDS (FOOD PRODUCTS STANDARDS AND FOOD ADDITIVES) REGULATIONS, 2011(FSSAI), defines Full Cream Milk, skimmed Milk, Standardised 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 admixture 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 case at hand, as per the label, the Milk constituent is 'Standardised Milk' or 'Toned Milk' which are not 'Full Cream Milk' or 'Skimmed Milk' as per the above definitions. The Chapter Note 1 clarifies the nature of Milk covered under the expression 'Milk' which is limited only to 'Full cream Milk' or 'partially or completely Skimmed Milk'. This shows that the other types of 'Milk' are excluded for the purposes of this Tariff heading. In the products at hand, the percentage composition of Standardised Milk or Toned Milk is 80 to 90% and the products are not of 'Full Cream Milk' or 'Skimmed Milk' and therefore are undoubtedly excluded from the purview of Tariff Heading 0402. Therefore, irrespective of the contentions that the product remains a 'Milk' even with added flavours until it is consumed, it is clearly established that the 'Milk' referred to in this Tariff heading and that of the appellant are not the same and the products in hand are not covered under CTH 0402.

8.5 With respect to the alternative Tariff heading 04049000, the same is examined as under:

0404	WHEY, WHETHER OR NOT CONCENTRATED OR CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER; PRODUCTS CONSISTING OF NATURAL MILK CONSTITUENTS, WHETHER OR NOT CONTAINING ADDED SUGAR OR OTHER SWEETENING MATTER, NOT ELSEWHERE SPECIFIED OR INCLUDED
0404 10	- <i>Whey and modified whey, whether or not concentrated or containing added sugar or other sweetening matter :</i>
0404 10 10	--- Whey, concentrated, evaporated or condensed, liquid or semi-solid
0404 10 20	--- Whey, dry, blocks and powdered
0404 10 90	--- Other
0404 90 00	- Other

Tariff heading 04049000 covers 'Products consisting of of Natural Milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included'. Thus this tariff item covers products of natural Milk

constituents with or without added sugar which is not elsewhere specified or included.

The relevant Explanatory notes to this tariff item states as follows:

04.04 - Whey, whether or not concentrated or containing added sugar or other sweetening matter; products consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included.

0404.10 - Whey and modified whey, whether or not concentrated or containing added sugar or other sweetening matter

0404.90 - Other

This heading covers whey (i.e., the natural constituents of milk which remain after the fat and casein have been removed) and modified whey (see Subheading Note 1 to this Chapter). These products may be in liquid, paste or solid (including frozen) form, and may be concentrated (e.g., in powder) or preserved.

The heading also covers fresh or preserved products consisting of milk constituents, which do not have the same composition as the natural product, provided they are not more specifically covered elsewhere. Thus the heading includes products which lack one or more natural milk constituents, milk to which natural milk constituents have been added (to obtain, for example, a protein-rich product).

Apart from natural milk constituents and the additives mentioned in the General Explanatory Note to this Chapter, the products of this heading may also contain added sugar or other sweetening matter.

The powdered products of this heading, particularly whey, may contain small quantities of added lactic ferments, with a view to their use in prepared meat products or as additives for animal feed.

The heading **does not cover** :

- (a) Skimmed milk or reconstituted milk having the same qualitative and quantitative composition as natural milk (**heading 04.01 or 04.02**).
- (b) Whey cheese (**heading 04.06**).
- (c) Products obtained from whey, containing by weight more than 95 % lactose, expressed as anhydrous lactose, calculated on the dry matter (**heading 17.02**).
- (d) Food preparations based on natural milk constituents but containing other substances not allowed in the products of this Chapter (in particular, **heading 19.01**).
- (e) Albumins (including concentrates of two or more whey proteins, containing by weight more than 80 % whey proteins, calculated on the dry matter) (**heading 35.02**) or globulins (**heading 35.04**).

From the above it is evident that the heading apart from whey, covers fresh or preserved products consisting of milk constituents, which do not have the same composition as the natural product, i.e., it includes products which lack one or more natural milk constituents; milk to which natural milk constituents have been added and such products are not to be more specifically covered elsewhere. In the case at hand, the product do not lack any natural constituents or no natural milk constituents are added and the product is not whey. Therefore, the products are not covered under this tariff heading also.

