

WEST BENGAL AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX
14 Beliaghata Road, Kolkata – 700015
(Constituted under section 96 of the West Bengal Goods and Services Act, 2017)

BENCH

Mr Sydney D'Silva, Joint Commissioner, CGST & CX
Mr Parthasarathi Dey, Senior Joint Commissioner, SGST

Preamble

A person within the ambit of Section 100 (1) of the Central Goods and Services Act, 2017 or West Bengal Goods and Services Act, 2017 (hereinafter collectively called 'the GST Act'), if aggrieved by this Ruling, may appeal against it before the West Bengal Appellate Authority for Advance Ruling, constituted under Section 99 of the West Bengal Goods and Services Act, 2017, within a period of thirty days from the date of communication of this Ruling, or within such further time as mentioned in the proviso to Section 100 (2) of the GST Act.

Every such Appeal shall be filed in accordance with Section 100 (3) of the GST Act and the Rules prescribed thereunder, and the Regulations prescribed by the West Bengal Authority for Advance Ruling Regulations, 2018.

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| Name of the applicant | Eskag Pharma Pvt Ltd |
| Address | Suite No. 804, 805 AG-112, Salt Lake, Baishakhi, 8 th floor, Salt Lake, Sector-II, Kolkata - 700091 |
| GSTIN | 19AAACE5646H1ZJ |
| Case Number | 06 of 2019 |
| ARN | AD1901190003801 |
| Date of application | January 25, 2019 |
| Order number and date | 46/WBAAR/2018-19 dated 26/03/2019 |
| Applicant's representative heard | Dipankar Majumdar, Advocate |

1. Admissibility of the Application

1.1 The Applicant is stated to be a manufacturer of pharmaceuticals, APIs and other medicaments. He seeks a ruling on classification of fifteen products. Advance ruling is admissible on classification of any goods or services or both under section 97(2)(a) of the GST Act.

1.2 The Applicant declares that the issue raised in the application is not pending nor decided in any proceedings under any provisions of the GST Act. The officer concerned from the revenue has raised no objection to the admissibility of the Application.

1.3 However, the West Bengal Appellate Authority for Advance Ruling (hereinafter the WBAAAR), while disposing the appeal against the ruling pronounced by this Authority in the

matter of Akansha Hair & Skin Care Herbal Unit Pvt Ltd (Appeal Case No. 2/WBAAAR/Appeal/2018 dated 01/08/2018), cautioned this Authority against accepting a single application for classification of multiple products, where such products cannot be clubbed together into a single category.

1.4 The Applicant argues that section 97(2)(a) of the GST Act allows filing of an application seeking advance ruling on classification of any goods or services or both. Neither the Act nor the rules framed there under prohibits filing a single application for seeking classification on multiple products. The above instruction of the Id WBAAAR is, therefore, unlawful. An order without any legal support has no binding effect as contemplated in Art 141 of the Constitution. In support of his argument the Applicant refers to several judgments of the apex court: Siddharam Satlingappa Mhetre [Criminal Appeal No. 2271 of 2010], Synthetics and Chemicals Ltd [(1991) 4 SCC 139], Thota Sesharathamma –vs- Thota Manikyamma (Dead) [(1991) 4 SCC 312] and B. Satyanarayana Rao (Dead) [Civil Appeal 883 of 1993].

1.5 The common thread in the above judgments is reference to the rule of per incurium. It can be applied when a court omits to consider a binding precedent of the same court or of the superior courts, or when the court omits to consider the relevant statutory provisions. In such situations the decision of the court is said to be given per incurium, and has no binding effect of law. It is a decision given sub-silently in the sense that the court has not applied its mind to the particular points of law involved. “A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Art 141” [Synthetics and Chemicals Ltd; (1991) 4 SCC 139].

1.6 The decision of a court is limited to the dispute or the question on which a judgment, decree or ruling is given. In Akansha Hair & Skin Care Herbal Unit Pvt Ltd (supra) the Id WBAAAR decided whether the ruling passed by this Authority, classifying several products, was valid. The Id WBAAAR concurred with this Authority on most of the issues, and modified the ruling on certain points. The Id WBAAAR did not modify the ruling of this Authority on the issue of classifying multiple products in a single application. The Applicant’s reference to the above judgments of the apex court is not, therefore, relevant in the present context. While passing a judgment, decree or ruling, the court may touch upon different issues that are not the subject matter of the dispute or decision thereon. An instruction to this Authority, given in course of discussing the appeal case, is one such point.

