

LKS | In Focus

FARM TO FOOD: KEY TRENDS AND REGULATORY OUTLOOK IN AGRITECH

INDIRECT TAX

9. Parotta or roti? Curd or yogurt? Classifying culinary delights under the Indian GST regime



INDIRECT TAX

Parotta or roti? Curd or yogurt?

Classifying culinary delights under the Indian GST regime

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What's in a name? That which we call a rose by any other name would smell as sweet.

| William Shakespeare, Romeo & Juliet (Act II, Scene I) |

Well, in the Indian GST regime, everything lies in the name. Last year, an Indian start-up approached the Authority for Advance Rulings (AAR) in India to determine the applicable rate of tax on “Whole Wheat Parotta and Malabar Parotta” – two popular Indian breads. The applicant contended that parotta is a type of roti and was classifiable under a category of bread covering “khakhra, plain chapatti or roti” attracting a rate of 5%. The AAR rejected the contention- it ruled that it was not roti (taxed at 5%) and that it was taxable at 18% as no specific entry covered the product and in its view roti and parotta are different. This is not a one-off case and in the area of food, the complications of classification are most pronounced.

In July 2017, India moved from an erstwhile indirect tax regime covering excise, Valued Added Tax (VAT), entry tax and other local indirect taxes to a unified Goods and Services Tax (GST). Giving credit where it is due, the GST regime had several positive impacts. It allowed credit to be seamless across borders, reduced the number of taxes to be complied with, boosted logistics and brought the entire country on a single platform. In a country like India with its complex federal structure, the implementation of GST has been note-worthy. But among the various compromises that needed to be made in order to roll-out GST, one of them was that India put in place one of the most complex classification structures for its goods and services. India adopted multiple slab-based GST rates (Nil,1,3,5,12,18 and 28) for various products with highest

ARTICLE IN FOCUS

GST & CLASSIFICATION

HSN Classification of a food product is important for determining the GST rate. GST rate impacts pricing decisions of the product and legal declarations on the package. Apart from additional tax liability, interest and penal consequences, incorrect classification can affect the entire forward supply chain with contractual disputes with customers.

The multiple GST rates and exemptions make it imperative to determine product classification before the launch of a product.

Factors impacting classification of food products:

- Trade parlance
- Branding and marketing
- Flavoring agents
- Technical and dictionary meaning
- Allied laws
- Packaging

standard rate of 28% along with compensation cess. Most countries have either a single rate or two rates structure (standard rate and concessional rate) for their GST regimes. The complex multi-rate GST structure puts pressure on Indian businesses to focus on nomenclature, branding and the technical nature of the goods and services it supplies, in order to get the right rate.

In the area of food and produce, the issue of classification is most stark. The Indian GST classification structure is based on a global system of nomenclature and classification called the Harmonised System of Nomenclature (HSN) developed by the World Customs Organisation (WCO). The HSN is a highly scientific system of classification and for most industrial products it provides clear and certain entry for classification. Even for food and produce items, the HSN provides a clear system of classification. However, Indian culinary products and innovations are not specifically covered and the Indian GST regime has added entries that are in addition and sometimes in variance to the HSN. It is here that confusion regarding classification arises.

At the same time, the changing culinary preferences of millennials have presented a huge business opportunity for innovation in the sector. Lifestyle changes in favour of packaged, canned/ frozen, ready-to-eat, ready to cook or pre-packaged food items have provided impetus for food entrepreneurs to set up shop in India. Changes can be seen across the farm to fork value chain. There has been a paradigm shift from the unorganised sector to branded food operators and chains in India. The introduction of new flavoring agents, proprietary food from fusion of cuisines, health supplements bridging the nutrition gap, and, innovations in food preservation and packing has posed a unique challenge in the taxation regime.

With this background, we wanted to illustrate some of the current issues that the food and beverage business is facing to highlight the challenges classification poses for businesses as relates to GST. These are real issues and from our experience classification can have a huge impact on the survival of the business itself. In the food and beverage areas, the following are important examples:

- Applicability of GST exemption in relation to curd and yogurt. The scientific meaning of the product has a crucial role in determining the GST rate. The issue is compounded by healthy and vegan alternatives with flavoring agents.

