

AUTHORITY FOR ADVANCE RULING- MADHYA PRADESH

Goods and Service Tax()

O/o THE COMMISSIONER, COMMERCIAL TAX,

MOTI BUNGALOW,

MAHATMA GANDHI MARG, INDORE (M.P.) - 452007

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PROCEEDINGS OF THE AUTHORITY FOR ADVANCE RULING
U/S,98 OF THE GOODS AND SERVICES TAX ACT ,2017

Members Present

1. **Rajiv Agrawal**
Additional Commissioner,
Office of the Commissioner, CGST and Central Excise, Indore
2. **Manoj Kumar Choubey**
Joint Commissioner,
Office of the Joint Commissioner of Commercial Tax, Indore Division-1

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|---|--|
| GSTIN Number. If any/User-id | 23AACCI2746N1ZG |
| Name and address of the applicant | M/s. ITALIAN EDIBLES PRIVATE LIMITED 309/1/8/8, Block 3, MangalUdhyog Nagar, Palda, Indore - 452001 |
| Clause(s) of section 97(2) of CGST/SGST Act, 2017 under which the question(s) raised | a) Classification of any goods or services or both; |
| Present on behalf of applicant | Shree Ajay Makhija, Director CA Pradeep Asawa And CA Palkesh Asawa |
| Case Number | 09/2018 |
| Order dated | 18-09-18 |
| Order Number | 13/2018 |

PROCEEDINGS

1. BRIEF FACTS OF THE CASE:

1.1. M/s. Italian Edibles Pvt. Ltd. Indore [hereinafter referred to as the Applicant] is engaged in the manufacture, supply and export of confectionary and dairy/ sweet product. The applicant manufactures various product including flavoured wafers, Milk chocolates, Milk compound chocolates and other dairy / sweet products. The applicant is having a GST registration with GSTIN **23AACCI2746N1ZG**.

1.2. Further, the applicant is also engaged in the manufacture of an edible product under the brand name "Militry Malai Mithai", which is, as per Applicant, identically known as "Rabdi", and recognised as a 'Mithai' or 'Misthan' by the common parlance. it contains the following ingredients :-

- i. Sugar



- ii. Vegetable Fats
- iii. Skimmed Milk Powder
- iv. Whey Powder
- v. Emulsifiers
- vi. Flavours

1.3. The above product is packed into small sachets of around 4 grams each, 58 such sachets are then packed into a large pack used for selling to the distributors and retailers and the end customer would buy the small sachet and consume it after opening the same.

1.4. As per the report of government approved laboratory, the product manufactured by the applicant, having following chemical parameters., i.e.:-

- a. Protein : 5.12%
- b. Fat : 34.27%
- c. Sugar : 45.10%

1.5. The Applicant have further submitted that as per their view the aforementioned product should be treated as 'sweet meat', classifiable under tariff Heading No.21069099. In support of their view the Applicant have adduced following points:

A. The Product is in the nature of sweet meat –

1. We submit that sweet meats include any product which includes sugar as ingredient. That there are no set ingredients for the composition of sweet meats and any sweet product can be called a sweet meat if they are known, sold and consumed as sweets.
2. That the only difference between the product that is commonly sold in the market as Rabdi and our product is that our product is packed in small sized sachets. We submit that merely packing the product does not alter the inherent nature or identity of the product. That, even if it is packed in sachets which are easily marketable, it still remains a sweet meat.
3. In this context we draw the attention of this Hon'ble Authority to the observation of the Hon'ble tribunal in case of Hindustan Lever Ltd. Vs.CCE, Mumbai [2005(189)ELT53(tri-Mumbai)], wherein the Tribunal held that it is not necessary that any product must be sold at traditional 'halwai' shops in order to be classified as a sweet meat. That, these sweet meats have become a commonly sold product in grocery and general departmental stores. Many famous brands such as Haldiram, Bikanerwala, Milan Mithai etc are sold in such ready to consume packets in departmental stores.
4. We further submit that we have got our product tested and verified in an approved laboratory. The findings of the laboratory are enclosed herewith. In the expert opinion of the laboratory testers the product is in the nature of a sweet and is most likely to be a sweet meat.