8.6 To sum up, the products in hand are products of Standardized/Toned Milk which are UTH sterilized and added with flavours, sugar, water, stabilizers, regulators, etc These are not Full cream milk or partially or completely skimmed milk and therefore not covered as 'Milk' under CTH 0402. Further, the products do not lack any natural constituents and further no natural milk constituents are added to it and therefore, are not covered under CTH 0404 also. Thus we find no infirmity in the findings of the lower authority that the product in hand do not fall

under Chapter 4 of the Customs Tariff, though the product is categorized under Dairy products and analogues under FSSAI Regulation 2011.

9.1 The product in hand is a 'ready to drink' product. The appellant has contended that their product though is ready to drink, it is Milk, being a dairy produce in which additions as admissible under the GMP as allowed under the FSSAI regulations are only added and has further contended that to be a 'Beverage', the product should have 'water' as the dominating ingredient. In this connection, we find that the National Dairy Development Board as seen in the 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 being a nodal agency in the Dairy products and the 'Flavoured Milk' is categorized as Beverage as can be seen above. The process mentioned under

'Flavoured Milk', above is the one followed by the appellant in the case at hand. Further, Beverage as per the dictionary definition is 'any type of drink except water'. Thus, it becomes evident that the product in hand is a Beverage.

9.2 Chapter 22 of Customs Tariff covers 'Beverages, Spirit and Vinegar'. Tariff Heading 2202 covers- Waters, including Mineral Waters and Aerated Waters, containing added sugar or other sweetening Matters or Flavoured, and Other Non-alcoholic Beverages, Not including Fruit or Vegetable Juices of heading 2009. Thus, this heading covers waters under CTH 2202 10 and other Non-alcoholic Beverages other than Non-alcoholic Beer under CTH 2202 99. The relevant tariff items are given below:

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

2202 99 30 --- Beverages containing milk

2202 99 90 --- Other

The relevant Explanatory notes as per HSN is as below:

(B) Other non-alcoholic beverages, not including fruit or vegetable juices of heading 20.09.

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.

As per HSN explanatory notes to Chapter 22, against Note No.(B) (2), 'Certain other beverages ready for consumption, such as those with a basis of milk and cocoa' is specifically mentioned against Chapter sub-heading No.2202 as "Beverages containing milk". In the case at hand, the product after process has attained the character of a beverage being packed in tetra pack having a slot in the packing in which the straw can be inserted. Further perusal of the records reveals that the 'Flavoured Milk' is marketed in a ready to serve condition and is marketed as a beverage. The product in hand being a beverage and there being a specific classification of "Beverages containing milk" under Chapter 2202, the impugned goods is classifiable appropriately under the sub-heading 22029030 only.

10. From the discussions in Para 8 and Para 9 above, it is evident that the product is classifiable on the application of the GRI 1 , which is as follows:

RULE 1

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

In the case at hand as has been brought supra, the classification is based on the Specific entry applicable to the product vide the Tariff heading read with the related HSN Explanatory Notes and the applicable Chapter Notes. The reliance of the HSN Explanatory Notes cannot be disputed and the tariff adopted for GST, i.e., Customs Tariff is aligned with the HSN completely. The appellant has relied on decisions stating reliance on HSN cannot prevail over a Tariff Description. In the case at hand, the Explanatory Notes have been taken as a guidance only, which is permitted under the Explanation to Notification No.01/2017. Further the classification is squarely dealt with by the application of GRI Rule 1 and therefore there is no need to examine the applicability of Rule 3(a) or 3(b) as claimed by the appellant.

