

**KARNATAKA APPELLATE AUTHORITY FOR ADVANCE RULING
6TH FLOOR, VANIJYA THERIGE KARYALAYA, KALIDASA ROAD,
GANDHINAGAR, BANGALORE – 560009**

**(Constituted under section 99 of the Karnataka Goods and Services Tax Act, 2017 vide
Government of Karnataka Order No FD 47 CSL 2017, Bangalore, Dated:25-04-2018)**

BEFORE THE BENCH OF

SHRI. D.P.NAGENDRA KUMAR, MEMBER

SHRI. M.S.SRIKAR, MEMBER

ORDER NO.KAR/AAAR-13//2019-20

DATE:11-02-2020

1	Name and address of the appellant	Assistant Commissioner of Commercial Taxes, LGSTO 40, Bangalore
2	Name and address of the person who had sought advance ruling.	M/s Karnataka Co-operative Milk Producers Federation Ltd, (Formerly known as KMF), KMF Complex, Dr M.H. Mari Gowda Road, Bengaluru 560029
3	GSTIN or User ID of the person who had sought advance ruling.	GSTIN: 29AAAAK1110G1Z7
4	Advance Ruling Order against which appeal is filed	KAR/ADRG 88/2019 Dated: 26th Sept 2019
5	Date of filing appeal	13-11-2019
6	Represented by	Shri. Jayaram N.R ,Assistant Commissioner of Commercial Taxes, LGSTO 40 - Authorized representative
7	Jurisdictional Authority- State	LGSTO-40 Bengaluru
8	Whether payment of fees for filing appeal is discharged. If yes, the amount and challan details	Not applicable

PROCEEDINGS

(Under Section 101 of the CGST Act, 2017 and the KGST Act, 2017)

1. At the outset we would like to make it clear that the provisions of CGST, Act 2017 and SGST, Act 2017 are in *parimateria* and have the same provisions in like matter and differ from each other only on a few specific provisions. Therefore unless a mention is particularly made to such dissimilar provisions, a reference to the CGST Act would also mean reference to the corresponding similar provisions in the KGST Act.

2. The present appeal has been filed under section 100 of the Central Goods and Service Tax Act 2017 and Karnataka Goods and Service Tax Act 2017 (herein after referred to as CGST Act, 2017 and SGST Act, 2017) by the Assistant Commissioner of Commercial Taxes, LGSTO 40, Bangalore (herein after referred to as Appellant) against the advance Ruling No. KAR/ADRG 88/2019 Dated: 26th Sept 2019.

Brief Facts of the case:

3. M/s Karnatka Co-operative Milk Producers Federation Ltd., (formerly known as Karnataka Milk Federation (KMF)) (hereinafter referred to as 'M/s KCMPFL') are engaged in the business of processing of milk and milk products. They are manufacturing and marketing Flavoured Milk. M/s KCMPFL sought advance ruling in respect of the following question:

Whether the Flavoured Milk is liable to be classified under HSN 0402 99 90 or under 2202 99 30 or under any other Chapter?

4. In the application before the Authority for Advance Ruling, M/s KCMPFL submitted that that flavoured milk is made from milk added with sugar and permitted flavours, which do not alter its essential character of milk; that as per the Food Safety and Standards Authority of India (FSSAI), 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-diary ingredients, stabilizers and food colours; that flavoured milk is a natural diary milk, and does not have any alcoholic content as certified in the laboratory report; that flavoured milk is required to be classified under Chapter 0402 99 90 only and not under Chapter 2202 99 30.

5. The Authority for Advance Ruling examined the application filed by M/s KCMPFL and vide ruling No. KAR/ADRG 88/2019 Dated: 26th Sept 2019, arrived at the conclusion that Flavoured Milk is classifiable under Heading 0402 99 90.

6. The Commissioner of Central Taxes, South Commissionerate, Bangalore reviewed the impugned order passed by the Authority and being aggrieved by the said order, communicated with the jurisdictional State GST officer to file an appeal before us. Accordingly, an appeal has been filed by the Assistant Commissioner of Commercial Taxes, LGSTO 40, Bangalore on the following grounds:

6.1. The Appellant submitted that it was brought to their notice by the DGGI, Bangalore Zone Unit, that M/s KCMPFL (the applicant-respondent) had suppressed vital facts in the application made before the Authority for Advance Ruling about the investigations that had been initiated by the DGGI under the CGST Act, 2017; that investigation was initiated by the Central authority Directorate General of GST Intelligence, Bangalore against the applicant and incident report was issued on 17.01.2019; that this fact of investigations conducted by DGGI against the applicant was not brought to the notice of the Authority; that the Advance Ruling thus obtained by keeping the Authority for Advance Ruling in the dark appears to be not a legal and correct order and therefore it should be appealed against as the subject order of the Authority appears to be invalid *ab initio*. They referred to the proviso to Section 98(2) of the CGST Act which states that advance ruling cannot be obtained when investigations have been initiated; that it has been brought to their notice that a number of cases have been booked by DGGI across India and in some cases the taxpayers have admitted the stand of the Department and made the payments of differential tax. The Appellant submitted that since huge revenue is at stake, the ruling of the lower Authority should be held as void *ab initio*.

6.2. On the issue of classification, they submitted that HSN Explanatory Note to heading 0402 states that the said heading does not cover

- (a) curdled, fermented or acidified milk or cream and
- (b) beverages consisting of milk flavoured with cocoa or other substances (heading 2202).

Further HSN Note (B) (2) to heading 2202 states that the heading includes beverages ready for consumption such as those with a basis of milk and cocoa. There are several judicial rulings which state that HSN Notes have persuasive value. Reliance has been placed on *Health India Laboratories vs CCE* (2007) 216 ELT 161 (CESTAT) affirmed by Supreme Court (2008) 22 ELT A133 (SC) wherein it has been held that HSN Explanatory Notes have overriding effect over trade parlance.

6.3. The Appellant submitted that prior to GST, under Central Excise regime, M/s KCMPFL were classifying flavoured milk under Tariff Heading 2202. Under GST they have changed the classification of flavoured milk to heading 0402 to avail undue advantage of lower rate of GST i.e from 12% to 5%.

6.4. They submitted that there is no change in the Chapter Notes, section notes or chapter headings for the period prior to 01.07.2017 or thereafter. The Appellant further pointed out that in the Central Excise Notification No 01/2011 CE dated 01.03.2011, Flavoured Milk of animal origin was classified under Chapter Heading 2202 90 30 and hence the Govt had recognised the classification of Flavoured Milk under Chapter 22 and not under Chapter 4.

6.5. They submitted that the legal grounds mention in the Advance Ruling No AAR/44/CE/02/2012 dated 23.03.2012 in the case of M/s Danone Foods and Beverages (I) Pvt Ltd, the Advance Ruling Authority, New Delhi has not been considered by the lower Authority wherein it has been concluded in para 11 as follows:-

"Therefore any beverages based on milk and flavoured with cocoa or any other substance will fall for classification under Chapter heading 22 of the CETA and appropriate heading would be 22029030 of CETA."

They submitted that the impugned product 'Flavoured Milk' is correctly classifiable under HSN Code 2202 99 30 attracting GST at 12%.

PERSONAL HEARING

7. The appellant was called for a personal hearing on 24-12-2019 and was represented by the Sri. Bhanu Prakash, Commercial Tax Officer of Commercial Taxes, LGSTO 40. During the hearing the appellant reiterated the grounds of appeal and pleaded that the ruling given by the Authority for Advance Ruling may be set aside.

8. The respondent was represented by Shri. H.N Srinivas Rao, Advocate who submitted that the investigations by DGGI commenced only in April 2019 whereas the advance ruling was applied for in March 2019. As regards the letter dated 9th Jan 2019 issued by DGGI, the Counsel submitted that the said letter cannot be considered as a summons since it was a routine letter calling for documents and that no investigation had commenced as on the date of filing the advance ruling application.

DISCUSSIONS AND FINDINGS

9. We have gone through the records of the case and taken into account the submissions made by the Appellant in their grounds of appeal as well as at the time of

personal hearing. The counter made by the respondent during the personal hearing has also been taken into consideration.

10. The instant appeal has been filed before us with a plea that the ruling of the lower Authority is to be held as void ab initio since it appears that the same has been obtained by suppression of material facts. The contention is that the application filed by the respondent KCMPLFL should not have been admitted by the Authority in terms of the proviso to Section 98 (2) of the CGST Act since an investigation was already pending against them on the same issue of classification of "Flavoured Milk" by the Directorate General of GST intelligence, Bangalore Zonal Unit(DGGI).

11. The relevant Section 98 (2) of the CGST Act is reproduced here under:

98(2) The Authority may, after examining the application and the records called for and after hearing the applicant or his authorised representative and the concerned officer or his authorised representative, by order, either admit or reject the application :

Provided that the Authority shall not admit the application where the question raised in the application is already pending or decided in any proceedings in the case of an applicant under any of the provisions of this Act.