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5. We are also marketing the said product as Mithai. That the name of the product itself is 'Military Malai Mithai' which is recognised in the market as such. We submit that packing the said product in such small sachets is useful in consuming the product in small quantities, which would be helpful for consumption of the product by children or other people casually.
6. Further, the CBEC, vide its FAQ on classification dated 29.09.2017, clarified that products like halwa, barfi (i.e. Khoa product), laddus, falling under HS Code 2106 are sweet meats and attract 5% GST. We submit that the Board has listed certain commonly known sweets which are similar to them. We submit that our product i.e. Rabdi, is also in the same class as those which are covered by the CBEC circular, and hence should be classified as sweet meat.

B. Chapter 21 specifically includes sweet meats as per Chapter Note 5 –

7. As per chapter note 6 of chapter 21 of the GST tariff in India, '**Tariff item 2106 90 99 includes sweet meats commonly known as misthan or mithai or called by any other name. They also include products commonly known as 'Namkeens', Mixtures', 'Bhujia', 'Chabena' or called by any other name. Such products remain classified in these sub-headings irrespective of the nature of their ingredients.'**
8. That, it is to be noted that any products which are commonly known as Mithai or Mishthan remain classified in Chapter 21, irrespective of the nature of their ingredients. That the intention of the chapter note is to remove any doubts as to the classification of such products and to include all such products regardless of their nature of ingredients in tariff heading 2106 90 99.
9. In this context we invite the kind attention of this Hon'ble Authority to the case of *Globe Confectionery Vs. CCE, Allahabad [2005(190) ELT 239 (Tri-Del)]*, wherein the Hon'ble Tribunal held in Para 4 as follows:

'The dispute is not whether the item is Rasgulla or Peda. Nor is classification dependent upon composition. Composition is irrelevant, since Note 10 reproduced above states that 'products remain classified under 2108' irrespective of the nature of their ingredients. The scheme of the classification is to place all Mishthan or Mithai under 2108. The terms of the note are 'include sweet meats commonly known as Mishthan or Mithai or by any other name'. In view of such broad scope of the note, the appellant's claim for classification has to be accepted, because there could be no doubt that the items are sweet meat. Dictionary refers to sweet meat as 'food rich in sugar'. Thus despite sugar being the predominant ingredient, in view of the note the items can't go under sugar confectionery.

C. Alternatively, our product may also be classified as a dairy product:



10. To 15. It has been adduced by the applicant in these paras that the product in question closely resembles a dairy product and assuming the said product may not be classified as sweet meat, then it has argued that the same may be classified as a dairy product. It has been argued that the product in question is almost completely a milk based item which is only subjected to addition of certain flavours to skimmed milk powder, whey powder and sugar. It is thus argued that the impugned product may also be considered for classification under Chapter Heading 0404 90 00 since it contains natural milk constituents i.e. skimmed milk powder, whey powder and it contains sugar.

D. The said product cannot be classified as a confectionery item -

16. We submit that at present, due to uncertainty and doubt, we are selling the aforementioned product as a sugar confectionery i.e. after paying GST at a higher rate of 18% to avoid any future tax burden on us. Without clarification if we charge a lower rate, we not be able to pass on any unforeseen future tax liability to our consumers since our product is a retail product
17. However we are of a firm opinion that our product is not a sugar confectionery. That the HSN code for sugar confectionery items i.e. heading number 1704 covers **'Sugar Confectionery (including white chocolate), not containing cocoa'**.
18. We submit that heading 1704 covers "confectionery". That confectionery is a preparation in the form of candies or preserves. Confectionery means products such as candies or other flavoured sweets which are marketed as toffees. That our product is not a confectionery since we are not marketing the same in the form of candy or a toffee.
19. We further that "boiled sweets" in heading 1704 90 20 includes toffees. Boiled sweets are prepared using sugar syrups that are heated and then cooled so as to take a hard form. Such boiled sweets are then wrapped and marketed as toffees. We submit that our product is not a hardened boiled sweet. It is a soft preparation and hence cannot be considered as 'boiled sweet'.
20. That the Oxford Dictionary defines boiled sweets as 'A hard sweet made of boiled sugar'. We submit that our product does not contain boiled sugar and it is also not a hard sweet. It is a soft liquid preparation which cannot be called as boiled sweet.
21. We further invite the attention of this Hon'ble Authority to the CBEC's FAQs on classification released on 29.09.2017, wherein the Board clarified that HS code 1704 covers most of the sugar preparations which are marketed in a solid or semi-solid form generally suitable for immediate consumption. We stress on the fact that as per the Board's clarification, the HSN code 1704 contains products which are marketed in solid or semi-solid form. This is other products such as



peanut chikki, rajgira chikki, shakkarpara are classified in HS Code 1704 vide the aforementioned clarification. **Since our product is in fact a liquid preparation and is not in a solid or semi solid form, it cannot be grouped in the same category as other solid forms of confectionery under heading 1704.**

