

GUJARAT AUTHORITY FOR ADVANCE RULING GOODS AND SERVICES TAX D/5, RAJYA KAR BHAVAN, ASHRAM ROAD, AHMEDABAD – 380 009.	
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ADVANCE RULING NO. GUJ/GAAR/R/05/2021
(IN APPLICATION NO. Advance Ruling/SGST&CGST/2020/AR/46)

Date: 20.01.2021

Name and address of the applicant	:	M/s. Vadilal Industries Ltd., Vadilal House, 53, Shrimali Society, Nr. Navrangpura Police Station, Navrangpura, Ahmedabad-380009
GSTIN/ User Id of the applicant	:	24AAACV4887F1Z6
Date of application	:	03.11.2020
Clause(s) of Section 97(2) of CGST / GGST Act, 2017, under which the question(s) raised.	:	(a) classification of any goods or services or both.
Date of Personal Hearing	:	23.12.2020
Present for the applicant	:	Shri Amal Dave

M/s. Vadilal Industries Ltd. is a Limited Company and having a GSTIN: 24AAACV4887F1Z6, has filed an application for Advance Ruling under Section 97 of CGST Act, 2017 and Section 97 of the GGST Act, 2017 in FORM GST ARA-01 discharging the fee of Rs. 5,000/- each under the CGST Act and the GGST Act.

2. M/s. Vadilal Industries Ltd. (hereinafter referred to as “the applicant”) is a Company inter-alia engaged in the manufacture of goods like Ice Cream, ready to eat food and various other Milk products. Among other products, the applicant is producing flavoured milk, which is sold under the trade name of “Power Sip”. It is the applicant’s understanding, and also the applicant’s case in the present application that such flavoured milk is a product meriting classification under Heading 0402, Sub Heading 04029990 of the GST Tariff.

3. The applicant submitted the following with regard to the case about flavoured milk:-

- The process of the flavoured milk is 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 flavours and finally bottling. The flow chart of the manufacturing process is enclosed and marked as Annexure-“A”.
- As aforesaid, the process involves various operations, but it comes out from the process that (i) adding flavours to milk does not change essential character of milk; (ii) flavoured milk is a substitute for milk; (iii) it is a

simple preparation of milk; (iv)no manufacturing process is involved nor does milk change its composition in any way. Since the commodity milk and milk products are enumerated in Chapter 4, the applicant understands that tariff item/ HSN code 0402 9990 is applicable to flavoured milk.

- As per Harmonised System of Nomenclature, Chapter 4 covers the following Dairy products.
 - i. Milk (i.e. Full Cream Milk, and partially or completely skimmed milk),
 - ii. Cream,
 - iii. Butter milk, Curdled milk and cream, yogurt, kephir and other fermented acidified milk and cream,
 - iv. Whey,
 - v. Products consisting of natural milk constituents, not elsewhere specified or included, and
 - vi. Cheese and curd.

- As per the GST Tariff, Chapter 4 specifically covers “Diary products, bird’s eggs, natural honey, edible products of animal origin, not elsewhere specified or included’. Further sub-heading 0402 covers “Milk and Cream, concentrated or containing added sugar or other sweetening matter including skimmed milk powder...”. The applicant understands that the product in question is goods classifiable under SH No. 04029990, as other milk (and cream).
- The product in question is, as a matter of fact, partly skimmed milk which is a product falling under Heading No. 04029990, and the product in question not being whole milk or condensed milk, it falls under the category of ‘Other’ under 8 digit classification code 04029990.
- The composition of the Flavoured Milk is enclosed herewith and marked as Annexure-“B” hereto. A perusal of the details about composition would show that common name of the product is “Flavoured Milk”. Added sugar in this product has been 8%, whereas flavours as required are used but do not exceed 0.150%. Fat content of the product has been on an average 2.50%. In view of these specifications and ingredients, classification of the product under Chapter 4 of the Tariff appears to be appropriate. The details of composition and other relevant information are shown on labels of this product also. Such labels are enclosed as Annexure-“C” hereto
- Flavoured milk is made of milk added with sugar and permitted flavours. The reason for adding sugar and flavour is to improve the shelf life and increase the taste. The essential constituent of the milk have not changed even after adding sugar and permitted flavours, and still retains its essential character of milk. The product flavoured milk is made from milk added with sugar and permitted flavours, which do not alter its essential character of milk. If the natural constituents of the milk are replaced with

any other substance, then flavoured milk would not fall under Chapter 4, but that is not the case here.