1.7 While issuing an instruction to the subordinate court – a power inherent to the authority of a higher court, the Id WBAAAR is not bound to discuss the relevant statutory provisions etc. Of course, the instruction must not be illegal. The instruction of the Id WBAAAR to limit the ruling to a single category of goods or services or both while disposing an application on classification, does not deny the applicant his right to seek an advance ruling on multiple products. It does not, therefore, violate section 97(2)(a). This Authority is, therefore, bound to follow the instruction.

1.8 The table below contains information about the composition and category of the products as provided in the Application. The Serial numbers of this table are the same as that of Table I of the Application.

| Sl No | Name of the product | Composition | Category as per the label |
|-------|---------------------|--|--|
| 1 | Biogut capsule | Streptococcus faecalis 30 million Clostridium Butyricum 2 million Mesentericus 1 million Lactic Acid Bacillus 50 million | |
| 2 | Folcovit capsule | Lactoferrin 20mg Bacillus coagulans 2.0 billion spores Saccharomyces boulardii 0.25 billion cells Folic acid 1.5 mg Vitamin B12 15 mg Sodium selenite equ to elemental selenium 40 mcg Zinc ascorbate equ to elemental Zinc 12 mg | Dietary Supplement |
| 3 | Folcovit Distab | Bacillus Coagulans 1.25 billion spores Folic acid 1.5 mg Vitamin B12 15 mcg | Dietary Supplement |
| 4 | Myova/Myowin tablet | Myo -Inositol 550 mg D-chiro-Inositol 13.8 mg L-Methylfoate calcium 1.0 mg Chromium 100 mcg (As chromium picolinate) Vitamin D3 1000 IU | Health Supplement |
| 5 | Candyflora Tablet | Lactobacillus reuteri 200 million CFU Lactobacillus rhamnosus 50 million CFU Bifidobacterium longum 50 Million CFU | Health Supplement |
| 6 | Carisma Tablet | Carica Papaya Extract 1100 mg Excipients Q.S. | Dietary Supplement |
| 7 | Lactolite syrap | Sodium chloride 520 mg Potassium Chloride 300 mg Sodium Citrate 580 mg Dextrose (anhydrous) 2.7 mg Purified Water Sucrose Dextrose Preservative | Lemon flavor Health Drink In the label it is written that “ this product is not intended to diagnose, treat, cure or prevent any disease” |
| 8 | Lacolite Z Sachet | Sodium chloride IP 0.52 gm Potassium Chloride IP 0.3 gm Sodium Citrate IP 0.58 gm Dextrose (anhydrous) IP 2.7 mg Zinc sulphate monohydrate 10.98 mg Eqv. to elemental zinc 4 mg Bacillus coagulans 0.5 billion spores Lactobacillus acidophilus 0.25 billion cells | Dietary Supplement |

| | | | |
|----|----------------------------|--|--|
| | | Lactobacillus rhamnosus 0.25 billion cells Excipients q.s. | |
| 9 | Biogut Dry Syrup | Each 5 ml contains probiotics 1.25 billion cells strains | Health supplement |
| 10 | Enterobiotic Dry Syrup | Lyophilizes saccaromyces Boulardii 2.5 billion cells | Health Supplement. This product is not intended to diagnose, cure or prevent any disease. |
| 11 | Gutclausy Dry Syrup | Each 5 ml contains Bacillus clausii 2 billion cells | Health Supplement. This product is not intended to diagnose, cure or prevent any disease. |
| 12 | Evaday Capsule | Evening primrose oil, Isoflavonoids, Vitamin E Acetate, Vitamin C, Vitamin B6, Cynocobalamide, Niacinamide, Folic acid, Dibasic Calcium Phosphate, Magnesium sulphate, Zinc Sulphate Monohydrate, biotin | Dietary Supplement Not for medicinal use |
| 13 | Zink Ascorbate (Dry syrup) | Each 1ml contains Zine Ascorbate Equ. To elemental Zinc 20mg | Health Supplement |
| 14 | Zink ascorbate (syrup) | Each 5ml contains Zine Ascorbate Equ. To elemental Zinc 20mg | |
| 15 | Lactoin Drop | Each 1 ML contains Lactase Enzyme 600 units | |

1.9 It is evident from the above table that the labels of the products mentioned under SI Nos. 2 to 13 describe them as dietary/health supplements. No such description for clubbing into a homogenous category is available from the labels of the rest of the products.