11. The appellant has relied on certain decisions which are not applicable to the case at hand for the reasons stated below:

1. Addition of small quantity of flavour does not take milk/ milk products outside purview of Chapter 4- In the case at hand, the product is outside the purview of CTH 0402 not because of the addition of the flavour but of the fact that as per Chapter Note 1 to Chapter 4, the 'Milk' is not full cream Milk or Skimmed Milk and therefore not applicable.
 - a. The decision in the case of Cavinkare Private Limited Vs. Commissioner of Central Excise do not have a precedent value as per Section 35-R of the Central Excise Act 1944 and
 - b. In the case of Nestle India Ltd Vs. CCE, New Delhi, the classification dispute was between 0404 and 1901. "NESCLAC Nutritious Milk Drink' being a baby milk powder based drink which is not comparable with the product"

2. The product in question is essentially milk and deserves to be classified under Chapter 4 –
 - a. Gujarat Coop Milk Marketing Federation Ltd Vs State of U.P.[2017(5)GSTL 351 (All.)]- The decision is a VAT case and is on the exemption to be extended based on the wordings of the description & the listing of products under VAT laws of U.P. is different from the Tariff Classification.
 - b. Karnataka Co-operative Milk Producers Federation Ltd-The decision of AAR has been declared as *voidab initio* by the appellate authority in the Order No. KAR/AAAR-13/2019-20 dated 11/02/2020
 - c. Deputy Commissioner of Sales Tax (Law), Board of Revenue, Ernakulam Vs. PIO Food Packers- on 'Manufacture' which is not applicable to the case

3. Flavoured Milk is classified under Chapter 4 –
 - a. Commissioner of C.Ex Vs. Amrit Food [2015(324) ELT 418 (SC)] - The facts of the case in the subject case is whether the Milk Shake Mix and soft serve is to be classified under CH:0404.90 or under CH:1901.90.90 and the question of classification under CH:2202.90 never raised and discussed. Also, the products discussed in these cases are not 'Beverages' – Not applicable
 - b. Fun Foods Pvt Ltd Vs. Commissioner of Central Excise, Jaipur-I[2017(348) ELT 357(Tri-Del.)] – It relates to Milk Shake Mixes and not 'Beverages'
 - c. Nestle India Limited Vs. Commissioner of Central Excise [2001(132) ELT 134 (Tri-Del.)]- This Case also relates to Mix and not 'Beverage'. Also the decision of the case was based on the Central Excise Tariff existed before 2006 i.e, before alignment of the Central Excise Tariff with the HSN
 - d. Danone Foods and Beverages(I) Pvt Ltd Vs. The Commissioner of Central Excise[2012(280)E.L.T.563] – deals with CTH 0403. However, it is noticed that it is observed in Para 11 of the decision that any beverage based on milk and flavoured will fall for classification under CTH 2202.

12. In view of the above, we rule as under:

RULING

For the reasons discussed above, we hold that UHT Sterilized Flavoured Milk marketed under the brand name 'Britannia Winkin' Cow Thick Shake' by the appellant is not classifiable under the Tariff heading '0402 /0404" but classifiable under CTH 22029930 as held by the Lower Authority. The subject appeal is disposed of accordingly.

(M.A.SIDDIQUE) 20/6
Pr.Secretary/Commissioner of State Tax
Tamilnadu /Member AAAR

(G.V.KRISHNA RAO) 20/6/2021
Pr.Chief Commissioner of GST&C-Ex
Chennai Zone/Member AAAR

To

M/s Britannia Industries Limited,
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Ambattur Industrial Estate,
Chennai, TamilNadu-600 058.

// BY SPEED POST WITH ACK.DUE //

E.Mail: snk@britindia.com

**APPELLATE
AUTHORITY FOR
ADVANCE RULING**
30 JUN 2021
**GOODS AND SERVICE TAX
Chennai-5, Tamilnadu.**

Copy to

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2. Additional Chief Secretary/Commissioner of Commercial Taxes, II Floor, Ezhilagam, Chepauk, Chennai-5.
3. The Advance ruling Authority, Tamilnadu
Room No. 503 B, 5th Floor,
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No. 32, Elephant Gate Bridge Road,
Chennai - 600 003
4. The Commissioner of GST & C.Ex., 26/1, Mahatma Gandhi road,
Chennai North Commissionerate, Nungambakkam, Chennai 600034
5. The Deputy Commissioner (ST)-III
Large Tax Payer Unit, Chennai-600 008.
6. Master File / spare - 1.