- Chapter 4 of the Tariff inter-alia covers milk and cream. The word “milk” is statutorily defined under Note 1 to Chapter 4, and according to Note 1, the expression “milk” means full cream milk or partially or completely skimmed milk. Heading Nos. 0401 and 0402 would therefore, cover milk, that is to say, full cream milk or partially or completely skimmed milk.
- A reference may be made to the judgement of the Hon’ble Punjab & Haryana High Court in case of Food Specialities Ltd. V/s UOI at this stage, because the Hon’ble High Court has, in the said judgment reported in 1991 (51) ELT 310 (P&H), held that the Indian Standard specifications for milk powder issued by the ISI as well as the Standards under the Prevention of Food Adulteration Rules, 1955 were relevant to decide even under the Central Excise law as to what was skimmed milk or partly skimmed milk or full skimmed milk. The view of the Hon’ble Punjab & Haryana High Court, as expressed in the above judgment, is also affirmed by the Hon’ble Supreme Court, and therefore, the Indian Standards as well as PF Rules may be applied to consider classification of the product in question under the GST Tariff which is an adoption of the Customs Tariff.
- A product containing fat more than 1.5 and less than 26.0% is considered to be partially skimmed milk/powder under the PF Rules. Same parameters for partly skimmed milk/powder i.e. fat percent by mass being above 1.6 and below 26.0% is prescribed under IS: 1165 - 1975 also. These Standards are applied by the Punjab & Haryana High Court as could be seen from paras 7 to 10 of the above judgment.
- Since fat content is minimum 2.5% in the product in question, and it is not more than 26.0%, the product in question is partially skimmed milk in accordance with the above referred Standards. This partly skimmed milk contains added sugar and therefore, it would fall for classification under Heading No.0402 of the Tariff which covers “*milk and cream, concentrated or containing added sugar or other sweetening matter*”. Since skimmed milk and whole milk are specifically covered under Tl Nos. 04021010 and 04022910 respectively, partly skimmed milk would fall under the category of ‘Other’ under Tl 040299, and the most appropriate classification thereof would be Tl 04029990 i.e. other milk and cream. In this regard, a decision of the CESTAT in case of Mehsana District Co-Operative Milk Producers Union Ltd. reported in 2004 (167) ELT 456 may also be considered wherein the Appellate Tribunal has held that Chapter 4 of the Tariff covered all types of milk/milk powder, whether it was whole, partly skimmed or skimmed.