Provided further that no application shall be rejected under this sub-section unless an opportunity of hearing has been given to the applicant.

Provided also that where the application is rejected, the reasons for such rejection shall be specified in the order.

12. Sec. 98(2) provides that the application shall not be admitted where the question raised is already pending under any of the provisions of this Act. It is clear from the record submitted by the Appellant Department that proceedings were pending against KCMPLFL before the DGGI and the issue taken up by the DGGI in the proceedings related to the classification of the Flavoured Milk – whether under Chapter heading 2202 99 30 or under 0402 99 90.

13. The DGGI is the apex intelligence agency under Ministry of Finance, Department of Revenue which has been invested with powers to detect and investigate cases of GST evasion throughout the territory of India under the Central GST Act, 2017, irrespective of the fact that whether the taxpayer is under the control and administration of Centre or State authorities.

We find from the records that the DGGI, Bangalore had issued a letter bearing F.No V/1/FLAV MILK/KMF/2018-19 BZU dated 7th January 2019 to KCMPFL calling for certain details in connection with the enquiry undertaken by them on the supply of beverages containing flavoured milk. Thereafter a summons under Section 70 of the CGST Act, 2017 was issued on 9th January 2019 to Shri. Ramesh Konnur, Director (Finance), KCMPFL directing him to appear before the Senior Intelligence Officer on 18th Jan 2019 to tender evidence and to produce certain documents listed therein. This was followed by issue of Incident Report No 133/2018-19 ST on 17th January 2019 wherein it was stated that intelligence was gathered that KCMPFL were mis-classifying flavoured milk under Chapter heading 0402 and discharging GST at 5% instead of classifying the same under Chapter heading 2202 99 30 which attracts 12% GST. The incident report states that investigation was initiated by calling for records under summon procedure and the investigation is under process.

14. In their counter, the respondent has stated that the application for advance ruling was filed by them on 20th March 2019 at which time there was no investigation by any agency of the Department. They submitted that the summons was issued only on 1st April 2019 whereas the letters dated 7th Jan 2019 and 9th Jan 2019 were merely communications calling for documents and cannot be treated as summons in connection with any investigation. We are unable to appreciate this argument by KCMPFL. The summons dated 9th Jan 2019 issued by the Senior Intelligence Officer, DGGI, Bangalore is in terms of Section 70 of the CGST Act which empowers an officer to call a person to give evidence in respect of an enquiry being conducted. The summons dated 9th Jan 2019 has also informed the person being summoned about the legal consequences of not honouring the summons and to specifically produce documents relating to the sale of flavoured milk during the period July 2017 to November 2018.

15. It becomes clear from the above that the respondent KCMPFL made an application for advance ruling on 20th March 2019 all the while being aware of the investigation being conducted against them by the DGGI, Bangalore. The respondent KCMPFL chose to keep this fact away from the Authority for Advance Ruling at the time of filing the application. The application for advance ruling could not have been made in this case as it is hit by the provisions of Section 98 (2) of the CGST Act in as much as an investigation was already initiated against them by DGGI on the very same issue that was raised before the Authority

for Advance Ruling. We therefore hold that the order of the lower Authority is *voidab initio* as it was vitiated by the provisions of Section 98(2) of the CGST Act.

16. Having held that the order of the lower Authority is void ab initio, the question of discussing the issue of classification of the Flavoured Milk does not arise.

17. In view of the above discussions, we pass the following order: -

ORDER

We allow the appeal of the Department for the reasons mentioned above. The order No KAR ADRG 88/2019 dated 26.09.2019 passed by the Authority for Advance Ruling is declared *voidab initio* as it was vitiated by the process of suppression of material facts. We, however, do not intend to give a ruling on the issue of classification since the matter is pending in a proceeding under this Act.


(D.P.NAGENDRAKUMAR)

Member
Karnataka Appellate Authority
For Advance Ruling


(M.S. SRIKAR) 11.2.22

Member
Karnataka Appellate Authority
For Advance Ruling

To,
The Appellant

Copy to

1. The Member (Central), Advance Ruling Authority, Karnataka.
2. The Member (State), Advance Ruling Authority, Karnataka
3. The Commissioner of Central Tax, South Commissionerate, Bangalore
4. The Assistant Commissioner, LGSTO-40Bangalore
5. Office folder