- Applicability of Compensation Cess on carbonated fruit beverages. The importance of allied laws such as regulations issued by Food Safety and Standards Authority of India (FSSAI) and the trade parlance test in determining the correct classification. Carbonated fruit beverages qualifying as a 'fruit juice based drink' to attract concessional GST rate is highly litigated by the department.

- The meaning of 'bread' under HSN and its applicability to various Indian breads namely roti, chapatti, paratha, thepla, naan, kulcha, etc. Making this even more complicated are new categories of the bread-family of products such as: frozen, ready-to-eat, ready to cook packages are introduced.

- Branded products attract higher GST rates. The usage of proprietary marks,

standardisation of packing materials, sale from branded retail chains, etc. pose unique challenges in applying the GST rate in the forward supply chain.

- The flavoring agent and its impact on classification of products. In trade parlance test, the influence these agents have on consumer behavior is critical to the classification and in availing concessional rates. Further, marketing and product positioning also impact the perception and ultimately the classification of a product.

Issues based on technical meaning of a product

Curd or yogurt and GST exemption

A wide variety of fermented milk-based products are available namely, curd, yogurt, artisanal curd. The products are marketed as fermented dairy product, lactose-free curd with added probiotics and flavoring agents. The health benefits of such products are highlighted. In general, the ingredients of these products include pasteurised toned milk, milk solids, enzymes, active probiotic cultures, active live cultures and minimal lactose.

Curd and yogurt are both types of fermented milk products but there are two different GST rates for classifying fermented dairy products and hence a confusion as to the applicable rates.

Sr. No.	HSN ¹	Description of goods	GST Rate
1	0403	Cream, yoghurt , kephir and other fermented or acidified milk and cream , whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa.	5% ²
2	0403	Curd , Lassi, Butter milk	0% ³

Merely looking at the table above, it is clear that whether a product is classifiable as ‘curd’ or as “yogurt or other fermented or acidified milk and cream” can have significant GST implications. As with all classification matters, before considering the description, the classification under HSN needs to be determined (in terms of column 2 of the above table). The explanatory notes to the HSN clarifies that Chapter Heading No. 04.03 of Custom Tariff Act, 1975 (CTA) covers buttermilk and all fermented or acidified milk. The fermented dairy product manufactured from milk will be classified under Chapter Heading 04.03. Therefore, clearly both yogurt and curd fall under Chapter Heading 0403. The Indian GST notification, however, goes a step further and creates a sub classification for Curd with NIL rate of GST. It is hereafter that various rules and laws relating to classification come into play.

Don't cry over spilled milk. By this time tomorrow, it'll be free curd. With right cultures, you might also get some yogurt.

DID YOU KNOW

‘Curd’ is made of starter probiotic cultures such as Lactobacillus acidophilus, Streptococcus lactis, etc. and yogurt has other active live cultures such as S. thermophilus, L. bacillus delbrueckii subsp. Bulgaricus, L. bacillus delbrueckii subsp. lactis, L.occus lactis subsp. Lactis, L. coccus lactis subsp. Cremoris, etc.

In India, the curd/dahi is a daily use product of the common man. Generally, consumers consume various kinds of 'curd/ dahi' and 'yogurt' is also used as a substitute for curd. The classifications in such matters can be resolved through the robust route of technical differences between the product or by means of a simpler common parlance understanding of the products. The technical literature of 'curd' and 'yogurt'⁴, distinguishes curd as made of starter probiotic cultures such as *Lactobacillus acidophilus*, *Streptococcus lactis*, etc. and yogurt, will have other active live cultures such as *S. thermophilus*, *L. bacillus delbrueckii subsp. Bulgaricus*, *L. bacillus delbrueckii subsp. lactis*, *L.occus lactis subsp. Lactis*, *L. coccus lactis subsp. Cremoris*, etc. Accordingly, based on the technical specification, curd and yogurt can be distinguished.