The Application is, therefore, admitted for classification of the products that the Applicant himself has labeled in the category of dietary/health supplements.

2. Submissions of the Applicant

2.1 The Applicant claims in his Application that the products listed above have therapeutic or prophylactic uses. They are being sold at pharmacies and are not available at any general stores or groceries. They are prescribed by physicians or medical practitioners for treatment of various diseases. In support of his argument the Applicant refers to the data analysis published by IQVIA – a US based organization, showing data on how many medical practitioners recommend the Applicant's products for treating specific ailments.

2.2 The Applicant refers to several judicial pronouncements to establish that the main criteria for classification should be how the customers use the products. It is the common parlance test. The opinion coming from a competent and authorized source is of great relevance. Letters from the customers, doctors are also relevant. Whether the manufacturer is under license issued by the Drugs and Cosmetic Authorities is of little relevance for classification of medicaments. [Shree Baidyanath Ayurved Bhavan Ltd; (1996) 83 ELT 492 SC). Dabur (India) Ltd; (2002) 145 ELT 441 (Tri – Kolkata). Puma Ayurvedic Herbal (P) Ltd; (2006)196 ELT 3 (SC)].

2.3 The Applicant, therefore, concludes that the products listed above are to be classified under HSN 3004.

3. Submissions of the Revenue

3.1 The concerned officer from the Revenue submits that whether the products are meant for therapeutic or prophylactic use needs to be ascertained from experts in the field of medicine and also from the Drug Control Authority. He also points out that the invoices attached (Exhibit –B) show that some of the products are classified under HSN 2106.

4. Observations & Findings of the Authority

4.1 The question to be answered is whether the products listed in the above table and labeled as dietary / health supplements are to be classified as medicaments under HSN 3004. Classification under any other HSN needs to be considered only if the above products are not medicaments.

4.2 Classification refers to determination of the nature and character of the goods being supplied. The purpose of the exercise is to ascertain the applicability of any entry of the notifications issued under the GST Act, specifying the rate of tax or exemption from payment of tax [Rate of tax on supply of goods is specified under Notification No. 1/2017-CT (Rate) dated 28/06/2017 of the Centre and Notification No. 1125-FT dated 28/06/2017 of the State, as amended from time to time, and hereinafter collectively called the Rate Notification]. Explanation to the Rate Notification clearly mentions that Tariff item, sub-heading, heading and Chapter in the Rate Notification refer to those specified in the First Schedule to the Customs Tariff Act, 1975 (hereinafter called the Tariff Act). For the purpose of interpreting the Rate Notification, so far as may be, the Rules of Interpretation, Section and Chapter Notes and the General Explanatory Notes to the Tariff Act may be applied.

4.3 The term ‘Medicament’ is not defined in the GST Act or in the Tariff Act. The meaning and scope of ‘Medicaments’ and, more specifically, of HSN 3004 need, therefore, to be ascertained from judicial observations in this regard. In Shree Baidyanath Ayurved Bhavan (supra) a three judge bench of the apex court has examined whether Dant Manjan Lal, manufactured by the Appellant, is Ayurvedic Medicine. The apex court observes, “in interpreting statutes like the Excise Act the primary object of which is to raise revenue and for which purpose various products are differently classified, resort should not be had to the scientific and technical meaning of the terms and expressions used but to their popular meaning, that is to say, the meaning attached to them by those using the products.” The apex court continues, “So the certificates and affidavits given by the Vaidyas do not advance the case of Shree Baidyanath Ayurved Bhawan Limited in the absence of any evidence on record to show and prove that the common man who uses this Dant Manjan daily to clean his teeth considers this Dant Manjan as a medicine and not a toilet requisite.” The Supreme Court concurs with the view of the CEGAT, New Delhi, and observes, “ordinarily a medicine is prescribed by a medical practitioner and it is used for a limited time and not every day unless it is so prescribed to deal with specific disease like diabetes.” Other judgments that the Applicant has referred to more or less followed the above judgment and are, therefore, not discussed separately.