- Thus, the product in question being partially or partly skimmed milk and since it contains added sugar also, such partly skimmed milk containing added sugar is most appropriately classifiable under SH No. 0402/04029990 of the Tariff.
- Further, for classifying the product, one has to identify the heading in the chapter where the product could fall and then sub-heading and finally tariff item has to be identified. As there is no other specific heading in the GST Tariff which covers milk and milk products, classifying the same in Chapter 4 is prima facie correct; that Chapter 4 provides more specific description, and classification of flavoured milk in Chapter 4 is more appropriate for the reasons stated above.
- The PFA Standards are also relevant for classifying milk under Chapter 4 of the Tariff. It is required to be appreciated that “flavoured milk” is also milk containing flavour, and flavoured milk is specifically covered under Para A.11.01.05 of the Prevention of Food Adulteration Rules under the category of milk. It is judicially held [1991 (55) ELT 310 - Judgment of Punjab & Haryana High Court] and [1998 (97) ELT 402 -Judgment of the Hon’ble Supreme Court] that PFA Standards were relevant for classifying milk under Chapter 4 of the Tariff
- The National Dairy Research Institute, Bangalore has also confirmed that flavored milk falls, under Dairy produce as per the FSSAI, 2006. Under FSSAI regulations 2011, section 2.1.3 defines flavoured milk as a “*product prepared from milk or other products derived from milk, or both, and edible flavorings with or without addition of sugar, nutritive sweeteners, other non-dairy ingredients, including stabilizers and food colors*”. Flavoured milk shall be subjected to heat treatment as provided in sub-regulation 2.1.1 (general standards for milk and milk products). Where flavoured milk is dried or concentrated, the dried or concentrated product on addition of prescribed amount of water also gives a product conforming to the requirements of flavoured milk.
- The applicants submits that a similar Advance Ruling Application seeking clarification regarding the HSN code and rate of duty for “flavoured milk” was made by M/s. Karnataka Co-operative Milk Producers’ Federation Ltd., Bengaluru reported at 2019 (30) G.S.T.L. 350, which has been decided by the Adjudicating Authority in Bangalore. It is held by the said Advance Ruling Authority that the commodity “flavoured milk” is classified under the Tariff heading 04029990. The said Advance Ruling Authority has also taken note of the judgment rendered by Hon’ble Allahabad High Court in Gujarat Co-operative Milk Marketing Federation Ltd. (2017(5) GSTL 351). The Hon’ble Allahabad High Court has specifically observed that “flavoured milk” is a form of milk, and it is

neither a derivative of milk nor a milk product. The above referred Advance Ruling Authority has therefore held that the product "flavoured milk" was covered under "milk", and would therefore merit classification under Tariff heading 04029990. A copy of this Advance Ruling order No. KAR ADRG 88/2019 dated 26.09.2019 (2019 (30) G.S.T.L 350) and judgement of Hon'ble Allahabad High Court reported in 2017(5) GSTL 351 (All.) are enclosed herewith marked as "Annexure-D.

- In the above premises, the applicant submits that an appropriate order on the present Advance Ruling Application classifying the product "flavoured milk" under Heading 0402, Sub Heading 04029990 may be made in the interest of justice.

Accordingly, the applicant sought the Advance Ruling on the following question :

What would be the classification of "Flavored Milk" sold under trade name of Power Sip.

Personal Hearing

4. Personal hearing in the matter was held on 23.12.2020 Authorised representative of the company appeared on behalf of the applicant and reiterated the submission made in the Application.

DISCUSSION & FINDINGS

5. We have considered the submissions made by the applicant in their application for advance ruling as well as the arguments/discussions made by their representative. We have also considered the issues involved on which Advance Ruling is sought by the applicant.

11. At the outset, we would like to state that the provisions of both the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017 are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the GGST Act.

6. We observe that the applicant is engaged in the manufacture of goods like Ice cream, ready to eat food and various other milk product. Among other products, the applicant is producing flavoured milk viz. Badam, Elaichi, Kesar and Rose flavour, which is sold under the trade name of "Power Sip".

7. The facts of the case is that the process of the flavored milk is standardization of fresh milk according to the fat contents and then heating at certain temperature followed by filtration, pasturisation and homogenization and then mixing of sugar and various flavors and finally bottling. The essential constituents of the milk have not changed even after adding sugar and permitted flavors and still retain its essential character of milk. Further stated

that the process involves various operations, but it comes out from the process that (i) adding flavors to milk does not change essential character of the milk; **(ii) flavoured milk is a substitute for milk** (iii) It is a simple preparation of milk (iv) no manufacturing process is involved nor does milk change its composition in any way. The word “milk” is statutorily defined under Note 1 to Chapter 4, and according to Note 1, the expression “milk” means full cream milk or partially or completely skimmed milk. Chapter 4 of GST tariff covers “dairy Product” and Sub-heading No. 0402 covers “Milk and cream, concentrated or containing added sugar or other sweetening matter including skimmed milk powder.....”. The goods viz. flavoured milk is a partly skimmed milk and not being whole milk or condensed milk therefore, the applicant is of the view that flavoured milk falls under the category of “Others” and classifiable under tariff item/ HSN code 04029990.

