



**IN THE HIGH COURT OF ANDHRA PRADESH
AT AMARAVATI
(Special Original Jurisdiction)**

[3508]

TUESDAY ,THE TENTH DAY OF DECEMBER
TWO THOUSAND AND TWENTY FOUR

PRESENT

THE HONOURABLE SRI JUSTICE R RAGHUNANDAN RAO

THE HONOURABLE SRI JUSTICE MAHESWARA RAO KUNCHEAM

WRIT PETITION NO: 254/2024

Between:

M/s. Sri Vijaya Visakha Milk Producers Company Ltd., **...PETITIONER**

AND

Asst. Commissioner Of Central Tax and Others **...RESPONDENT(S)**

Counsel for the Petitioner:

1.A SARVESWAR RAO

Counsel for the Respondent(S):

1.GP FOR COMMERCIAL TAX (AP)

2.SANTHI CHANDRA (Jr. Standing Counsel for CBIC)

3.Y V ANIL KUMAR (Central Government Counsel)

4.Y N VIVEKANANDA

The Court made the following Order:

(per Hon'ble Sri Justice R. Raghunandan Rao)

The petitioner is a registered dealer under the GST Act, dealing with milk and milk products. As part of its business, the petitioner

processes and sells, flavoured milk, to customers within and outside the State of Andhra Pradesh. For the purpose of payment of tax, on the sale of flavoured milk, the petitioner had filed its returns by placing the product “flavoured milk” in Tariff Heading No.0402 99 90 (hereinafter referred to as 402). The 1st respondent, while considering the returns filed by the petitioner for the period July, 2017 to July, 2019 had rejected the classification placed by the petitioner and held that flavoured milk would fall under GST Tariff Heading No.2202 9930 (hereinafter referred to as 2202). The 1st respondent had accordingly passed orders, by way of an order in Original No.14/2023-24 GST-AC (SS)-2023-24, dated 03.10.2023. In this order the 1st respondent noticed that the petitioner was earlier classifying flavoured milk under 2202 and had deliberately tried to pass it off as a product falling under 0402, to evade tax. On this basis the 1st respondent not only raised a demand for shortfall of tax but also a penalty under Section 122(2) (b) and Section 74 of the Central GST act, and corresponding Sections of APGST Act and Integrated GST Act. This order is assailed before this Court, by way of this Writ Petition.

2. Heading 0402 99 90 reads as follows:

8.	0402	Milk and cream, concentrated or containing added sugar or other sweetening matter, including skimmed milk powder, milk food for babies (other than condensed milk)	2.50%	2.50%	5%
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Tariff item 2202 90 30, reads as follows:

50	2202 99 30	Beverages containing milk	6%	6%	12%
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3. The 1st respondent applying the general rules for interpretation of the Customs Tariff Act, 1975, held as follows:

The description of goods under Chapter Heading No.0401/0402 under GST Tariff and that of CH 2202 are to be compared to arrive at the most specific description between the two Chapter Headings. Chapter 0401/02 mentions milk or cream of milk, concentrated or otherwise, with or without sweetening matter. However, in the present case the goods in question is 'flavoured milk'. Here, Badam flavour is present in additional to milk and Sugar. Under Chapter Heading 22029030 the description is 'Beverages containing Milk'.

It is general understanding that in public parlance 'Flavored Milk' is distinguished from normal Milk. It is consumed as a drink, and not merely as milk. Though added in a small quantity, the added flavor changes the public perception to a special drink from mere milk. The Oxford dictionary meaning of 'beverage' is 'any type of drink except water'. Thus, the impugned goods are drink containing milk i.e. a beverage containing Milk. Therefore, I hold that classification under Chapter Heading 22029030 is the most specific description as per the guideline given under Rule 3(a) of General rules of Interpretation of Customs Tariff Act, 1975.

4. The 1st respondent passed the impugned order on the following grounds:

- i) Flavoured milk not only contains sugar and sweetening matter but also Badam flavour which takes it out outside 0402. Entry 2202 is 'beverages containing milk' which would mean that flavoured milk would fall within this entry;
- ii) Entry 0402 relates to milk. Flavoured milk cannot be treated as milk, as addition of Badam flavour changes it from milk to a special drink. Consequently flavoured milk cannot be classified under Entry No.0402;
- iii) The rules for interpretation of the First Schedule to the Custom Tariff Act, 1975 would be applicable for interpretation of the classification of goods under the GST Regime. Rule 3(a) of the Customs Tariff Act specifies that where goods can be classified under two or more headings, the heading which provides the more specific discrepancy shall be preferred to the heading providing a more general discrepancy. As flavoured milk would amount to a beverage, 2202 is more specific and flavoured milk should be classified under this tariff heading.

