IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on:	Pronounced on:
09.08.2023	31.10.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.16608 & 16613 of 2020 and

W.M.P.Nos.20602 & 20604 of 2020

M/s.Parle Agro Pvt. Ltd.,
Represented by its Manager,
G.Madhavan,
Thandalam Post, Mevallurkuppam Village,
Sriperumpudur Taluk, Kanchipuram, Tamil Nadu, Pin Code – 602 105.
GSTIN: 33AAACP8416G1ZM .. Petitioner (in both cases)

Vs.

1.Union of India,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi,
Represented by its Jt. Secretary.

2.Commissioner of Commercial Taxes,
Ezhilagam Chepauk, Chennai – 600 005.

3.GST Council,
5th Floor, Tower II,
Jeevan Bharti Building, Janpath Road,
Connaught Place, New Delhi – 110 001. .. Respondents (in both cases)

Prayer in W.P.No.16608 of 2020: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus,

calling for the records of 3rd respondent relating to Minutes of its meeting held on December 22, 2018, more particularly, the decision to classify "flavoured milk" under HS Code 2202, and quash the same for being contrary to the decision of the Supreme Court of India in *Commissioner Vs. Amrit Food* reported in 2015 (324) ELT 418 (SC), provisions of Articles 279(A), 14, 19(1)(g) and 265 of the Constitution of India.

Prayer in W.P.No.16613 of 2020: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, directing the 2nd respondent to classify the goods under Chapter 0402 in accordance with the binding precedent in *Commissioner Vs. Amrit Food* reported in 2015 (324) ELT 418 (SC) and levy GST accordingly.

(In both cases):

For Petitioner : Mr.Vijay Narayan Senior Counsel for Mr.Rahul Unnikrishnan

For R1 : Ms.P.J.Anitha
Additional Government Pleader

For R2 : Mr.C.Harsharaj
Additional Government Pleader

For R3 : Mr.V.Sundareswaran
Senior Standing Counsel

COMMON ORDER

By this common order, these Writ Petitions are disposed of.

2.In W.P.No.16608 of 2020, the petitioner has prayed for a Certiorarified Mandamus to call for the records of the decision of the 3rd respondent GST Council's Minutes of Meeting taken on 22nd December, 2018 classifying "flavoured milk" under HS Code No. 2202 instead of HS Code 0402 as being contrary to the decision of the Hon'ble Supreme Court in **Commissioner versus Amrit Food** 2015 (324) ELT 418, Articles 279 A (4), 14, 19(1) (g) and Article 265 of the Constitution of India and to quash the same and to direct the 2nd respondent to classify "flavoured milk" under HS Code 0402 in terms of decision of the Hon'ble Supreme Court ancillary and collect Goods And Service Tax.

3.In W.P.No.16613 of 2020, the petitioner has prayed for a Writ of Mandamus directing the 2nd respondent to classify the goods under Chapter 0402 in accordance with the binding precedent in **Commissioner Vs. Amrit Food** reported in 2015 (324) ELT 418 (SC) and levy GST accordingly.

4.Relevant portion of the impugned decision of the 3rd respondent GST Council in its Minutes of Meeting dated 22nd December, 2018 classifying "flavoured milk" under HS Code No. 2202 reads as under:-

Sl. No.	Description	HSN	Present GST Rate (%)	Requested GST Rate (%)	Comments
18.	Flavoured Milk	2202	12%	Clarification classifiable classifiable under Chapter 0402 as under: 4 *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 (hearing 04.02) and curdled, fermented or acidified milk and cream (heading 04.03). 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.*	1.The Explanatory Notes to that it is HSN describe the goods the heading **2.Flavoured milk is classifiable under HS code 2202.** 3.Fitment Committee does not recommend issuance of such clarification.

Sl. No.	Description	HSN	Present GST Rate (%)	Requested GST Rate (%)	Comments

5.The trigger for filing this writ petition in 2020 is the decision of the Authority for Advance Ruling in the case of **In Re:Britannia Industries Ltd.** 2020 (36) GSTL 582 (AAR-GST-T.N.). Relevant portion from the decision of the Authority for Advance Ruling in **In Re:Britannia industries Ltd.** 2020 (36) GSTL 582 (AAR-GST-T.N.) reads as under:-

> "*6.7 We find that the applicant has relied on various decisions from different judicial fora and 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 22029930 and excluded from the chapter 04. Further, the decisions in the cases relied upon on the classification, the same is based on the tariff existed before aligning the same with HSN. In this connection it is relevant to note that the classification of 'flavoured milk', has been represented before the GST Council and the Council has considered the same in the 31s1 GST council Meeting. The Council has accepted the findings of the Fitment committee, which has observed as under: Relevant portion of the ruling of theAppellate Authority for Advance Ruling* ***In Re:Britannia industries Ltd.*** *GST in 2022 (56) GSTL 36 (App AAR GST-TN) reads as under:-*

18.	Flavoured Milk	2202	12%	Clarification that it is classifiable under Chapter 4	1.The Explanatory Notes to HSN describe the goods classifiable under the heading 0402 as under: *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 (hearing 04.02) and curdled, fermented or acidified milk and cream (heading 04.03). 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.* 2.Flavoured milk is classifiable under HS code 2202. 3.Fitment Committee does not recommend issuance of such clarification.

The above also supports the classification of the 'flavoured Milk' under CTH 22029930

6.8 The applicant has relied on the FSSAI regulations and has claimed that the product is a milk and to be classified under CTH 04. We find the classification as available in the Customs Tariff is aligned with the International convention based on Harmonised system of Nomenclature. The product is specifically covered under a specified heading. When this being 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 v. 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."

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

7. In view of the foregoing, We rule as under:

RULING

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 2202 99 30."

6.The above rulings of the Authority For Advance Ruling is binding on the on the applicant namely Britannia Industries who had sought for such clarification and the jurisdictional authority under the scheme of the respective GST Enactments as per Section 103(1) of the respective GST enactments. Section 103(1) of the respective GST enactment reads as under:-

"103. Applicability of advance ruling.—

(1) The advance ruling pronounced by the Authority or the Appellate Authority under this Chapter 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 orthe jurisdictional officerin respect of the applicant."

7.The Authority for Advance Ruling had followed the had impugned of the GST Council in the impugned recommendation based on the decision of the Fitment Committee of the GST Council. Similar views was also taken by the Authority for Advance Ruling in **Sri Chakra Milk Products LLP**2020 (32) GSTL 206.

8.The aforesaid ruling has been approved by the Appellate Authority for Advance Ruling **In Re:Britannia industries Ltd.** GST in 2022 (56) GSTL 36 (App AAR GST-TN). Relevant portion of the ruling of theAppellate Authority for Advance Ruling **In Re:Britannia industries Ltd.** GST in 2022 (56) GSTL 36 (App AAR GST-TN) reads as under:-

*"**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 Regulations, 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 per cent 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-fillercum-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 hikes 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 2202 90 30 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. 1/2017. 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 v. Commissioner of Central Excise do not have a precedent value as per Section 35R of the Central Excise Act, 1944 and

(b) In the case of Nestle India Ltd. v. 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. v. State of U.P. [2017 (5) G.S.T.L. 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 void ab initio by the appellate authority in the Order No. KAR/AAAR-13/2019-20, dated 112-2020 [2020 (34) G.S.T.L. 606 (App. A.A.R. - GST - Kar.)]

(c) Deputy Commissioner of Sales Tax (Law), Board of Revenue, Ernakulam v. 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. v. Amrit Food [2015 (324) E.L.T. 418 (S.C.)] - 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. v. Commissioner of Central Excise, Jaipur-I [2017 (348) E.L.T. 357(Tri. - Del.)] - It relates to Milk Shake Mixes and not 'Beverages'

(c) Nestle India Limited v. Commissioner of Central Excise [2001 (132) E.L.T. 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. v. 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

13. 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 2202 99 30 as held by the Lower Authority. The subject appeal is disposed of accordingly."

9.In terms of the above decision, flavoured milk is liable to tax at 6% in terms of Sl. No.50 to Second Schedule to **Notification No. 1/2017-**

Central Tax (Rate) dated 28.6.2017. On the other hand, if flavoured milk is to be classified under Heading 0402 of the HS Code 0402 as has been claimed by the petitioner, it would be liable to tax at

2.5% in terms of Sl.No.8 to the first schedule to Notification No. 1/2017Central Tax (Rate) dated 28.6.2017.

10.It is the submission of the petitioner that GST Council can only recommend the rate but cannot determine the classification of goods or services. It is submitted that "flavoured milk" was naturally classifiable under Heading 0402.