4.4 In HSN 3004 the emphasis is on therapeutic or prophylactic uses. Even if a product is manufactured using ingredients and according to the formula prescribed in the Pharmacopeia, it should not be classified as a medicament under heading 3004 unless it is meant for therapeutic or prophylactic uses. Its curative or preventive value must be substantial, and the product must be manufactured primarily to control or cure a disease, and the consumers use it primarily for treatment, mitigation, cure or prevention of specific disease or disorder. The emphasis clearly, therefore, lies in the user's perception of a particular product. If the user consumes the product primarily for cure from or treatment or mitigation of or for prevention of a disease or disorder, it should be treated as a medicament classifiable under HSN 3004.

4.5 The Applicant has furnished various documents for facilitating the common parlance test. They include photocopies of prescriptions indicating that several products are being prescribed by the medical practitioners, invoices issued by the pharmacies, and data analysis showing how many medical practitioners recommend the Applicant's products for treating specific ailments. Finally, the Applicant has submitted the labels containing a description and use of the products and physical samples.

4.6 Pharmacies keep various FMCG products and medical practitioners often prescribe health drinks and food supplements for aiding recovery from ailments. They do not provide objective and conclusive evidence about the therapeutic or prophylactic value of what the Applicant is offering and the consumer is using. A more objective way to examine is to analyse the information contained in the labels attached to the product when offered in retail set up. The information provided on the labels may be considered as written communication from the manufacturer to the consumer as to what is being offered. If a customer purchases the product it may be presumed that he or she accepts the offer and believes in the information contained in the label.

4.7 The labels of the products mentioned under SI Nos. 2 to 13 of the above table describe them as dietary/health supplements. The labels of the products mentioned under SI No. 7, 10,11 and 12 specifically mention that these products are not to be consumed as medicine or for treatment, cure or prevention of any disease. It is, therefore, clear that the products mentioned under the above serial numbers of the table above are being offered as food supplements and sometimes with specific declaration that they are not meant for use as medicine for treatment of any disease. Note 1(a) of Chapter 30 excludes food supplements from Chapter 30. These products are not, therefore, classifiable as medicament under HSN 3004.

4.8 Moreover, according to section 3(b) of the Drugs and Cosmetics Act, 1940, "drug" includes inter alia all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals. Section 18(c) of the said Act prohibits manufacture, stocking or sale of any drug without a license procured under the Act. The Applicant has failed to show any such license for the manufacture and sale of the products mentioned under SI Nos. 2 to 13 of the above table. These products cannot, therefore, be lawfully offered to the consumers as medicines having therapeutic or prophylactic uses.

4.9 Food supplements are not specifically covered under any HSN. The Section or Chapter Notes or the Explanatory Notes to the Tariff Act do not contain any specific reference to inclusion of food supplements. The products mentioned under SI Nos. 2 to 13 of the above table are, therefore, classifiable under HSN 2106, being food preparations not elsewhere specified or included, and taxable under SI No. 23 of Schedule III of the Rate Notification, as amended vide Notification No. 41/2017-CT(Rate) dated 14/11/2017 (corresponding State Notification No. 2019-FT dated 14/11/20174).

In view of the foregoing, we rule as under.

RULING

The Application has been admitted for classification of the products mentioned in Table I of the Application that are labelled as dietary/health supplements.

Products mentioned under SI Nos. 2 to 13 are classifiable under HSN 2106, and taxable under SI No. 23 of Schedule III of Notification No. 1/2017-CT (Rate) dated 28/06/2017 of the Centre (corresponding State Notification No. 1125-FT dated 28/06/2017), as amended vide Notification No. 41/2017-CT(Rate) dated 14/11/2017 (corresponding State Notification No. 2019-FT dated 14/11/20174).

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

(SYDNEY D'SILVA)
Member

(PARTHASARATHI DEY)
Member

West Bengal Authority for Advance Ruling

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