5. The petitioner, having classified 'flavoured milk' under 2202, before the GST regime had come into effect, had changed the classification, under the GST regime to Tariff Entry No.0402 99 90. This change was done without any change in the manufacturing process. In the absence of any special reasons given for such change, the petitioner would have to be treated as having deliberately avoided payment of proper tax and consequently, the provisions of Section 122(2)(b) read with Section 74 of the GST Act would be applicable, making the petitioner liable to pay penalty under these two provisions, on the short fall of tax paid.

6. The petitioner, relying upon the Food Safety and Standards (Food Products Standards & Food additives) Regulations, 2011 contends that 'flavoured milk' would fall within the meaning of "Milk" set out in 0402. The petitioner would contend that the Tariff Heading, claimed by the petitioner, includes milk containing sugar or other sweetening matter, and since flavoured milk, processed by the petitioner, consists of approximately 90.5% of milk and 9% of sugar apart from 0.5% of artificial natural flavorings and permitted colour, the same would fall within the meaning of 'milk' under the said Tariff Heading. The petitioner contends that 2202 "beverages containing milk" would not cover 'flavoured milk'. The contention of the petitioner is that firstly, flavoured milk would fall

within 0402 as flavoured milk is predominantly milk with some sweetening matter added to it whereas beverages containing milk would mean beverages where one of the components is milk. The petitioner would also contend that when a product can fall into two categories, wherein one category is a special category as opposed to the 2nd category which is a general category, it would be the special entry that would be applicable. Learned counsel for the petitioner would also submit that the common man test, when applied to the present case, would also require flavoured milk to be classified under 0402.

7. Sri Y.N. Vivekananda, the learned Standing Counsel appearing for the Assessing Authority would contend that even the petitioner had accepted that flavoured milk would fall within 2202 and had, earlier, paid taxes on that basis. However, the petitioner deliberately sought to pay tax by classifying flavoured milk under 0402 even though flavoured milk would not fall within that category. The learned Standing Counsel would contend that the change in classification clearly amounts to an attempt to evade payment of tax and Sections 122 (2)(b) and 74 of the GST Act would be applicable.

8. A preliminary objection, as to the maintainability of the writ petition, has also been raised on the ground that questions of

classification should be left to the tribunals, set up under taxation statutes, and the scope of judicial review should not be extended to such issues.

Consideration of the Court:

9. At the outset, the preliminary objection relating to the maintainability of the writ petition needs to be addressed. Though, the contention of the respondents that matters of classification should be best left alone to the tribunals does bear consideration, the fact remains that the writ petition has been pending before this court for the past one year and it would not be fair to relegate the petitioner to the remedy of appeal, especially when the period for filing such an appeal has lapsed. In any event, the existence of an alternative remedy does not bar judicial review, under Article 226 of the Constitution of India. The decision, whether such a review is to be taken up or not, is within the sole purview of this court. Accordingly, this objection is rejected.

10. The petitioner was earlier taxed under the Central Excise Act. At that stage, the petitioner paid tax on 'flavoured milk' under 2202. The petitioner, after the GST regime came into effect, paid tax by classifying 'flavoured milk' under 0402. This change of classification is said to have been done as the petitioner had realized that it had classified

flavoured milk under the wrong tariff entry. The description of the relevant entries during Pre and Post GST Regime are as follows:

Chapter Heading	Description during Pre-GST Regime (Central Excise Tariff Act)	Description during Post-GST Regime (GST Tariff)
First Schedule of Section-I Tariff Item-0401	Milk and cream, not concentrated nor containing added sugar or other sweetening matter.	Milk and cream, not concentrated nor containing added sugar or other sweetening matter.
First Schedule of Section-I Tariff Item-0402	Milk and cream, concentrated or containing added sugar or other sweetening matter.	Milk and cream, concentrated or containing added sugar or other sweetening matter <u>including skimmed milk powder, milk food for babies (other than condensed)</u>