22. Hence our product cannot be classified as a confectionery and is also not a boiled sweet or a jelly confectionery which are specified under heading 1704. We therefore submit that our product is not classifiable under any sub heading of heading 1704.

D. Classifying our product as a sugar confectionery would be unfair and unjust –

23. It is further submitted that earlier, in the pre-GST regime, VAT on confectionery items was 5% and Central Excise duty was 6%. However, Central Excise duty on dairy products and sweet meats was NIL. Now in the GST regime also the GST on sugar boiled confectionery items is 12%. However, our product cannot be called sugar boiled confectionery. Hence, if our product is classified as other sugar confectionery, it will attract GST @18% which is unfair and unjust, considering that even boiled sugar confectionery items are chargeable at lower rate, and further, it is significantly more than the pre-GST rate.

24. It is also submitted that GST on all our major inputs, including sugar, skimmed milk powder and vegetable oil is 5%. Therefore charging GST on our product @18% would be against the trade interest and not viable for business.

1.6. In view of above, the Applicant has filed the instant application seeking clarification on classification of their product marketed under the brand name 'Militry Malai Mithai'.

2. QUESTIONS RAISED BEFORE THE AUTHORITY:

The following questions have been posted before the Authority :-

Whether the product having brand name "Militry Malai Mithai", manufactured and supplied by the applicant containing the ingredients Sugar, Vegetable Fat, Skimmed Milk Powder, Whey Powder, Emulsifier and other permitted Flavours, which is identical to the commonly known Indian sweet "Rabdi", should be classified under the Tariff Heading 2106 as Sweet Meats or under Tariff Heading 0404 as other dairy product consisting of natural milk constituents or under the Tariff Heading 1704 as a Sugar confectionery.?

3. DEAPRTMENT'S VIEW POINT:



The CGST & Central Excise Commisionerate has furnished its opinion through the Joint Commissioner, CGST & Central Excise, Indore. The department has merely opined that since the Applicant had been classifying the impugned product under Chapter Head 1704 as Confectionery, during the pre-GST as well as GST regime, the same should be classified under Chapter Head 1704 as Confectionery item.

4. RECORD OF PERSONAL HEARING:

- 4.1. Shree Ajay Makhija, Director CA Pradeep Asawa And CA Palkesh Asawa, appeared on behalf of the applicant for Personal Hearing and he reiterated the submissions already made in the application.

5. DISCUSSIONS AND FINDINGS:

- 5.1. We have carefully considered the submissions made by the applicant in the application, the pleadings on behalf of the Applicant made during the course of personal hearing. At the outset, we find that the issue raised in the Application is squarely covered under Section 97(2)(a) of the CGST Act 2017 being a matter related to classification of goods, and the applicant have complied with the all the requirements for filing this application as laid down under the law. We therefore admit the application for consideration on merits.
- 5.2. We find that the present application seeks Ruling on appropriate classification of goods manufactured by the Applicant and marketed and supplied as Militry Malai Mithai. The Applicant have submitted that they have been manufacturing and supplying the impugned item by classifying the same under Chapter 1704 of the HS Code as Confectionery item. It has been admitted and revealed by the Applicant that even during the pre-GST regime they had been clearing the impugned product under Chapter Head 1704 merely because they had been already in manufacturing of other confectionery products ;like Chocolates & toffees etc which are undisputedly classifiable under Chapter 17, and thus this new product when initiated by them, they chose to classify the same under Chapter 17. However, they wish to seek a ruling from the AAR on appropriate classification of the impugned product.
- 5.3. The Applicant have given detailed description of the product in question along with chemical examination report, obtained by the Applicant on their own, giving the composition of the impugned product. They have also submitted the necessary licence and certificates issued by different Governmental authorities connected with manufacture and sale of food items such as FDA, FSSAI, Department of Legal Metrology etc. However, on going through these licences and certificates, we find that these only give a circumspect description of the impugned goods and that too as declared by the Applicant before respective authorities. We thus do not find these reports/certificates

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of much help for arriving at the correct classification of the impugned product particularly for taxation purpose.