8. In terms of explanation (iii) and (iv) to Notification No. 1/2017-Central Tax (Rate), dated 28-6-2017, 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.

8.1 The relevant chapter notes of CTH 0402 and 0404 and the Explanatory Notes are examined as under:

CTH 0402 :

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
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

The Chapter Note 1 of Custom Tariff Act, 1975 is read as under :

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

The relevant explanatory notes of CTH 04.02 and 04.04 as per the HSN is as below:

CTH 04.02

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%
	- <i>In powder, granules or other solid forms, of a fat content, by weight, exceeding 1.5% :</i>
0402.21	-- Not containing added sugar or other sweetening matter
0402.29	-- Other
	- <i>Other :</i>
0402.91	-- Not containing added sugar or other sweetening matter
0402.99	-- Other

This heading covers milk (as defined in Note I 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).

CTH 04.04

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 17412).*
- (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).*

8.2 From the above, the following are deduce:

- 'Milk', to be covered in this chapter are 'full cream milk or partially or skimmed milk'
- Beverages consisting of milk flavoured with cocoa or other substances (heading 22.02) are not covered under CTH 0402

- CTH 0404 90 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

9. From the constituents of the product as furnished by the applicant, it is seen that the product consists of Standardized Milk (92.00%) without removal of Fat content thereon, which is sweetened with around 8% of sugar to which color 0.08% and flavor in kesar & Badam Milk 0.120%, Rose milk 0.075% and Elaichi Milk 0.150% etc. are added and is supplied in tetra packs/ Bottle after necessary processes. The products are marketed as “Power Sip” i.e. “Flavoured milk” and are ready for consumption as stated by the applicant. Comparing the product and those covered under CTH 0402/0404, it is evident that the product in hand consisting of milk flavored with Badam/Elaichi/Kesar/Rose being ready for consumption beverages based on Milk is specifically excluded under CTH 0402, as seen from the Explanatory notes to HSN of the said chapter and hence not classifiable under CTH 0402; Also the product being not ‘Whey’, the plausible CTH will be 0404 90 only and there again the Explanatory notes clearly states that this heading includes products which lack one or more natural milk constituents, to which natural milk constituents are added, whereas in the case at hand, the product do not lack any natural milk constituents nor any natural milk constituents is added to the product. Therefore, we hold that the product is not classifiable under either CTH 0402 or 0404.

10. We find that the applicant has relied on various decisions from different judicial fora of Central Excise Regime. The applicant has relied upon on the following case law;

- *CESTAT in the case of Mehsana District Co-operative Milk Producers Union Ltd reported in 2004 (167) ELT 456 has held that Chapter 4 of the Tariff covered all types of milk/milk powder whether it was whole, partly skimmed or skimmed*

The above case law is not relevant in the instant case and not applicable because in the said referred case CETAT was to decide “whether skimmed milk powder produced by them is classifiable under sub-heading 0401.19 of the Schedule to the Central Excise Tariff Act as claimed by them or under sub-heading 0401.13 as confirmed by the Commissioner (Appeals) under the impugned order” where as the present application is with regard to the classification of “Beverages containing milk” and not of “skimmed milk powder”.

- *Hon’ble Punjab & Haryana High Court in case of Food Specialities Ltd. V/s UOI reported in 1991 (51) ELT 310 (P&H), held that the Indian Standard specifications for milk powder issued by the ISI as well as the Standards under the prevention of Food Adulteration Rules, 1955 were relevant to decide even under the Central Excise Law as to what was skimmed milk or partially skimmed milk or full skimmed milk.*

The aforesaid judgement is not applicable in the instant Advance Ruling case **because the said judgement is with regard to decide the nature of skimmed milk or partially skimmed milk or full skimmed milk whereas in the case at hand is to decide the classification of “Beverage containing milk”**. Further, the other Act cannot be considered to decide the classification under the GST Tariff which is aligned with Custom Tariff because the purpose and objective of the other Act i.e. PFA (Prevention of Food and Adulteration Act) are different from the Custom Tariff Act. The standards of PFA cannot be considered to decide the classification of any product under GST Act because objective and purpose of both the Act are different and both cannot be mixed to decide the particular issue of one Act. When this is the fact, there appears to be no relevance to import the ingredients from another legislation/Act. Constitution Bench of the Apex Court in *Hari Khemu Gawali Vs. Deputy Commissioner of Police, Bombay and Another* [AIR 1956 SC 559], has stated :

“It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be in pari materia.”