11. The primary finding of the 1st respondent, to remove 'flavoured milk' from tariff heading 0402 99 90 is that flavoured milk, with the addition of Badam flavour, ceases to be milk and becomes a special drink. Entry 0402 at the cost of repetition, reads as follows:

First Schedule of Section-I Tariff Item-0402	Milk and cream, concentrated or containing added sugar or other	Milk and cream, concentrated or containing added sugar or other
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	sweetening matter.	sweetening matter including skimmed milk powder, milk food for babies (other than condensed)
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12. The first issue that comes up is whether only milk is to be treated under 0402. The said entry not only enumerates milk *per se* but also cream, skimmed milk powder, milk food for babies etc. It includes even plain or concentrated milk containing sugar or other sweetening matter. This entry clearly incorporates milk and milk products. For example milk food for babies, by normal standards, is not milk. However, it is treated as falling in 0402. Thus, the test propounded by the 1st respondent that only plain milk is to be treated as falling under 0402 is not correct. The finding of the 1st respondent that 'flavoured milk' goes out of this entry by addition of Badam flavour also cannot be accepted. Though the entry speaks only of milk containing added sugar or other sweetening matter, flavoured milk cannot be taken out of tariff heading 0402 merely because of addition of 0.5% of Badam flavour.

13. The second ground taken by the 1st respondent is that "beverage" is any type of drink except water and as such any milk drink, would fall within 2202. This ground is also not available if the earlier entry

in Tariff Item 2202 is seen. The entries under Chapter heading 22 read as follows:

Tariff Item	Description of goods
2202 10	--Waters, including mineral waters and aerated waters, containing added sugar or other sweetened matter or flavoured
	--Other
2202 91 00	--Non alcoholic beer
220299	--Other
2202 99 10	--Soya milk drinks, whether or not sweetened or flavoured
2202 99 20	--Fruit pulp or fruit juice based drinks
2202 99 30	--Reverages containing milk
2202 90 90	--Tender coconut water
2202 99 90	--Other

The entries, under this chapter heading, enumerate water, mineral water, aerated water and other beverages which can be made only by using water. Except entry 2202 90 90, "Tender coconut water", water is an essential part of the beverages mentioned therein. Applying the principle of *Nocitur a Sociis*, the placement of Tariff Item 2202 90 30 in

the same tariff heading would mean that entry 2202 99 30, would cover beverages which contain milk as well as water.

14. Another way of looking at this issue is to consider sweetened milk. In a case where sweetened milk is to be sold, after bottling the same, it would fall within the meaning of Milk containing added sugar or other sweetening matter, under 0402. This drink could also be called a beverage, containing milk, falling under 2202. The entry, in 0402, is the special entry and the entry, under 2202, is the general entry and would have to give way to entry 0402. The same principle would apply to flavoured milk.

15. The Hon'ble High Court at Madras, in it's judgement, dated 31.10.2023, in W.P. No. 16608 and 16613 of 2020, in the case of M/s Parle Agro Pvt. Limited Vs. Union of India, after reviewing the law and the changes in the tariff entries, had come to the conclusion, on similar lines, that flavoured milk would fall under 0402 and not under 2202. We are fortified, in our conclusion, by this judgment.

16. The 1st respondent also sought to levy penalty against the petitioner, on the ground that the petitioner had deliberately sought to evade payment of tax, in terms of Section 122(2)(b) read with Section 74 of the Central GST Act and other related Acts. In view of the fact that this

Court is of the view that flavoured milk cannot be treated to fall under the Tariff Heading 2202, the question of penalty under any of the aforesaid provisions would not arise. In any event, the question of whether a penalty can be levied, even if flavoured milk falls within 2202, merely on the ground that the dealer changed his classification of goods from one entry to another is left open.

17. Accordingly, the Writ Petition is allowed, setting aside the impugned order in Original No.14/2023-24 GST-AC (SS)-2023-24, dated 03.10.2023, passed by the 1st respondent. There shall be no order as to costs.

As a sequel, miscellaneous petitions, pending if any, shall stand closed.

JUSTICE R. RAGHUNANDAN RAO

JUSTICE MAHESWARA RAO KUNCHEAM

RJS

HON'BLE SRI JUSTICE R. RAGHUNANDAN RAO

&

HON'BLE SRI JUSTICE MAHESWARA RAO KUNCHEAM

WRIT PETITION NO: 254 of 2024

(per Hon'ble Sri Justice R. Raghunandan Rao)

Dt: 10 .12.2024

RJS