- 5.4. We have also considered the opinion of the department which is nothing but the reiteration of the existing position regarding classification of impugned product, as has already been admitted and narrated by the Applicant in the application. Thus we do not find the departmental opinion of any help as it does not throw any light on the merits of the issue and merely reiterates the existing position and recommends *staus quo*. However, we would not let ourselves be prejudiced with either the prevailing position or the insufficient information available from the documents available before us.
- 5.5. We find that the Applicant has vehemently opposed classification of the impugned product under Chapter 1704, the heading under which they are supplying the product at present. On a closure look we sense that the Applicant's reservations against Chapter Head 1704 are driven, among other things, by financial grounds. Because, against Chapter Head 1704 they would have to cough up GST @18%. We also sense a similar but tacit approach from the department to maintain the status quo by placing the impugned product under Chapter 17 with an eye on higher rate of tax that is attracts. However, we observe that the endeavour of the department should be to decide appropriate classification irrespective of the rate of tax attached to it. To be precise, while deciding classification of any product we have to take a subjective route covering all the aspects related to the product.
- 5.6. The applicant has, on his own understanding of the issue, pushed forward two alternate classification of the impugned product. One as a Dairy Product covered under Chapter 04 and the other as Sweet Meat covered under Chapter 21. We would like examine each of these alternate classification and also Chapter 17 under which the impugned product is being manufactured/supplied by Applicant at present.
- 5.7. Chapter 04 essentially covers dairy products and as per Chapter Note 4 of Chapter 04, the heading 0404 applies interalia to products consisting of natural milk constituents whether or not containing added sugar or other sweetening matter or flavoured or containing added fruit or cocoa. Now while chapter head 0401 to 0406 are meant for natural dairy products viz. Milk, Cheese, Butter Milk, Butter, Whey etc. and other products made out of such items, the product in question i.e. Military Malai Mithai contains Skimmed Milk Powder, Whey Powder, Sugar, Emulsifiers etc. as predominant ingredients, which would not make it entitles to be classified as a product of natural milk constituents as has been pleaded by the Applicant. By no stretch of imagination, the product in question can be brought under the ambit of Chpater 04 of the HSN. Thus we definitively rule out the classification of the impugned product under Chapter 04 of the HSN.

14



- 5.8. Now we proceed to examine the fitment of impugned product under Chapter 1704, under which the Applicant have been classifying their impugned product till date. We find that the Chapter 17 of the HSN is for 'Sugar & Sugar Confectionery'. While 1701 to 1703 headings relate to Sugars in different forms, the Heading 1704 mentions Sugar Confectionery. Sugar Confectionery has no where been specifically defined under the GST law or for that matter under HSN. However, going by the trade parlance and prevailing practice, the Sugar Confectionery has been classified as under:

| 1704 | | Sugar Confectionery (Including white chocolate), not containing cocoa |
|------------|-----|---|
| 1704 10 00 | - | Chewing Gum, whether or not sugar coated |
| 1704 90 | - | Other: |
| 1704 90 10 | --- | Jelly Confectionery |
| 1704 90 20 | --- | Boiled Sweets, whether or not filled |
| 1704 90 30 | --- | Toffees, Caramels and similar sweets |
| 1704 90 90 | --- | Others |