On the other hand, the marketing campaigns of 'curd / dahi' and 'yogurt' and consumer preferences will have a role in determination of classification under the common parlance route. The packaging, the common man's perception of the differences between curd and yogurt and materials accompanying the product all play a role in this process. Various courts have taken different approaches to classification of products, sometimes a common parlance method is preferred⁵ and in other times the technical meaning⁶. The issue of yogurt as curd is likely to go down the path of the courts where the answer to this question will be settled in the future. But until then, the suppliers will still need to grapple with the story of these fermented milk products.

Fruit based carbonated drink - A 'fruit juice-based drink' to attract concessional GST rate?

Broadly, non-alcoholic beverages can be categorised into carbonated beverages (also known as aerated/ fizzy drinks) or non-carbonated beverages. In the year 2014, Hon'ble Narendra Modi, the Prime Minister of India, appealed to leading

beverage manufacturers of India to blend natural fruit juice in fizzy drinks which will help distressed farmers find a new market place for their agricultural produce.⁷ The food regulator also made necessary changes in FSSAI regulations to encourage healthy carbonated drinks. Various fruit-based drinks were launched by domestic and multi-national corporations (MNCs) in the beverage space.

These fruit-based fizzy drinks were manufactured by procuring juice concentrate/pulp (made out of real juice after extraction of water) and mixing sweeteners, preservatives, carbon dioxide and other additives. As these drinks contain aspects from different types of beverages (without being a class in themselves) and the Indian GST classification

has different rate structures for different types of beverages, the classification of these products again poses a huge challenge. The relevant classification entries for these drinks under GST are as follows:

Sr. No.	HSN	Description of goods	GST Rate
1	2202 99 20	Fruit pulp or fruit juice-based drinks	12% ⁸
2	2202 99 90	Other non-alcoholic beverages other than tender coconut water and caffeinated beverages	18% ⁹
3	2202 10	All goods including aerated waters, containing added sugar or other sweetening matter or flavoured	40% (28% ¹⁰ + 12% ¹¹ compensation cess)

These drinks are essentially Indian culinary innovations and the HSN explanatory notes are of little help. The next best option is to make references to various literature on food & beverages and allied laws to determine its classification. According to the FSSAI, the quantity of fruit juice in a beverage determines the classification of the product as 'carbonated fruit beverages or fruit drink'. Where the content of fruit juice added is only the purpose of a flavouring agent in water, it will continue to remain as 'flavoured water drink'. Hence, the quantum of fruit in the carbonated drink could push it either towards a 12% (fruit drink) or a 40% (flavoured aerated water) rate. Interestingly, a similar question arose in the erstwhile regime of VAT and excise. In this¹² case, the Supreme Court of India held that commercial nomenclature or trade understanding should be departed where the statutory content in which the tariff entry appears, requires such a departure and applied the principle of '*noscitur a sociis*'¹³ to determine classification of fruit juice-based drinks along with allied laws.

Regardless, the classification of such drinks continues to pose issues with many of the following factors coming into play:

- type, proportion and purpose of adding any ingredient in the beverage;
- whether juice prepared out of fruit concentrates will qualify as 'fruit juice-based drinks';
- how different beverages are perceived and marketed under common parlance, etc.

Without a specific entry for such products, the classification is likely to be questioned again and again.

FOOD FOR THOUGHT

Will the form and content of fruit extracts in carbonated drink determine the rate of GST in India? If yes, then why not reduce the rate of GST and sell drinks at competitive prices by adding higher content of natural fruit extracts.

AMAZE YOURSELF

There is no straight jacket formula for defining 'bread', and the form, nature & types of bread will change with changing times and innovations.

Wikipedia lists approx 200 types of bread tagged to different origins globally. As per the said list, breads with an India origin include Appam "Hoppers", Bhakri, Dosa, Khakhra, Kulcha, Papad, Paratha/ Parotta, Puran Poli and Roti/ Rumali Roti.