10.1 In the light of the above it would not be proper to transplant the provisions of PFA Act, which has a different object and purposes, for determining the classification under the coded Tariff, when there is no ambiguity

11. The applicant has claimed that the addition of flavour do not change the characteristics of the product and the product still remains milk and therefore classifiable under CTH 04. We do not disagree with the fact that the product in hand is a form of milk but as brought out supra, the product being a ready for consumption drink, i.e. a beverage with a basis of milk, is specifically classified under CTH 2202 99 30 and excluded from the Chapter 04. The Tariff Item No. 2202 99 30 covers “Beverages containing milk”.

11.1 Now, we discuss whether flavored milk is merit classifiable under the said tariff item 22029930 or otherwise.

11.2 The applicability of CTH 2202 99 30 to the product is examined as under. The CTH 2202 99 is read as under:

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 -
2202 99 30	- Beverages containing milk -
2202 99 90	- Other -

The relevant Explanatory notes as per HSN is as below:

22.02	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 20.09.
2202.10	- Waters, including mineral waters anti aerated waters, containing added sugar or other sweetening matter or flavoured - Other :
2202.91	-- Non-alcoholic beer
2202.99	-- Other

This headings covers non-alcoholic beverages, as defined in Note 3 to this Chapter not classified under other headings, particularly heading 20.09 or 22.01.

(A) **Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured.**

This group includes, inter alia:

- (1) *Sweetened or flavoured mineral waters (natural or artificial).*
- (2) *Beverages such as lemonade, orangeade, cola, consisting of ordinary drinking water, sweetened or not, flavoured with fruit juices or essences, or compound extracts, to which citric and or tartaric acid are sometimes added. They are often aerated with carbon dioxide gas, and are generally presented in bottles or other airtight containers*

(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.**

From the above, it is clear that **other non-alcoholic beverages**, not including fruit or vegetable juice of Heading 20.09 **are covered under ‘2202.99 - Other’** and **as per the explanation at (B)(2), the group covers beverages ready for consumption such as those with a basis of milk.** The word “beverage”, though not defined under CGST Act, 2017, is considered, in

common parlance, as a drink that can be consumed directly and the instant product “flavored milk” can be consumed as it is and hence is a beverage with a basis of milk. Therefore, the product is appropriately classifiable under CTH 2202 99 30.

11.3 The Hon’ble Madras High Court in the case of the **State of Tamil Nadu v. TVL. Ganesh Corporation, vide Order dated 3 April, 2012**, recorded that “as per the Oxford Dictionary “beverage” means “a type of drink except water”. In Webster’s 3rd International Dictionary, “beverage” has been described as “liquid for drinking especially such liquid other than water (as tea, milk, fruit juice, beer) usually prepared (as by flavouring, heating, admixing) before being consumed”.

11.4 In the case of **M/s. Ernakulam Reg. Co-Op. Milk Products Union Ltd. v. CCE, Kochi [2009 (236) E.L.T. 329 (Tri. - Bang.)]**, it is recorded that;

“4. We have carefully considered the submissions, it is an undisputed fact that the appellants were adding flavours to the milk and the Commissioner (A) after seeing the ingredients has considered the item to be beverage containing milk falling under Chapter 22 as against classification under Chapter 4 - ‘Milk and Milk Products’. The item cannot be used as milk per se in view of the addition of flavour added to it and it has to be considered as a beverage. This is our prima facie finding.”