11.Arguing on behalf of the petitioner, the learned Senior Counsel submitted that the issue was settled long before in the context of Central Excise Act, 1944 and Central Excise Tariff Act, 1975 by a series of decision rendered by the Tribunal and Hon'ble Supreme Courts. In this connection, decisions of the Courts and Tribunal's in the following cases were invited:-

(i)**Vadilal Chemicals Ltd., Vs. State of AP and others**, [(2005) 6 SCC 292];

(ii)**Ramavatar Budhaiprasad, ETC Vs. Assistant Sales Tax Officer, Akola and another**, [AIR 1961 SC 1325];

(iii)**Indian Aluminium Cables Ltd. Vs.Union of India**, [1985 (21) E.L.T.3(S.C.)];

(iv)**Collector of Customs, Madras Vs. Lotus Inks**, [(1997) 10 SCC 29];

(v)**CCE Vs. Wood Craft Products Ltd.**, [1995 (77) ELT 23 (SC)];

(vi)**Indodan Milk Products Ltd., Vs. Commissioner of Sales Tax, U.P.**, [(1974) 33 STC 381 (ALL)];

(vii)**Commissioner of Central Excise Vs. Amrit Foods**, [2015 (324) E.L.T. 418 (S.C.)];

(viii)**Nestle India Limited Vs. Commissioner of Central Excise, Delhi**, [2017 (6) G.S.T.L. 483 (Tri. – Del)];

(ix)**Fun Foods Private Ltd., Vs. Commissioner of Central Excise – Jaipur**, [2017 (348) E.L.T. 357 (Tri. – Del)];

(x)**Gujarat Coop. Milk Marketing Federation Ltd., Vs. State of U.P.**, [2017 (5) G.S.T.L. 351 (ALL.)];

(xi)**Nestle India Limited Vs. Commissioner of Central Excise (LTU), Delhi**, [2018 (8) G.S.T.L. 211 (Tri. – Del)];

(xii)**Cavinkare Private Limited Vs. Commissioner of Central Excise**, [2019 SCC Online CESTAT 7218];

(xiii)**Neulife Nutrition Systems Vs. Commissioner of Central Excise**, [2018 SCC Online CESTAT 3722];

(xiv)**Commissioner of Customs (Import) Nhavasheva Vs. Neulife Nutrition Systems**, [2021 SCC Online SC 936];

(xv)**In RE: Sri Chakra Milk Products LLP**, [2020 (32) G.S.T.L. 206 (A.A.R. – GST – A.P.)];

(xvi)**In RE: Britannia Industries Limited**, [2020 (36) G.S.T.L. 582 (A.A.R. – GST – T.N.)];

(xvii)**In RE: Britannia Industries Limited**, [2022 (56) G.S.T.L. 36 (App. A.A.R. – GST – T.N.)] and

(xviii)**Union of India and another Vs. Mohit Minerals Private Limited Through Director**, (2022) 10 SCC 700.

12.The learned Senior Counsel for the petitioner further submitted that the manufacturing and distribution of dairy products are governed by the provisions of the Food and Safety and Standards Act, 2006, (i.e, FSS Act, 2006) and Food Safety and Standards (Food Product Standards and Food Additives) Regulation 2011. It is therefore submitted that the said Act mandates license for manufacturing as well as distribution and sale of products. The petitioner applied for modification of license vide application dated 01.07.202 for distribution and sales in the State of Tamilnadu, wherein "flavoured milk" was classified as a "Dairy Product". It is submitted that since "flavoured milk" is a "Dairy Product", it has to be naturally classified only under Heading 0402 of the Customs Tariff Act, 1975.

13.The learned Senior Counsel for the petitioner further submitted that at the petitioner's manufacturing unit at Sitarganj, Udham Singh Nagar District in Uttarakhand, the petitioner had intended to manufacture "flavoured milk" and applied for modification of license vide letter dated

19.02.2021. The said application was reverted by the Authority under FSS Act, 2006 vide communication dated 20.04.2021 directing the petitioner to modify the product description of "flavoured milk" under dairy product.

14.It is submitted that the petitioner responded to the same and the license had amended with addition of manufacturing of "flavoured milk" under the category of dairy products.

15.Therefore, it is submitted the above facts clearly establish that the Government of India has considered "flavoured milk products" as dairy products in its policies.

16.The learned counsel for the respondent submits that there is no merits in the present writ petition. He submits that the present writ petition is devoid of merits and is liable to be dismissed. It is submitted that the decision that were rendered in the context of Central Excise Act, 1944 and Central Excise Tariff Act, 1975 are totally wholly irrelevant. It is submitted that the ratio rendered therein cannot be imported in the context of the classification of goods under the above notification under GST regime.

That apart, it is submitted that the issue relating to rate of duty was the subject matter of the Minutes of the Meeting of the GST Council held on 22.12.2018.

17.A request was placed regarding change in the rate of tax and in the said meeting and it was unanimously decided by the GST Council to continue the rate that was fixed at the time of inception vide Sl.No.50 to Second Schedule to Notification No. 1/2017-Central Tax (Rate) dated 28.6.2017.

18.It is further submitted that the 3rd respondent is a constitutional body and the functions of the 3rd respondent are clearly delineated under the Constitution. The function of the 3rd respondent Goods and Service Tax Council cannot be diluted at the behest of the petitioner to reduce the rate of tax, it being policy decision taken by the GST Council in consultation of the all stake holders viz., all the State Government and Union Territories. It is submitted that, Sub-clause (6) of Article 279A of the Constitution states that while discharging the functions, the Goods and Services Tax Council shall be guided by the need for a harmonised structure of Goods and

Services Tax and for the development of a harmonised national market for goods and services and the rate has been fixed accordingly.

19.It is submitted that under Sub Clause (11) to Article 279A of the Constitution, the Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute:-

(a)Between the Government of India and one or more States; or

(b)Between the Government of India and any State of States on one side and one or more other States on the other side; or

(c)Between two or more States, arising out of the recommendations of the Council for implementation thereof.

20.It is submitted that for the Court to issue a Writ of Mandamus to compel the respondent to do something, it must be shown that the statute imposes or cast a legal obligation or duty upon that respondent to do an obligation and that the person seeking the Writ has a legal right under the statute to enforce its performance. It is submitted that Writ of Mandamus is limited to the enforcement of the obligation imposed by law and not otherwise.

21.On behalf of the respondents, learned counsel for the respondent has placed reliance on the following decisions:-

(i)**Collector of Central Excise, Bombay-I and ors. Vs. Parle Exports (P) Ltd.**, (1989) 1 SCC 345;

(ii)**Kaira Dist. Co-op. Milk Producers' Union Ltd., Vs. Union of India**, 2007 SCC Online Guj 429;

(iii)**The State of Tamil Nadu Vs. Tvl. Ganesh Corporation** in T.C.(R).No.1825 of 2006;

(iv)**Ernakulam Reg. Co-op. Milk Products Union Ltd., Vs. C.C.E., Kochi**, 2008 SCC Online CESTAT 832;

(v)**Ercmpu (Milma) Vs. Commissioner of Central Excise, Cochin**, 2013 SCC Online CESTAT 2632;

(vi)**Danone Foods and Beverages (I) Pvt. Ltd**., 2012 (280) E.L.T. 563 (A.A.R.);

(vii)**Sri Chakra Milk Products LLP**., MANU / AI / 0129 / 2019;

(viii)**Vadilal Industries Ltd**., 2021 (54) G.S.T.L. 59 (A.A.R. – GST – Guj.);

(ix)**Tirumala Milk Products Pvt. Ltd**., MANU / AI / 0063 / 2021;

(x)**Britannia Industries Ltd**., 2022 (56) G.S.T.L. 36 (App. A.a.R. – GST – T.N.) and

(xi)**Gujarat Co-operative Milk Marketing Federation Ltd**., MANU / AR / 0285 / 2022.

22.It is submitted that the decision of the Hon'ble Supreme Court in **Commissioner Vs. Amrit Food**, 2015 (324) ELT 418 was rendered in the context of Ist Schedule to the Central Excise Tariff Act, 1985. It is submitted that till 27.2.2005, "flavoured milk" was specifically classifiable under Tariff Heading 04.01 and under sub-heading 0401 .11 and attracted 'NIL' rate of duty. It is submitted that with effect from 28.2.2005, after 8 digit code system was introduced in the Central Excise Tariff Act, 1985, all the Headings, in the chapters underwent a sea change in tune with Harmonized System of Nomenclature (HSN).