“Bread” - The meaning of ‘bread’ under HSN and its applicability to various Indian breads namely roti, chapatti, tortilla, paratha, thepla, naan, kulcha, etc

Bread is a staple food prepared from dough of cereal flour and water. Various kinds of breads are made depending upon the culinary traditions and eating habits of different countries. Indian breads include roti, chapatti, tortilla, paratha, thepla, naan, kulcha, etc of different shapes and sizes with different additions (spices, herbs, vegetables) to the bread dough. The products are available in frozen, ready to eat, ready to cook packages. Again, the meaning of the word ‘bread’ in HSN has led to several classification disputes. Under GST, the relevant entries for classifying breads are as under:

Sr. No.	HSN	Description of goods	GST Rate
1	1905	Bread (branded or otherwise), except when served for consumption and pizza bread	0% ¹⁴
2	1905	Khakhra, plain chapatti or roti	5% ¹⁵
3	Any Chapter	Goods which are not specified in Schedule I, II, IV, V or VI	18% ¹⁶

Whether the dictionary meaning of “bread” includes indigenous bread or not is a question that has been settled in the past. The judicial pronouncements specify that the word ‘bread’ should not be restricted to a single kind of bread. Therefore, ‘bread’ includes indigenous breads (whether leavened or unleavened) such as roti, chapati, paratha, naan, tandoori, etc. and consequently, NIL rate of GST should be applicable on the different forms of bread.

However, the Indian consumers perceive ‘bread’ as a specific bakery product. If we seek to classify various types of ‘bread’ by the “commercial parlance test”, it will result in different conclusions - some breads attracting Nil tax, others attracting 5% tax and yet others attract 18% tax and the taxation department will contend that the specific entry will override the general entry. As we have seen in the case of ‘Whole Wheat Parotta and Malabar Parotta’ before the AAR, the department is likely to deny concessional rates of tax to parotta as not being either bread or roti and in absence of specific classification entry for parotta, impose GST at the full rate of 18%. Similarly, stuffed parathas, herb infused theplas or mixed vegetable (or paneer) rotis - all very popular for food connoisseurs but are likely to pose significant headaches for the food manufacturer.

Issues relating to type of packing and combos

Branded food products and GST rate implications

In many cases, the GST rate and taxability of a product are based on the manner in which a particular product is packed. The branding on the package/ product has implications on the GST rate. A few illustrative GST entries for branded and non-branded Namkeens’ products are as under:

Sr. No.	HSN	Description of goods	GST Rate
1	2106 90	Namkeens, <i>bhujia</i> , mixture, <i>chabena</i> and similar edible preparations in ready for consumption form, <u>other than those put up in unit container, and bearing a brand name</u>	5% ¹⁷
2	2106 90	Namkeens, <i>bhujia</i> , mixture, <i>chabena</i> and similar edible preparations in ready for consumption form other than roasted gram, <u>put up in unit container and bearing a brand name</u>	12% ¹⁸

The term “unit container” is also defined to include package such as tin, can, box, jar, bottle, bag or carton, drum, barrel or canister, etc. designed to hold a pre-determined quantity or number of the product, as indicated on such package. Here, it is relevant to note that both the conditions i.e., (i) branded goods which are, (ii) put up in unit container, must be satisfied for levying GST at the rate of 12%. Thus, the products displayed in loose form in branded retail chain or packed in branded package after sale will not attract higher GST rate.

Branded products sold in ‘pre-packed form’ attract higher rate of GST. On the other hand, non-branded products sold in package form or for that matter, branded products sold in loose form do not attract higher rate of GST. There is a need for more clarity with regard to the meaning of ‘branded products’. Is a product ‘branded’ if affixation of the brand is on whole sale packages, (i.e., meaning of unit container) or does it require the brand name to be embossed on the product itself (or on the retail packs). The GST rate will impact pricing decisions of the product and legal declarations on the package. This is again an area of much confusion under the GST regime especially with regard to food.

“Ready-to-eat combo packs” - Essential character of the combo packs

Many times, combo packs including more than one kind of food is supplied under a single package at a single price. For example, one compartment of the combo pack may contain the ‘main course’ (say ‘butter chicken’) while the second compartment may contain the ‘complimentary dish’ (say ‘*ghee* rice’). How does one determine the classification of such packages - should it be on the basis of weight, content, consumer preference or some other

POINT TO NOTE

- Branded goods put up in unit containers, will attract higher rate of GST.
- Whereas, branded goods sold in loose form, or unbranded goods sold in unit containers will attract a lower rate of GST.