11.5 **The Hon’ble High Court of Gujarat, in the case of M/s. Kaira Dist. Coop. Milk Producers’ Union Ltd. v. UOI [2015 (320) E.L.T. 408 (Guj.)] dealt with the issue of classification of flavoured milk, which is as follows :**

“[Order per : M.S. Shah, J. (Oral)]. - What is challenged in this petition under Article 226 of the Constitution of India is the constitutional validity of the Central Government Notification No. 28/2007-Central Excise, dated 15-6-2007, particularly Serial No. 1 in the table insofar as in column No. 2, code 2202 90 30 is given to “Flavoured milk of animal origin” while giving the said item exemption from duty. The dispute is about the flavoured milk being produced by the petitioners under the brand name Amul Kool/Amul Kool Cafe.

2. Mr. Paresh M. Dave for the petitioners has submitted as under :-

2.1 Earlier under the six digit code system prevailing till 27-02-2005, the flavoured milk made by the petitioners was falling under Entry 0401.11 which read as under :-

CHAPTER 4

DAIRY PRODUCE; EDIBLE PRODUCTS OF ANIMAL ORIGIN, NOT ELSEWHERE SPECIFIED OR INCLUDED

Notes :-

1. The expression, ‘Milk’ means full cream milk or partially or completely skimmed milk.
2.

Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
04.01	0401.11	Flavoured milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale.	Nil.

2.2 It is submitted that even under the 8 digit code introduced from 28-2-2005, flavoured milk could only fall under Chapter 4 Heading No. 0402, more particularly under sub-

heading No. 0402 99 90 reading as under :-

CHAPTER 4

DAIRY PRODUCE; BIRD'S EGGS; NATURAL HONEY; EDIBLE PRODUCTS OF ANIMAL ORIGIN, NOT ELSEWHERE SPECIFIED OR INCLUDED

Notes :-

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

Tariff Item	Description of goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
0401	Milk and cream, not concentrated nor containing added sugar or other sweetening matter.		
0402	Milk and cream, concentrated or containing added sugar or other sweetening matter.		
0402 91	Not containing added sugar or other sweetening matter.		
0402 99	Other		
0402 99 10	Whole milk	kg.	Nil
0402 99 20	Condensed milk	kg.	16%
0402 99 90	Other	kg.	Nil

2.3 Simultaneously with bringing into operation the above Tariff Amendment Act, the Central Government has issued various Notifications thereby maintaining the effective rates as they stood for various products till 28-2-2005 once again signifying that the objective of the above Tariff Amendment Act was not to change scope of any Chapter or to change classification of the excisable goods, nor was the objective to change the rate structure of the excisable goods.

2.4 According to the department, as per the show cause notice dated 16-04-2007, the Flavoured milk falls in Chapter 22 under Tariff Item No. 2202 90 30.

CHAPTER 22

Beverages, spirits and vinegar

Tariff Item	Description of goods	Unit	Rate of duty
(1)	(2)	(3)	(4)
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 90 30	Beverages containing milk	1	16%

Mr. Dave further states that only items like Milkis and Swerve (Vanana) being made by other foreign producers can be considered as beverages containing milk because over and above milk, they contain many other ingredients and milk is only one of the ingredients. On the other hand, Amul Kool and Amul Kool Kafe are only skimmed milk with sugar and flavour and therefore they fall only under Chapter 4 providing for dairy produce where note 1 specifically defines milk as including skimmed milk.

2.5 The Notification dated 15-6-2007 reads as under :-

"In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby further amends the following notifications of the Government of India in the Ministry of Finance (Department of Revenue) specified in column (2) of the Table hereto annexed, in the manner and to the extent specified in the corresponding entry in column (3) of the said Table, namely :-

Sr. No.	Notification No. and date	Amendments

(1)	(2)	(3)		
1.	3/2005-Central Excise dated the 24th February, 2005 [G.S.R. 95(E), dated the 24th February, 2005]	In the said notification, in the Table, after S. No. 11 and the entries relating thereto, the following S. No. and entries shall be inserted, namely :-		
		(1)	(2)	(3)
		"11A.	2202 90 30	Flavoured milk of animal origin
				(4) Nil"