- 5.9. Now, putting the impugned product to test against each of the entries above, we find that the product 'Military Malai Mithai' cannot be terms as 'Chewing Gum' (1704 10 00) or Jelly Confectionery (1704 90 10) or Boiled Sweet (1704 90 20) or Toffee, caramel etc (1704 90 30). Clearly the product is neither a gum nor boiled sweet nor toffee or caramel. That leaves residual entry 'Others' (1704 90 90) if at all the impugned product is to brought under the purview of Chapter 17. In other words, there is no specific entry under Chapter 17 which would encompass the impugned product even by a remote chance. Moreover, the residual entry i.e 'Others' (1704 90 90) is to take care of other similar products of the same family viz. Sugar Confectionery which do not find specific mention against rest of the sub-headings. The impugned product i.e. 'Military Malai Mithai' is made of Skimmed Milk Powder, Sugar, Whey Powder, Emulsifiers & flavours etc. mixed together in a semi-liquid form (neither semi-solid nor in the form of Jelly) and packed in elongated pouches/sachets and ready for consumption. The ingredients, process and final shape of the impugned product takes itself out of the family of Sugar Confectionery in any form. We are thus of a firm view that the impugned product cannot be termed and classified as Sugar Confectionery under Chapter 17 of the GST Tariff.

- 5.10. Finally we come to examine the impugned product vis-à-vis Chapter 2106. We observe that Chapter 21 essentially covers 'Miscellaneous Edible Products'. Obviously, the term 'Miscellaneous' indicates that this particular chapter would contain all such edible products which are not specifically covered elsewhere under the Tariff. The Chapter Headings further describes various edible preparations such as extracts of Coffee, tea, Yeast, Soups, broths, Sauces etc under Heading 2101 to 2105. Further as is the convention, Heading 2106 has been given to include all those items which are not



elsewhere specified. Furthermore, 2106 further sub-divides and classifies various edible items like Protein Concentrates, Pan Masala, Sharbats, Supari, Custard Powder etc. under Sub-headings 21061000 to 21069080 and to conclude there is a residual entry as 'Others' under 2106 90 99.

5.11. Now, we find that the product in question i.e. 'Military Malai Mithai' is a product made out of Skimmed Milk Powder, Sugar & Whey Powder as main ingredients with Emulsifiers etc. put up in small sachet/pouch in semi-liquid (paste) consistency, ready for consumption. The product cannot be termed as Dairy Product or Sugar Confectionery as already discussed above. However, there is no doubt that being edible preparation, manufactured under due license issued by concerned Government authorities, it would merit classification under Chapter 21 i.e. 'Miscellaneous Edible Products'. Once the chapter is decided, a careful examination of different entries under Chapter 21, the quest for appropriate classification rests finally at 2106 90 99, the residual entry, as the product itself does not find specific place anywhere else in the Chapter 21. We thus conclude that the impugned product viz. 'Military Malai Mithai' would merit classification as Miscellaneous Edible Product under Chapter Heading 2106 90 99, as 'Sweetmeat' and chargeable to GST as applicable.

5.12. Having observed as above, we further hold that the impugned goods shall be aptly classifiable under Chapter Head 2106 90 99 as 'Sweetmeats' and shall be entitled to benefit of Notification No.01/2017-Central Tax (Rate) dtd.28.06.2017 (as amended) and corresponding notification under MPGST Act,2017 at present attracting GST @5% Adv. [(2.5% CGST + 2.5% SGST) or 5% IGST as the case may be) as envisaged under Serial Number 101 Schedule I to the said Notification.

5.13. We also find it necessary to mention here that the classification decided by this Ruling shall be effective prospectively and this ruling shall not entail any right of the Applicant to claim refund of any tax which they may have paid prior to this Ruling.

RULING


6. The Advance Ruling on question posed before the authority is answered as under:

6.1 The product 'Military Malai Mithai' as described in the Application will merit classification under Chapter Heading 2106 90 of the GST Tariff as 'Sweetmeat' and would be chargeable to GST at applicable rate under the said tariff entry, presently read with Notification No.01/2017-Central Tax (Rate) dtd.28.06.2017 (Sr. No.101 to Schedule I) and corresponding notification under MPGST Act,2017.


6.2 This ruling is valid subject to the provisions under section 103(2) until and unless declared void under Section 104(1) of the GST Act.



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RAJIV AGRAWAL
(MEMBER)

No. 09/2018/A.A.R./R-28/41


MANOJ KUMAR CHOUBEY
(MEMBER)

INDORE dt. 18/09/2018

Copy to:-

1. Applicant
2. The Principal Chief Commissioner, CGST & Central Excise, Bhopal Zone, Bhopal
3. The Commissioner(SGST) Indore
4. The Commissioner, CGST & Central Excise, Indore
5. The Concerned Officer
6. The Jurisdictional Officer – State/Central

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