23.The learned counsel for the respondent has also drawn attention to the Notification No.3/2005-CE dated 24.02.2005 as amended by Notification No.28/2007-CE dated 15.06.2007. It is submitted that by an amendment to Notification No.28/2007-CE dated 15.06.2007, Sl.No.11A was inserted and "flavoured milk" was classified under heading 2202 90 30 and was liable to Nil duty after Tariff was amended. It is submitted that flavoured milk was later liable to tax at 1% vide Notification No.1/2011-CE dated 01.03.2011.

24.The issue of classification that is rate of duty and valuations are normally reserved with the authorities under the Tax Acts/enactments, the Tribunal and the Supreme Court. This is the scheme of the Central Excise Act, 1944 & Central Excise Tariff Act, 1985 and the Central Excise Act, 1944 & Customs Tariff Act, 1975 as also under the respective GST enactments.

25.It is submitted that there are also rulings of the courts that when an authority fails to exercise their discretion vested in it or exercise of such discretion by malafidely or irrelevant consideration, mandamus can be issued. However, the ruling of the court is also clear in **Hero Motocorp Ltd versus Union of India**2022 (66) GSTL 129 (SC), wherein it has been held that no mandamus can be issued to the Central Government to exercise the power under section 11 of the Central Goods and Service Tax Act 2017. There, the Court held that court cannot interfere with the matters of government, unless such policy is found to be palpably arbitrary and irrational.

26.The court was dealing with area based exemption granted to industrial units under the erstwhile Central Excise Act, 1944 and under

Value Added Tax Act of the states and migration of such units under the GST regime. While dismissing the appeal filed by the industries which had lost of the incentives granted under the previous regime with implementation of the GST enactments, the Court declined to interfere and therefore granted liberty to the industries to approach the GST Council.

27.I have considered the arguments advanced by the learned Senior Counsel for the petitioner and the learned Senior Standing Counsel for the respondents. I have also perused the impugned Minutes of the Meeting dated 22.12.2018 of the 3rd respondent GST Council recommending the classification of "Flavoured Milk" under HS Code 2202 instead of HS Code 0402.

28.I have also considered the provisions of the Central Excise Act, 1944, Central Excise Tariff Act, 1985, Customs Act, 1962 and Customs Tariff Act, 1975. I have also perused the Notifications issued under these enactments relating to classification and fixation of rate of duty of "flavoured milk" as "Beverage Containing Milk". I have also considered the provisions of the respective GST enactment of 2017. I shall refer to them in the ensuing paragraphs.

29.I shall now proceed to answer the point in question namely whether the petitioner is justified and questioning the wisdom of the GST Council whose decision has been accepted by the Authoritty for

Advanced Ruling **In Re:Britannia industries Ltd.** GST in 2022 (56) GSTL 36 (App AAR GST-TN).

30.Goods falling in the First Schedule to the said Notification attracts 2.5% GST. On the other hand, the 3rd respondent GST Council in the impugned Minutes of the Meeting dated 22.12.2018 has classified "Flavoured Milk" under Chapter Heading 2202 90 30 of the Customs Tariff Act, 1975. Sl.No.8 to the First Schedule deals with goods falling under Heading 0402 namely "**Milk and cream, concentrated or containing added sugar or other sweetening matter, including skimmed milk powder, milk food for babies [other than condensed milk]**". Sl.No.50 to Second Schedule to Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 prescribes 6% CGST on "**Beverage Containing Milk**".

31.Second Schedule to Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 prescribes 6% CGST on goods specified therein. Sl.No.50 to Second Schedule to Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 prescribes 6% CGST on "Beverage Containing Milk". Sl.No.50 to Second Schedule to Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 relates to goods under Chapter Heading 2202 90 30.

32.The impugned recommendation of the GST in its meeting held on 22.12.2018 has concluded that flavoured milk is classifiable under HSN Code 2202 and thereby has suggested that flavoured milk will be liable to tax at 6% CGST. Consequently, flavoured milk will be classifiable under Heading 2202 of HSN. The function of the GST is not to determine the classification under the provisions of the Customs Tariff Act, 1975.

33.The recommendation of the GST Council is recommendatory. It is not binding on the Government as evident from a reading of Article 279-A(4) of the Constitution of India. Article 279-A(4) of the Constitution of India is reproduced below :-

"***279A. Goods and Services Tax Council***:-

(1) ...

(2) ...

(3) ...

(4)The Goods and Services Tax Council shall make recommendations to the Union and the States on—

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) the goods and services that may be subjected to, or exempted from, the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-State trade or commerce under article 269A and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax ;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide."

34.The Hon'ble Supreme Court has also taken this view in its recent decision in **Union of India versus Mohit Mineral Private Limited** (2022) 10 SCC 700. A reference is made to the Summation/conclusion of the Hon'ble Supreme Court in the above case.

Paragraph 171 of the decision of the Hon'ble Supreme Court is reproduced below:-

> "*171.Based on the above discussion, we have reached the following conclusion:*
>
> *171.1.* ***The recommendations of the GST Council are not binding on the Union and States for the following reasons****:*
>
> *171.1.1.The deletion of Article 279B and the inclusion of Article 279(1) by the Constitution Amendment Act 2016 indicates that the Parliament intended for the recommendations of the GST Council to only have a persuasive value, particularly when interpreted along with the objective of the GST regime to foster cooperative federalism and harmony between the constituent units.*
>
> *171.1.2.Neither does Article 279A begin with a nonobstante clause nor does Article 246A state that it is subject to the provisions of Article 279A. The Parliament and the State legislatures possess simultaneous power to legislate on GST. Article 246A does not envisage a repugnancy provision to resolve the inconsistencies between the Central and the State laws on GST. The 'recommendations' of the GST Council are the product of a collaborative dialogue involving the Union and States. They are recommendatory in nature. To regard them as binding edicts would disrupt fiscal federalism, where both the Union and the States are conferred equal power to legislate on GST. It is not imperative that one of the*

federal units must always possess a higher share in the power for the federal units to make decisions. Indian federalism is a dialogue between cooperative and uncooperative federalism where the federal units are at liberty to use different means of persuasion ranging from collaboration to contestation.

171.1. 3.The Government while exercising its rulemaking power under the provisions of the CGST Act and IGST Act is bound by the recommendations of the GST Council. However, that does not mean that all the recommendations of the GST Council made by virtue of the power Article 279A (4) are binding on the legislature's power to enact primary legislations.

171.2. On a conjoint reading of Sections 2(11) and 13(9) of the IGST Act, read with Section 2(93) of the CGST Act, the import of goods by a CIF contract constitutes an "inter-state" supply which can be subject to IGST where the importer of such goods would be the recipient of shipping service.

171.3.The IGST Act and the CGST Act define reverse charge and prescribe the entity that is to be taxed for these purposes. The specification of the recipient – in this case the importer – by Notification 10/2017 is only clarificatory. The Government by notification did not specify a taxable person different from the recipient prescribed in Section 5(3) of the IGST Act for the purposes of reverse charge.

171.4.Section 5(4) of the IGST Act enables the Central Government to specify a class of registered persons as the recipients, thereby conferring the power of creating a deeming fiction on the delegated legislation.

171.5.The impugned levy imposed on the 'service' aspect of the transaction is in violation of the principle of 'composite supply' enshrined under Section 2(30) read with Section 8 of the CGST Act. Since the Indian importer is liable to pay IGST on the 'composite supply', comprising of supply of goods and supply of services of transportation, insurance, etc. in a CIF contract, a separate levy on the Indian

importer for the 'supply of services' by the shipping line would be in violation of Section 8 of the CGST Act."

35.For levy of Customs Duty under the provisions of the Customs Act, 1962 and Central Excise Duty under the provisions of the Central Excise Act, 1944, the Parliament has enacted the Customs Tariff Act, 1975 and Central Excise Tariff Act, 1985. The respective Tariff enactments prescribes and prescribed the rates under the First Schedule to the respective Tariff enactments. There is however no stand alone enactment for fixing rate of tax under the present regime as under the Central Excise Act, 1944 and Customs Act, 1962.

36.Rates of tax under the Customs Tariff Act, 1975 and Central Excise Tariff Act, 1985 could be reduced by the Central Government in public interest by notifications issued under Section 5A of Central Excise Act, 1944 and under Section 25 of the Customs Act, 1962.

37.By Notifications issued under Section 11C of the Central Excise Act, 1944 and under Section 28A of the Customs Act, 1962, by the Central

Government could also grant special exemptions on account of trade practice.

38.It will be useful to keep in mind the general scheme of the GST Law. The charging section for levy and collection for supply of goods and service tax is under Section 9 of the respective GST Enactments of 2017.