2.6 The basic Notification No. 3/2005-C.E. is a general exemption notification prescribing effective rate for various excisable goods, and it is under this general exemption notification that Sr. No. 11A has been inserted from 15-6-2007 thereby specifying nil rate of duty for flavoured milk of animal origin. As the product in question was classified as flavoured milk under SH No. 0401.11 of the Tariff as it stood till 28-2-2005 and since it is not disputed by the Revenue even at this stage that Amul Kool/Amul Kool Cafe is flavoured milk, the respondents would now treat the goods as chargeable to nil rate of duty from 15-6-2007. However, in the process, the petitioners' right to establish classification of these goods under Chapter 4 of the Tariff as dairy produce has been defeated because the classification of this product is shown under this Notification as 2202 90 30.

2.7 The petitioners' submission is that Section 5A of the Central Excise Act empowers the Central Government to exempt excisable goods of any specific description from the whole or any part of the duty of excise leviable thereon. The power is thus, to grant exemption of excisable goods of any specified description, but not to decide a classification of any excisable goods by way of a notification issued under this Section. The Central Government could have very well prescribed nil rate of duty for flavoured milk of animal origin without referring to its classification in the said Notification, but having prescribed **these goods as falling under classification Code No. 2202 90 30 under this Notification, the Central Government has decided classification of the product by virtue of Notification under Section 5A of the Act**, and therefore also, this action is also ultra vires the powers conferred upon the Government under Section 5A of the Act.

The petitioners' submission is that if this Notification had been issued without indicating Tariff Item No. 2202 90 30, it would have been open to the petitioners to contend that the petitioners were entitled to exemption from excise duty for the entire period from 28-2-2005 to 14-6-2007 by contending that the flavoured milk is only milk with sugar and flavour and is not beverage containing milk as such. Hence, it would have been open to the petitioners to contend that the flavoured milk made by them only falls under Tariff Item No. 0402 99 90 for which Nil rate of duty is prescribed right from 28-2-2005 onwards.

2.8 However, the Central Government itself having given the classification of Tariff Item No. 2202 90 30 in the Notification dated 15-6-2007, apparently with prospective effect, no authority whether the Commissioner of Central Excise or the Appellate Tribunal could accept the petitioners' contention that flavoured milk falls under Tariff Item No. 0402 99 90. The petitioners have, therefore, challenged the Notification dated 15-6-2007 only in so far as it purports to give classification of Tariff Item No. 2202 90 30 to "Flavoured milk of animal origin".

2.9 In view of the above Notification, the authority which has issued the show cause notice on 16-4-2007 would simply proceed on the basis of the said classification code given by the Central Government in the Notification dated 15-6-2007 to which the petitioners have already given reply on 10-7-2007.

3. Having heard learned counsel for the petitioners, we are of the view that looking to the subject matter of the controversy raised in the petition, this appears to be an eminently fit case where the petitioners should make a representation to the Central Government. Accordingly, if the petitioners make such a representation within one week from today, it is expected that the Central Government will decide the same as expeditiously as possible and preferably within one month from the date of receipt of the representation.

4. As regards pendency of the proceedings arising from the show-cause notice, it will be open to the petitioners to make a request before the Commissioner of Central Excise to adjourn the hearing suitably so as to await the decision of the Central Government on the representation. We are sure that such a request will be considered by the Commissioner in the proper perspective when the matter comes up for hearing before the Commissioner on 16-8-2007.

5. The petition stands disposed of in the above terms.

6. Liberty to apply in case of difficulty.

7. Direct service is permitted.”

11.6 The above, decisions relate to the Central Excise regime. However, the interpretation and *Ratio Decidendi* is applicable to the very goods under GST also.