39.Under section 9(1) of the respective GST Enactments, the maximum rate of tax that can be levied has been capped at 20%. The rate is to be notified by the respective Governments on the recommendation of the GST Council constituted under Article 279-A of the Constitution of India, though the reality the rates are uniform across the country and the rates recommended by the GST Council is uniformly adopted. The Central Rate, State Rates of various States and Union Territories are uniform as tax rates are adopted only on the recommendation of the GST Council.

40.As far as, supply of goods is concerned, the rate of tax is specified in Notification No. 1/2017-Central Tax (Rate) dated 28.6.2017. As far as supply of services is concerned, the rate of tax is specified in Notification No. 11/ 2017-Central Tax (Rate) dated 28.6.2017.

41.The Central Government has issued Notification No.1/2017Central Tax (Rate) dated 28.06.2017 in exercise of power conferred under Section 9 and Sub-Section 5 of 15 of CGST Act, 2017. The aforesaid notification prescribes the rate of tax on various goods.

42.The corresponding notification mirroring Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 issued by the Central Government under the aforesaid provision of CGST Act, 2017 have also been issued by the State / Union Act to ensure uniformity in the rates.

43.As per explanation (iii) to Notification No.1/2017-Central Tax (Rate) dated 28.06.2017 Tariff item", "sub-heading" "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975). As per explanation (iv) to Notification No. 1/2017-Central Tax (Rate) dated 28.06.2017 states that the "Rules for the Interpretation" of the 1st Schedule to the Customs Tariff Act, 1975 (51 of 1975), including Section and Chapter Notes and General Explanatory Notes of the 1st

Schedule to the said Act shall, so far as may be, apply to the interpretation of the notification.

44.Explanations (iii) & (iv) to Notification No.1/2017-Central Tax (Rate) dated 28.6.2017 reads as under:-

> "**Explanation**:
>
> (iii) Tariff item", "sub-heading" "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).
>
> (iv) The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification."

44(A).For comparision, they are reproduced below in the following table:-

Explanation (iii)	Explanation (iv)
(iii) Tariff item", "sub-heading" "heading" and "Chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975).	(iv) The rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification.

45.Thus, the rule of interpretation of First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of this notification.

46.Since, no standalone enactment has been contemplated under the present regime, for rates and for classification of the "goods" and "service", the Parliament and State Legislatures have left it to the wisdom of respective Governments to fix rate of tax under Section 9(1) of respective GST enactments on the recommendations of GST Council.

47.This has been provided to give flexibility to the Governments to ensure that the rates are common all over the country so that both the assesses and customers are clear about the rate of tax. This practice of adoption of classification under the Customs Tariff Act, 1975 (51 of 1975) is similar to the adoption of classification under the respective State VAT enactments which were in force earlier till 30.06.2017 which got subsumed into the respective GST enactments.

48.The Notification No:1/2017-Central Tax (Rate) dated 28.06.2017 has undergone several amendments. As far as the present dispute is concerned, Entry 8 to the First Schedule and Entry 50 to the Second Schedule to the Notification No.1/2017-Central Tax (Rate) dated 28.6.2017 are relevant.

49.Entry 50 to the Second Schedule to the Notification No.1/2017Central Tax (Rate) dated 28.6.2017 has not seen any major changes.

Entry 8 to the First Schedule to the Second Schedule to the Notification No.1/2017-Central Tax (Rate) dated 28.6.2017 benefit of which is claimed by the petitioner for “flavoured milk” has also not seen any major changes since its inception.

50.As mentioned above under Sl.No.50 to the Second Schedule to Notification No. 1/2017-Central Tax (Rate) dated 28.6.2017, rate of tax is 6%. According to the petitioner, “flavoured milk” is classifiable under Sl.No.8 to the First Schedule to Notification No. 1/2017-Central Tax (Rate) dated 28.6.2017 and therefore liable to tax at 2.5%.

51.Extract of the rival entries from the First Schedule and Second Schedule to Notification No.1/2017-Central Tax (Rate) dated 28.6.2017 are reproduced below:-

	First Schedule to Notification No.1/2017Central Tax (Rate)	***Second Schedule to Notification No.1/2017-Central Tax (Rate)***
Serial No.	*8*	*50*
Chapter/Heading/Sub heading/Tariff Item	*0402*	*2202 99 30*
Description of Goods	*Milk and cream, concentrated or containing added sugar or other sweetening matter, including skimmed milk powder, milk food for babies [other than condensed milk].*	*Beverage Containing Milk.*
Rate of Tax	*2.5%*	*6%*

52.The decision of the Hon'ble Supreme Court in **Commissioner Vs. Amrit Food**, 2015 (324) ELT 418, was rendered in the context of Tariff Entries in the Central Excise Tariff Act, 1985. It is no longer relevant.

53.The rival entries which fell for consideration in **Commissioner v. Amrit Food** – 2015 (324) E.L.T. 418 (S.C.) are Tariff Heading 04.04 and Tariff Heading 19.01 of the Central Excise Tariff Act, 1985, read as under:-

04.04	*Other dairy produce, edible products of animal origin, not elsewhere specified or included*	*19.01*	*Malt extract, food preparations of flour, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of heading Nos. 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.*
	- Ghee :		*Put up in unit containers :*
0404.11	*- Put up in unit containers and bearing a brand name.*	*1901.11*	*For instant use.*
0404.19	*Other*	*1901.19*	*Other*
0404.90	*Other*	*1901.91*	*Malt extract.*
		1901.92	*Food preparations containing malt or malt extract or cocoa powder in any proportion.*
		1901.99	*Other"*

54.The Hon'ble Supreme Court in **Commissioner v. Amrit Food** – 2015 (324) E.L.T. 418 (S.C.) in para Nos.6 to 9 and in para Nos.13 and 14 thus held as under:-

> "**6.** *Chapter Heading 04.04 deals with other dairy produce; edible products of animal origin not elsewhere specified or included. Thus, all the dairy produce other than those which are specified elsewhere (for example, ice cream is covered by chapter Heading 21) are covered by Chapter Heading 04.04. We would also like to mention here that Heading 04.01 which is the main heading gives the description of goods as : -*

"04.01	*Milk and Cream, concentrated or containing added sugar or other sweetening matter*
	- In or in relation to the manufacture of which any process is ordinarily carried on with the aid of power:
0401.11	*- **Flavoured milk**, whether sweetened or not, put up in Nil unit containers and ordinarily intended for sale*
0401.12	*- Skimmed milk powder, specially prepared for feeding infants*
0401.13	*- Milk powder, other than powder specially prepared for feeding infants, put up in unit containers and ordinarily intended for sale.*
0401.14	*- Concentrated (condensed) milk, whether sweetened or not, put up in unit containers and ordinarily intended for sale.*
0401.19	*- Other*
0401.90	*- Other"*

7. *It is clear from the aforesaid that all the products of milk and cream would be covered by this Chapter Heading and the addition of sugar or other sweetener would not make any difference.*

8. *Since the products in question are the mix of milk as well as milk powder, as far as milk, viz., **flavoured milk** is concerned, it is covered by sub-Heading 0401.11 and, skimmed milk powder and milk powder are covered by 0401.12 and 0401.13 respectively. Since the products in question are the mixture of the two, assessee seeks to cover it under 0401.19, viz., 'Other'. From the description of the products given aforesaid along with the Chapter Heading 04.01, in the first blush, it becomes clear that it is to be covered under 0404.90. However the submission of the learned counsel for the appellant-Revenue is that since stabilizer is added while preparing the aforesaid goods, it does not remain a dairy produce and on the contrary, it becomes food preparation and therefore, would be classified under Chapter Heading 19.01. In this behalf, she has also referred to Head Note 4 to Chapter 4 which reads as under : -*

"4.Heading No. 04.04 applies, inter alia, to butter-milk, curdled milk, cream, yogurt, whey, curd, and products

consisting of natural milk constituents, whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa and includes fats and oils derived from milk (e.g. milkfat, butterfat and butteroil), dehydrated butter and ghee."

9. *From the aforesaid Note 4, it is argued that stabilizer is not mentioned therein and therefore, addition of stabilizer while making the aforesaid preparation would take it out from Heading 04.01. Thus, it needs to be determined as to whether the addition of stabilizer would make it a food preparation and therefore, it would no more remain diary produce and would be covered under Heading 19.01.*

> **13.** *Insofar as Chapter Note 4 on which reliance is placed by the learned counsel for the appellant is concerned, we are of the opinion that even that would not advance the case of the appellant. It has to be noted that the description given there is open ended inasmuch as the Chapter Note itself uses the expression "inter alia". Further, while mentioning the products which would be covered under the said Chapter Heading 04.04, and stating about the additions which could be made, the crucial words are "whether or not". Therefore, the additives which can be added while making the product are illustrative only and merely because stabilizer is not mentioned therein would not mean that after adding the stabilizer the product in question ceases to be dairy produce.*
>
> **14.** *In view of the aforesaid, we are of the opinion that the view taken by CESTAT is perfectly in tune with legal position and does not call for any interference. We, thus, do not find any merit in this appeal, which is, accordingly, dismissed."*

55.The above case was against the decision of the Tribunal rendered in **Amrit Food Vs. Commissioner of Central Excise**, 2006 (202) ELT 545. The Hon'ble Supreme Court in **Amrit Food Vs. Commissioner of Central Excise**, 2005 (190) ELT 433 (SC) had earlier set aside the order of

the Tribunal in **Amrit Food Vs. Commissioner of Central Excise**, 2003 (153) ELT 190 (T). Pursuant to a remand order of the Hon'ble Supreme Court in **Amrit Food Vs. Commissioner of Central Excise**, 2005 (190) ELT 433 (SC), the Tribunal had rendered its decision in **Amrit Food Vs. Commissioner of Central Excise**, 2006 (202) ELT 545, which was appealed before the Hon'ble Supreme Court. It is in this background, the Hon'ble Supreme Court rendered its decision in **Commissioner of Central Excise Vs. Amrit Food,** 2015 (324) ELT 418 (SC).

56.Till 27.2.2005, "flavoured milk" was specifically classifiable under Tariff Heading 04.01 and under sub-heading 0401 .11 and attracted 'NIL' rate of duty. The said tariff entry read as under:-

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*

57.With effect from 28.2.2005, after 8 digit code system was introduced in the Central Excise Tariff Act, 1985, all the Headings, in the

Chapters underwent a sea change in tune with Harmonized System of Nomenclature (HSN). Heading 2202 90 30 was inserted into the First Schedule to Chapter 22 of the Central Excise Tariff Act, 1985 for classification of "Beverages Containing Milk". With effect from 28.02.2005, Heading 0401 read as under:-

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*		
0401 10 00	*- Of a fat content, by kg. weight, not exceeding 1%:*		
0401 20 00	*- Of a fat content, by. Weight, exceeding 1% but not exceeding 6%*	*Kg.*	*Nil*
0401 30 00	*- Of a fat content, by weight, exceeding 6%*	*Kg.*	*Nil*
		Kg.	*Nil*

58.The Notifications that were issued by the Central Government under Section 5A of the Central Excise Act, 1944 classified "Flavoured Milk" under Sub Heading 2202 90 30. Sl. No.11A to Notification No. 03/2005-CE dated 15.6.2007 as amended by Notification No.28/2007-CE dated 15.06.2007 prescribed "Nil" rate of duty on "Flavoured Milk of Animal Origin".

59.Sl.No.11A to Notification No.03/2005-CE dated 15.06.2007 was later deleted by Notification No.15/2011-CE dated 01.03.2011. Eventually, Notification No.03/2005-CE dated 15.06.2007 was later superceded by Notification No.12/2012-CE dated 17.03.2012. Thus, there was no exemption for "Flavoured Milk", after the Central Government issued Notification No.15/2011-CE dated 01.03.2011.

60."Flavoured Milk of Animal Origin" was however brought within the purview of valuation with reference to its retail price under Section 4A of the Central Excise Act, 1944 by Notification No.49/2008-CE (NT) dated 24.12.2008 as amended by Notification No.11/2011CE(NT) dated 24.03.2011. Classification of "Flavoured Milk" continued to be under sub-heading 2202 9030. IN Notification No.49/2008-CE (NT) dated 24.12.2008 as amended by Notification No.11/2011-CE(NT) dated 24.03.2011 the description of "Flavoured Milk" was again "Flavoured Milk of Animal Origin" against tariff sub heading 2202 90 30 and was liable to tax at 1% with reference to its Maximum Retail Price(MRP).

61.Though Sl.No.11A to Notification No.03/2005-CE dated 15.06.2007 as inserted by Notification No.28/2007-CE dated 15.06.2007 was deleted by Notification No.15/2011-CE dated 01.03.2011, the trade however continued to claim exemption for "Flavoured Milk". Therefore, Notification No.17/2008-C.E.(N.T.) dated 27.03.2008 was issued by the Central Government under Section 11C of the Central Excise Act, 1944.

62.By Notification No.17/2008-C.E. (N.T.) dated 27.03.2008, special exemption was given to "Flavoured Milk of Animal Origin" under Section 11C of the Central Excise Act, 1944. It was issued in view of the prevailing trade practice and confusion that prevailed for period between 28.02.2005 and 14.06.2007. Text of Notification No.17/2008C.E. (N.T.) dated 27.03.2008 reads as under:

> "***Flavoured milk of animal origin"*** *and Jute twine – Exemption for periods* ***28.2.2005 to 14.6.2007*** *and 1.1.2007 to 14.6.2007 respectively*
>
> *Whereas the Central Government is satisfied that a practice was generally prevalent regarding levy of duty of excise (including nonlevy thereof) under Section 3 of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the said Act), on goods of the description given in table below, and that such goods were liable to duty of excise which was not being levied under Section*

3 of the said Act according to the said practice, during the period as specified below:

"**TABLE**

Description	*Tariff sub-heading*	*Period*
(1)	*(2)*	*(3)*
Flavoured milk of animal origin	*2202 90 30*	*28th Feb, 2005 to 14th June, 2007*
Jute twine	*5607 90 90*	*1st Jan, 2007 to 14th June, 2007"*

2. Now, therefore, in exercise of the powers conferred by section 11C of the said Act, the Central Government hereby directs that the whole of duty of excise leviable under the said Act on such goods falling under such tariff1 sub-heading as described above but for the said practice, shall not be required to be paid for the period detailed in column 3 above, subject to fulfilment of condition that the benefit under this notification shall not be admissible unless the unit claiming benefit in terms of this notification reverse the input credit, it any, taken in respect of inputs used in manufacture of such goods on which the said duly of excise was not levied during the aforesaid period in accordance with the said practice.

[Notification No. 17/2008-C.E. (N.T.), dated 27-3-2008]"

63.Before the Tribunal in **Amrit Food Vs. Commissioner of Central Excise**, 2003 (153) ELT 190 (T), the order dated 07.08.2001 of the Commissioner of Central Excise Meerut was in question. Thus, it is clear

in **Commissioner of Central Excise Vs. Amrit Food,** 2015 (324) ELT 418 (SC) was concerned with the Central Excise Tariff as it stood prior to 28.02.2005.

64.Since, the decision of the Supreme Court in **Commissioner of Central Excise versus Amrit Food,** 2015 (324) ELT 418 (SC) was rendered in the context of the tariff entry as it stood prior to the amendment the tariff in 2005 with effect from 28.02.2005 as mentioned above, the tests laid down by the Hon'ble Supreme Court **Commissioner of Central Excise Vs. Amrit Food,** 2015 (324) ELT 418 (SC) cannot be imported for determining the classification of "Flavoured Milk" after the amendment to the First Schedule to Central Excise Tariff Act, 1985 under the new regime under the respective GST Enactments.

65.Similarly, the decision of the Tribunal in **Nestlé India Ltd versus Commissioner of Central Excise, New Delhi,** 2017 (6) GSTL 483 and **Nestlé India Ltd versus Commissioner of Central Excise,** New Delhi 2018 (8) GSTL 211, which were rendered in the context of classification of "milk powder" under Tariff Heading 0404, Sub-heading 0404 90 between March 2008 and April 2010 are also of no relevance

merely because these two decisions have followed the ratio of the Hon'ble Supreme Court in **Commissioner of Central Excise versus Amrit Food,** 2015 (324) ELT 418 (SC). Further, in these two cases, the Tribunal was concerned with classification of "NIDO Nutrition Milk" and "NESCLAC Nutrition Milk", a type of milk shake.