11.7 In fact many dairy companies approached GST Council seeking clarification on the classification of flavoured milk. The matter recorded in the Agenda for 31st GST Council Meeting (Volume-2), dated 22-12-2018, in this regard is as follows :

S. No.	Description	HSN	Present GST Rate (%)	Requested GST Rate (%)	Comments
18	Flavoured Milk	2202	12	Clarification on that it is classifiable under Chapter 4	<p>1. The Explanatory Notes to HSN describe the goods classifiable under the heading 0402 as under :</p> <p>This heading covers milk (as defined in Note 1 to this Chapter) and cream, whether or not pasteurised, sterilised or otherwise preserved, homogenised or peptonised; but it excludes milk and cream which have been concentrated or which contain added sugar or other sweetening matter (heading 04.02) and curdled, fermented or acidified milk and cream (heading 04.03).</p> <p>The products of this heading may be frozen and may contain the additives referred to in the General Explanatory Note to this Chapter. The heading also covers reconstituted milk and cream having the same qualitative and quantitative composition as the natural products.</p> <p>2. Flavoured milk is classifiable under HS code 2202.</p> <p>3. Fitment Committee does not recommend issuance of such clarification.</p>

12. In view of the above, we arrive to the conclusion that ‘flavoured milk’ is classifiable under Tariff Item 2202 99 30 of the First Schedule to the Customs

Tariff Act, 1975 as a “beverage containing milk” under HS Code 2202.

13. We also refer to the following Rulings of Advance Authority, which are squarely applicable in the instant case:

(i) Tamilnadu Advance Authority in case of M/s. **BRITANNIA INDUSTRIES LIMITED** {Advance Ruling No. 08/AAR/2020, dated 25-2-2020} reported in ELT 2020 (36) GSTL 582 (AAR –GST-T.N.) has held that,

Milk - UHT Sterilized Flavoured Milk - Product consists of Standardised/Toned milk (87% to 89%) without removal of fat content thereon, sweetened with around 10% of sugar to which stabilizers, flavours, etc. are added - Products being marketed as Thick shakes' and ready for consumption, specifically excluded under Heading 0402 of Customs Tariff Act, 1975, as seen from the Explanatory notes to HSN of the said chapter - Product not lacking any natural milk constituents nor any natural milk constituents added to the product, therefore, not classifiable under Heading 0404 ibid also - Product appropriately classifiable under Tariff Item 2202 99 30 ibid as 'Beverages containing milk' as also clarified by GST Council. [paras 6.4, 6.5, 6.6, 6.7]

(ii) Andhra Pradesh Advance Authority in case of M/s. **TIRUMALA MILK PRODUCTS PVT. LTD** in ELT 2020 (32) G.S.T.L. 558 (A.A.R. - GST - A.P.) has held that,

Milk - Flavoured milk - Classifiable under Tariff Item 2202 99 30 of First Schedule to the Customs Tariff Act, 1975 as a “beverage containing milk” under HS Code 2202 - Rate of tax applicable is 12% GST (6% CGST + 6% SGST) under Entry No. 50 of Schedule II to Notification No. 1/2017-C.T. (Rate) as amended. [para 8.6]

(ii) Andhra Pradesh Advance Authority in case of M/s. **SRI CHAKRA MILK PRODUCTS LLP** in ELT 2020 (32) G.S.T.L. 206 (A.A.R. - GST - A.P.) has held that,

Milk - Flavoured milk - Classifiable under Tariff Item 2202 99 30 of First Schedule to the Customs Tariff Act, 1975 as a “beverage containing milk” under HS Code 2202 - Rate of tax applicable is 12% GST (6% CGST + 6% SGST) under Entry No. 50 of Schedule II to Notification No. 1/2017-C.T. (Rate) as amended. [para 8.6]

The above Rulings of Advance Authority are squarely applicable in the applicant case. In view of the said Rulings, it can be concluded that applicant’s product “Flavoured milk” merits classifiable under Tariff Heading 22029930 of the Custom Tariff Act, 1975.

14. In view of the above we rule as under:

RULING

Question: What would be the classification of “Flavored Milk” sold undertrade name of Power Sip?

Answer: ‘flavoured milk’ is classifiable under Tariff Item 2202 99 30 of the First Schedule to the Customs Tariff Act, 1975 as a “beverage containing milk”.

(SANJAY SAXENA)

(MOHIT AGRAWAL)

MEMBER

MEMBER

Place: Ahmedabad

Date: 20.01.2021.