66.**Nestlé India Ltd versus Commissioner of Central Excise,** New Delhi 2018 (8) GSTL 211, the Tribunal held as follows:-

> *"10. The appellant has relied upon the Tribunal decisions in the case of Amrit Foods as well as Nestle India Limited. However, the Commissioner has brushed aside the reliance placed on these judgments. In the case of Amrit Foods, the dispute before the CESTAT was inter alia regarding the classification of milk shake mixes. The product constituents were milk, milk powder, sugar, glucose and stabilizers. The assessee classified the product under Tariff Heading 0404. However, the adjudicating authority classified the product under Tariff Heading 1901 on the ground that the product contained stabilizers, whose main purpose was emulsification of oil in water throughout the self life, to improve the body and texture and to impart smoothness to the product, which as per the adjudicating authority, was not the case. The adjudicating authority relied upon the Chapter Note 4 of the Chapter 4 of Central Excise Tariff Act, 1985, wherein stabilizers*

were not specifically mentioned and thus, the authority contended that it is not a permitted ingredient in products classifiable under Tariff Heading 0404. However, the Tribunal ruled in the favour of the assessee relying on the decision of Nestle India Limited (supra). It is pertinent to note that the aforesaid decision has been affirmed by the Hon'ble Supreme Court, as reported (2015) 324 ELT 418 (S.C.). Thus, even when the stabilizers were not specifically mentioned in the Chapter Note 4 of the Central Excise Tariff Act, still the milk shake mixes containing the same were held classifiable under the Tariff Heading 0404 by CESTAT as well as the Hon'ble Supreme Court on the ground that stabilizers do not interfere with basic characteristics of the milk products and are added merely to impart stability to the product. The same analogy can be drawn in the present case where flavouring agent of 0.03% of the total composition is added, which does not change the basic characteristic of the product and the product remains a nutritious milk drink only."

67.The Tribunal in **Nestlé India Ltd versus Commissioner of Central Excise, New Delhi,** 2017 (6) GSTL 483 had held that HSN notes also make it clear that the products would fall under Chapter 1901 only when natural milk constituents are added with other items such as cereal, groats, yeast, etc., or the milk constituent is replaced by another substance such as oleic acid. The Tribunal concluded that addition of small quantity

of artificial flavouring substance does not change the essential nature of the product from what is covered under 0404 of the

tariff.

68.The decision of the Tribunal in **Fun Foods Private Limited versus Commissioner of Central Excise**, 2017 (348) ELT 357 at best is persuasive and not binding on this Court as this was also rendered in the context of the tariff entry in Central Excise Tariff Act, as it stood prior to amendment in 2005.

69.The decision of the Allahabad High Court in **Gujarat Cooperative Milk marketing Federation Limited versus State of U.P 2017 (5)** GSTL 351 (All.) was rendered in the context of UP VAT Act, 2004. Section 4 of the UPVAT Act, 2004, exempted few products including milk was excluded. It reads as under:-

> *"21. Section 4 of the Act provides for the exemptions from tax. It also authorises the State Government to exempt certain goods from payment of tax as may be notified. It reads as under:-*
>
> *"Section 4. [Exemption] from tax. - No tax under this Act shall be payable on.*

(a) *the sale or purchase of water,* ***milk****, salt, newspapers, or any other goods which the State Government may, by notification, exempt;" or*

(b) *the sale or purchase of any goods by the All India Spinners' Association or Gandhi Ashram, Meerut and their branches; or*

(c) *the sale or purchase of such goods by such other person or class of persons as the State Government may, by notification in the Gazette, exempt:*

Provided that while granting any exemption under clause (a) or clause (b) or clause (c) the State Government may impose such conditions including the condition of payment of such fees, if any, not exceeding eight thousand rupees annually as may be specified by the State Government by notification in the Gazettee.

Explanation - In this section, expressions-

(a) *'Water' does not include mineral water, aerated water, tonic water, distilled water or scented water;*

(b) *'Milk' does not include condensed milk, powder or baby-milk." [Emphasis supplied]"*

70.The Court there has held as under:-

"43.In common understanding "flavoured milk" is a form of milk and is not a derivative of a milk or a milk product. It is like hot or cold milk which remains a milk even if sugar is added to it. It does not lose its basic characteristic of the milk by heating or cooling or on addition of sugar or any permitted colour, essence or flavour. The addition

of permitted colour or flavour does not transform the milk into any other thing."

71.Interpreting Entry No.30 to Notification No.51-5785 dated 07.09.1981, the Court there took a peculiar view. It reads as under:-

"44. The notification dated 7-9-1981 only lays down the rate of tax applicable to milk powder, condensed milk, baby milk,baby foods and all other food stuffs or products used in the natural form or by mixing them with any other stuff or beverages and when sold in sealed or tinned containers. It is not a notification issued under a charging section but under a provision for prescribing rates of tax on different goods. Therefore, it does not purport to tax anything in addition to that which is already taxable or is exempted from tax. It does not specifically provide to levy tax on flavoured milk which is a form of milk whether sold in sealed or tinned containers or otherwise as milk is exempt under Section 4 of the Act.

45. Similarly, the notification dated 12-10-1983 is applicable only to "soft beverages" and not to milk or flavoured milk, ***Even though technically "flavoured milk" may be covered under the head "soft beverages" but that would not make the milk or any of its form taxable in view of Section 4 read with the notification dated 31-11985 which specifically grants exemption to milk and milk products from the taxability.*** *A notification issued under Section 3-A/3-D of the Act cannot override the express provision of Section 4 of the Act which exempts 'milk from the ambit of taxation by covering it under the head of beverages. The notification dated 12-10-1983 cannot override the express provision of Section 4 of the Act to tax the milk or any of its forms except*

those are specifically excluded which stand exempted in law."

72.In **Nue Life Nutrition System Versus Commissioner of Central Excise 2018 SCC online CESTAT 3722,** of the Tribunal in the context of 'whey' in Heading 0404 of Tariff is not relevant. The decision once again follows the view of the Hon'ble Supreme Court in **Commissioner v. Amrit Food** – 2015 (324) E.L.T. 418 (S.C.).

73.The decision of the Tribunal in **Cavinkare Private Limited versus Commissioner of Central Excise**. 2019 SCC Online CESTAT 7218 and the decision of the Tribunal in **Nestlé India Ltd versus Commissioner of Central Excise, New Delhi** 2018 (8) GSTL 211, and the decision of the Allahabad High Court in **Gujarat Cooperative Milk marketing Federation Limited versus State of U.P 2017 (5)** GSTL 351 (All.) are also irrelevant.

74.Merely because the Hon'ble Supreme Court upheld the view of the Tribunal in **Commissioner of Customs (Import) versus NueLife Nutrition System,** 2021 SCC Online 936 would not mean the contention of the petitioner has to be accepted for the reasons stated in the affidavit.

75.Thus, there is no comparison. The test that whether an artificial flavouring substance will not jettison the product from chapter 4 to Chapter 19 is not a relevant test under the GST regime.

76.The relief sought for on the strength of the decision of the Hon'ble Supreme Court in **Commissioner versus Amrit Food** 2015 (324) ELT 418 cannot therefore be granted to the petitioner.

77.In my view none of these decisions cited by petitioner are any longer relevant for the relief that has been sought for. In the present case what the petitioner is attempting to do is to over turn the decision of the Authority for Advance Ruling in the case of **In Re:Britannia industries Ltd.** 2020 (36) GSTL 582 (AAR-GST-T.N.).

78.At the same time, I am of the view that "Flavoured Milk" that was proposed to be manufactured by the petitioner at the time of institution of the Writ Petition has to be still classified under Tariff Heading 0402 of the Customs Tariff Act, 1974 and is therefore liable to

Central Tax at 2.5% in terms of Entry 8 to First Schedule to Notification No.1/2017-CT(Rate) dated 28.06.2017.

79.Note 1 to Chapter 4 of the Customs Tariff Act, 1975 defines the expression 'milk' as follows:-

*"**CHAPTER 4***

Dairy produce; birds' 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."*

80.Note 4 to Chapter 4 excludes the following:-

"*4.This Chapter does not cover:*

(a) products obtained from whey, containing by weight more than 95% lactose, expressed as anhydrous lactose calculated on the dry matter (heading 1702); or

(b) albumins (including concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter) (heading 3502) or globulin (heading 3504)."

81.Heading 0402 reads as under:-

Tariff Item	***Description of goods***
(1)	(2)
Tariff Item	***Description of goods***

0402	**Milk and cream, not concentrated nor 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%:*
0402 10 10	--- Skimmed Milk .....
0402 10 20	--- Milk food for babies .....
0402 10 90	--- Other .....
	- *In powder, granules or other solid forms of a fat content, by weight not exceeding 1.5%:*
0402 21 00	-- Not containing added sugar or other sweetening matter ...
0402 29	-- Other:
0402 29 10	--- Whole milk .....
0402 29 20	--- Milk for babies

82.Chapter 22 of the Customs Tariff Act, 1975 deals with beverages, spirits and vinegar. Note 3 to Chapter 22 reads as under:-

*"**CHAPTER 22***

Beverages, spirits and vinegar

***Note 3**: For the purposes of heading 2202, the term "non-alcoholic beverages" means beverages of an alcoholic strength by volume not exceeding 0.5% vol. Alcoholic beverages are classified in headings 2203 to 2206 or heading 2208 as appropriate."*

83.The rival entries in the Customs Tariff Act, 1975 namely heading 0402 and heading 2202 of the First Schedule to the Customs Tariff Act, 1975 have been reproduced in paragraph No.51 of this order.

The 3rd respondent GST Council has wrongly clarified that "Flavoured Milk" is classifiable under heading 2202 of Harmonious System of Nomenclature (HSN) based on Chapter Note 1 to Heading 0402.

Relevant portion of the decision also has been extracted in paragraph No.4 of the order at the beginning. It is based on the recommendation of the Fitment Committee.

84.Specifically it is stated that the flavoured milk will come within the purview of heading 0402 99 90.

85.Heading 2202 of the Customs Tariff Act, 1985 refers to "**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**".

86.Heading 2202 of the Customs Tariff Act, 1985 is divided into two Sub-Headings namely 2202 10 & 2202 90 as detailed below:-

Heading	***Tariff Item***		***Tariff Item***
2202	Waters, including mineral waters and aerated waters, containing added sugar or other	and	other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009
Heading	***Tariff Item***		***Tariff Item***

	sweetening matter or flavoured;			
Sub Heading	**Description of goods**		**Sub Heading**	**Description of goods**
2202 10	- *Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured:*		2202 90	- *Other*:
2202 10 10 2202 10 20 2202 10 90	--- Aerated waters..... --- Lemonade ..... - Other		2202 90 10 2202 90 20 2202 90 30 2202 90 90	---Soya milk drinks, whether or not sweetened or flavoured..... --- Fruit pulp or fruit juice based drinks .... --- Beverages containing milk... --- Other .....

87.Heading 2202 of the Customs Tariff Act, 1985 can be divided into two parts namely:-

(i) Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured; and

(ii) other non-alcoholic beverages, not including fruit or vegetable juices of heading 2009.

88.Chapter 4 of the Customs Tariff Act, 1975 deals with Dairy Products including Milk.Chapter 4 to Customs Tariff Act, 1975 defines the

expression “Milk” to mean full cream milk or partially or completely skimmed milk.

89.The expression used in Sub Heading 2202 90to Customs Tariff Act, 1975 is “Beverage Containing Milk”. The expression “Milk” has not been defined in Chapter 22 of the Customs Tariff Act, 1975. Sub-heading 2202 90 of the Customs Tariff Act, 1975 deals with “Other Forms of Beverages” viz., Non-Alcoholic Beverages. Sub-heading 2202 90 of the Customs Tariff Act, 1975 does not excludes fruit or vegetable juices of heading 2009.

90.Chapter 22 of the Customs Tariff Act, 1975 has also not defined the expression “Beverage”. The ordinary dictionary meaning of the expression ‘Beverage” means any type of “Drink”. The word Beverage is of French origin, while “Drink” is of old English origin.

91.The Sub Heading 2202 90 to Customs Tariff Act, 1975 fall under such category “**Other Non-Alcoholic Beverages**” . As per Chapter Note 3 to Chapter 22 of the Customs Tariff Act, 1975, the expression

"Non Alcoholic Beverage" means beverages of an alcoholic strength by volume not exceeding 0.5 vol. It reads as under:-

*"**CHAPTER 22***

Beverages, Spirits and Vinegar

***Notes**:*

3.For the purpose of heading 2202, the term "non-alcoholic beverages" means beverages of an alcoholic strength by volume not exceeding 0.5% vol. Alcoholic beverages are classified in headings 2203 to 2206 or heading 2208 as appropriate."

92.Therefore, the expression "Beverage Containing Milk" in Sub Heading 2202 90 to Customs Tariff Act, 1975can be identified only as specie of "Other Non Alcoholic Beverage" in the said Sub Heading.

93.Therefore, "Beverages Containing Milk" has to necessarily contain alcohol of the specified strength in Chapter Note 3 to Chapter 22 of the Customs Tariff Act, 1975. Therefore, "Flavoured Milk" made out of dairy milk from milch cattle/diary animals cannot come within the purview

of Chapter 22 of the Customs Tariff Act, 1975.At the same time, the expression "Beverage Containing Milk" has to be given a definite meaning.

94.If the principle of "*Nosciter – a sociss*" is applied, the meaning of the expression "Beverage Containing Milk" has to be ascertained from the meaning of other goods specified in Sub Heading 2202 90 of the Customs Tariff Act, 1985.

95.In the **Prabhudas Damodar Kotecha v. Manhabala Jeram Damodar**, (2013) 15 SCC 358, the Hon'ble Supreme Court held that the principle of "*Nocitur - a Sociis*", that the words must take colour from words with which they are associated. The meaning of the expression "Beverage Containing Milk" has to be there be ascertained from similar products under the heading 2202 90 of Customs Tariff Act, 1975.

96.By applying the principle of "*Nosciter – a sociss*" , the meaning of the expression "Beverage Containing Milk" has to be ascertained from the other items in Sub Heading 2202 90 of the Customs Tariff Act, 1975. The expression "Beverage Containing Milk" appears along with "soya milk drink", fruit pulp or fruit juice.

97.If the principle of "*Nosciter – a sociss"* is applied, the expression "Beverage Containing Milk" in Sub Heading 2202 90 30 of the Customs Tariff Act, 1975 can include only such beverage containing plant/seed based milk which incidentally contain alcohol of specified strength by volume not exceeding 0.5 vol.

98.The provisions of the Food Safety and Standards Act, 2006 and the Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011 are also relevant.

99.The expression 'Milk' has been defined in Chapter 2 to Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011. Regulation 2.1.1 of Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011 defines the expression 'Milk' as follows:-

> "***2.1: Dairy Products and analogues.***
>
> ***2.1.1 General Standards for milk and milk products***.
>
> *(e) "Milk" means the normal mammary secretion derived from complete milking of healthy milch animal, without either addition thereto or extraction therefrom, unless otherwise*

provided in these regulations and it shall be free from colostrums."

100.Thus, unless otherwise provided, expression "milk" in subheading 2202 90 30 of the Customs Tariff Act, 1975 cannot include milk secreted from mammary glands of milch animal, diary animals such as cow, goats, buffalo, etc. 79.

101.The provisions of the Food Safety and Standards Act, 2006 and the provisions of the Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011 indicate that all dairy products are to be grouped and classified together. Thus, in the Indian Context all dairy products are to be grouped together.

102.Regulation 2.1.3 of Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011 prescribes the standard for "**flavoured milk**" i.e., milk made out milch animal such cattle milk. It reads as under:-

"***2.1.3 Standard for Flavoured Milk***

This Standard applies to Flavoured Milk as defined in item 1 of this sub-regulation. *

1. Description. -

*"Flavoured Milk" 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-dairy ingredients including, stabilisers and food colours. Flavoured milk shall be subjected to heat treatment as provided in subregulation 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 shall give a product conforming to the requirements of flavoured milk.

2. Essential Composition and Quality Factors.-

(a) Raw Material. –

(i) Milk

(ii) Concentrated and dried milk

(iii)Milk fat, cream, butter and butter oil

(iv)Potable water for use in reconstitution or recombination

(b) Permitted ingredients. –

(i) Sugar or other nutritive sweeteners or both;

(ii)Other non-dairy ingredients like nuts (whole, fragmented or ground), cocoa solids, chocolate, coffee, fruits and vegetables and products thereof including juices, purees, pulps, preparations and preserves derived therefrom, cereals, and cereal products and cereal based extracts, honey, spices, condiments, salt, and other natural flavouring foods and flavours;

(iii) Potable water.

(c) Composition. -

Flavoured Milk shall have the same minimum percentage of milk fat and milk solidsnot-fat as that of

the milk, as provided for in the Standard for Milk, from which it is prepared.

3. *Food Additives. –*

For products covered under this standard, specific food additives specified in Appendix 'A' of these regulations may be used and only within the limits specified.

4. *Contaminants, Toxins and Residues. –*

The products shall comply with the Food Safety and Standards (Contaminants, toxins and Residues) Regulations, 2011.

5. *Hygiene. –*

(a) The products shall be prepared and handled in accordance with the requirements specified in Schedule 4, as applicable, of the Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011 and such other guidelines as specified from time to time under the provisions of the Food Safety and Standard Act, 2006.

(b) The products shall conform to the microbiological requirements specified in Appendix 'B' of these regulations.

6. *Labelling. –*

(a) The name of the product shall be 'Flavoured Milk'.

(b) The following details shall be always declared on the label of pre-packaged product or otherwise if the product is not pre-packaged, in respect of the product offered for sale: -

(i) the class of milk as per General Standard for Milk and Milk Products from which it is prepared;

(ii) the heat treatment, as per the General Standard for Milk and Milk Products, to which product

has been subjected to;

(c) In addition to the labelling requirements mentioned above, the provisions of the Food Safety and Standards (Packaging and Labelling) Regulations, 2011, shall apply to prepackaged products.

7. Method of Sampling and Analysis. –

The methods of sampling and analysis mentioned in the manuals as specified by the Food Safety and Standards Authority of India from time to time shall be applicable."

103.Regulation 4 of Food Safety & Standards (Food Products Standards & Food Additives) Regulations, 2011 states that "milk" and "milk products" may be enriched with essential nutrients such as vitamins, minerals, etc., as specified in these regulations labelling requirements. It reads as under:-

*"**4.Addition of Essential Nutrients** – Milk and milk products may be enriched/fortified with essential nutrients such as vitamins, minerals, etc., as specified in these regulations including labelling requirements."*

104.It does not deal with plant / seed based milk. Therefore, it has to be concluded that the "flavoured milk" made out of cattle or diary milk (milch cattle) is not classifiable under sub heading 2202 90 90 of the

Customs Act, 1975. Therefore, "flavoured milk" is to be classified in heading 0402 of the Customs Act, 1975.

105.The expression "milk" therefore in heading 2202 90 of the First Schedule to Customs Tariff Act, 1975, can include only "milk" from other vegetables products such as coconut milk, almond milk, peanut milk, lupin milk, hazelnut milk, pistachio milk, walnut milk or seed based milk such as sesame milk, flax milk, hemp milk, sunflower milk, or pseudo cereal based milk such as quinoa milk, teff milk, amaranth milk, etc.

106.It has to be therefore construed that "Beverage Containing Milk" will not include flavoured milk made out of dairy milk. "Beverage Containing Milk", "Non-Alcoholic Beverages" can include only plant / seed based "Milk".

107.In my view, "Beverage Containing Milk" can include only such "beverage" containing seed based, fruit based or plant based milk. It will not extend to "Dairy Milk" from milch cattle. "Beverage Containing Milk" from dairy animals cannot come within the purview of subheading 2202 90

30 as "Beverage Containing Milk". In view of Tariff Heading 2202 read with Chapter Note 3 to Chapter 22 of the Customs Tariff Act, 1975.

108.Therefore, "Beverage Containing Milk" will apply only to fruit / seeds of plant milk and not to dairy milk."Milk" in "Beverage Containing Milk" has to be plant or seed based milk and not milk from milch cattle or milk from dairy animals, as such milk is not grouped together with other milk.

109.To sum up till 2005, flavoured milk was specifically classified within the purview of Heading 0404 of the Central Excise Tariff Act, 1985, which fell for consideration in **Commissioner versus Amrit Food** 2015 (324) ELT 418.

110.However, after introduction of eight (8) Digit Code in the Central Excise Tariff Act, 1985 and the Customs Tariff Act, 1975, with effect from 28.02.2005, Sub Heading 2202 90 30 was specifically inserted for "Beverages Containing Milk" in the respective Tariff enactments.

111.The Central Government had however classified "Flavoured

Milk" under sub heading 2202 90 30 as a "Beverage Containing Milk", for the purpose of fixing rate, vide Notification No.03/2005-CE dated 15.06.2007 as amended from time to time, although Chapter 4 to the Second Schedule to Central Excise Tariff Act, 1985, did not exclude "Flavoured Milk" made out of dairy milk. Later, Notification No.17/2008-CE dated 27.03.2008 was issued under Section 11C of the Central Excise Act, 1944, whereby "Flavoured Milk" which was classified under the Sub Heading 2202 90 30 was exempted between 28.02.2005 and 14.06.2007.

112.Though under Notification No.03/2005-CE dated 15.06.2007 as amended by Notification No.28/2007-CE dated 15.06.2007, the Central Government classified "Flavoured Milk" under Chapter Sub Heading 2202 90 30 and exempted "Flavoured Milk" vide Notification No.03/2005-CE dated 15.06.2007, Notification No.03/2005-CE dated 15.06.2007 was itself deleted and superseded by Notification No.15/2011-CE dated 01.03.2011.

113.Thereafter, "Flavoured Milk" was subjected to tax at 1% with reference to its Maximum Retail Price (MRP) under Notification

No.49/2008-CE(NT) dated 24.12.2008, issued in terms of Section 4A of the Central Excise Act, 1944. In Notification No.49/2008-CE(NT) dated 24.12.2008, the expression used was "**Flavoured Milk of Animal Origin**". The classification in the above notification was under Sub Heading 2202 90 30 of the Central Excise Tariff Act, 1985. This classification was an artificial classification by bringing "**Flavoured Milk of Animal Origin"** under Heading 2202 90 30 of the Central Excise Tariff Act, 1985 for the purpose of Notification No.49/2008CE(NT) dated 24.12.2008.

114.These Notifications issued under the Central Excise Act, 1944 which classified "Flavoured Milk" / "Flavoured Milk of Animal Origin" as "Beverage Containing Milk" were erroneous. It was an artificial classification adopted by the Central Government while issuing Notifications under Section 5A & Section 11C and Section 4A of the Central Excise Act, 1944.

115.Since these Notifications classified "Flavoured Milk" / "Flavoured Milk of Animal Origin" as "Beverage Containing Milk" under Sub-Heading 2202 90 30 of the Central Excise Tariff Act, 1985 and were

never contested by Assessees, as they benefited them, it cannot mean "Flavoured Milk" infact did fall under Heading 2202 of the Customs Tariff Act, 1975.

116.These classifications adopted in the respective Notifications issued by the Central Government under the older regime under Central Excise Act, 1944 r/w Central Excise Tariff Act, 1985 are not relevant for determining the correct classification under the new regime. "Flavoured Milk" has to be classified only under Heading 0402 of the Customs Tariff Act, 1975 and not under Heading 2202 of the Customs Tariff Act, 1975 for the reason mentioned above.

117.Therefore, I am of the view that although the contention of the petitioner for the relief based on the decision of the Hon'ble Supreme Court in**Commissioner versus Amrit Food** 2015 (324) ELT 418cannot be accepted, nevertheless, the petitioner is entitled to relief. "Flavoured Milk" that was proposed to be manufactured at the time of institution of the Writ Petition merits classification under residuary Sub Heading 0402 99 90 of the Customs Tariff Act.

118.The 3rd respondent GST Council has given a wrong recommendation. It also cannot determine the classification. Determination of classification also does not fall within the preserve of the 3rd respondent GST Council.

119.Having adopted classification of 'Goods' and 'Services' under the First Schedule to the Customs Tariff Act, 1975, the 3rd respondent GST Council cannot impose a wrong classification of "Flavoured Milk" as a "Beverage Containing Milk" under the residuary item as "NonAlcoholic Beverages" under Sub Heading 2202 90 30 of the Customs Tariff Act, 1975.

120.Therefore, the impugned recommendation of the 3rd respondent GST Council cannot be upheld. Classification ought to have been independently determined by the Assessing Officer.

121.Further, the power of the 3rd respondent GST Council is merely recommendatory. It is for the Government to fix appropriate rate on the goods that are classifiable under the Customs Tariff Act, 1975. As long as

the Customs Tariff Act, 1975 is adopted for the purpose of interpretation of Notification No.1/2017-CT(Rate) dated 28.06.2017, classification has to be strictly in accordance with the classification under Customs Tariff Act, 1975, irrespective of the fact that concessions were given under the earlier regime by the Central Government under Sections 5 & 11C and Section 4A of the Central Excise Tariff Act, 1985.

122.While allowing this Writ Petition, I however leave it open for the Government to issue a fresh Notification for amending Entry Nos.8 & 50 to Notification No.1/2017-CT(Rate) dated 28.06.2017 to tweak the rate of tax, recognizing the well settled principle of law that in taxing matter, latitude can be given to the authorities while fixing the rate of tax.

123.The Central Government can either tweak the rate on the recommendation of the 3rd respondent GST Council or by itself.

124.In the result, these Writ Petitions stands allowed with the above observations. Consequently, the connected Miscellaneous Petitions are closed. No costs.

31.10.2023

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Index : Yes
Internet : Yes
Neutral Citation : Yes

C.SARAVANAN, J.

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To

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North Block, New Delhi,
Represented by its Jt. Secretary.

2.Commissioner of Commercial Taxes,
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