NOTE IT DOWN

Under GST

Composite Supply =

- ≥ 2 taxable supplies of goods or services or both (+)
- naturally bundled (+)
- supplied in conjunction with each other in the ordinary course of business (+)
- one being principal supply.

Mixed Supply =

- ≥ 2 taxable supplies of goods or services or both (+)
- made in conjunction with each other
- for a single price
- does not constitute composite supply

criteria? This again is not a theoretical example.

Classifying such products requires going beyond mere reading of the descriptions in the GST rate notifications and refer to the general rules for interpretation along with principle of composite supply⁷⁹ and mixed supply²⁰ under GST laws. The GST laws make a distinction between composite supplies (products that are naturally bundled) and mixed supplies (products that are bundled but the bundling is not natural) - again both these supplies have hugely different GST implications. Where two or more products are put up together for retail sale, being naturally bundled in the ordinary course of business and intended to be consumed together, then the classification of such combo pack can be done based on the product giving the essential characteristic to the set. However, where the products in the set are not naturally bundled and are sold for a single price, then the set should be classified based on the product attracting the highest rate of tax.

In the present example, the first question that arises is whether selling 'butter chicken with ghee rice' in India can be considered to be naturally bundled. If the answer is affirmative, then the next question is whether butter chicken being the 'main course' of the meal, provides the essential characteristic to the set. If the answer to both these questions is affirmative, the combo set of 'butter chicken sold with *ghee* rice' will be classified under the classification entry where the product 'butter chicken' falls. But there is an additional complication in the GST laws. The classification and taxability of 'butter chicken' under GST depends upon whether the content of chicken is more than 20% by weight or not. Needless to state, no guidelines have been provided on how to calculate the weight - whether the weight needs to be calculated in hydrated form or on as is basis. Hence, the taxability of combo set under question will be as follows:

Sr. No.	HSN	Description of goods	GST Rate
1	1602 32 00	Butter Chicken with Ghee Rice (<i>chicken content more than 20% by weight</i>)	12% ²¹
2	2106 90 99	Butter Chicken with Ghee Rice (<i>chicken content less than or equal to 20% by weight</i>)	18% ²²

The struggle of classifying such combo sets arises since there are no straight jacket formulae available to determine whether two or more products/ services are naturally bundled or not. Each case must be individually examined keeping in mind the facts of the case and several other factors.

Issues relating to flavoring agents

"Chocolate flavored diabetic food" – Classification as diabetic food or food product containing cocoa

Chocolate flavoring is one of the most common flavorings available in food products. The preferred ingredient for the chocolate flavoring is cocoa powder. The mixing of cocoa, however, poses a major classification issue. This is because when cocoa is in the mix, the question arises whether the concerned food products should be classified as the food

item or 'food preparation containing cocoa'.

One example of this issue is of a chocolate flavored diabetic food item. The competing entries are as under:

Sr. No.	HSN	Description of goods	GST Rate
1	2106 90 91	Diabetic foods	12% ²³
2	1806	Chocolate and other food preparation containing cocoa	18% ²⁴

In diabetic food, cocoa is added as a flavoring agent. Many times, what needs to be examined is whether the essential characteristic of the food is changed due to flavoring agent or not. The literal interpretation for the HSN 1806 will result in different classifications. Here, for the purpose of correct classification and charging appropriate rate of GST, various factors such as composition of the food item, proportion/ purpose of adding cocoa (i.e., high content or minimal amount added for flavoring purposes), brand positioning in the market as a product for persons with diabetics, etc. needs to be considered. Still classification in such cases poses issues.

Although the HSN explanatory notes to Chapter Heading 18 provide that any product containing any amount of cocoa shall be covered in the mentioned heading, food items shall continue to be classified as the respective food item if cocoa is merely used as a flavoring agent in small quantities. Further, the issue of whether adding cocoa as a flavoring agent in multifarious food products will attract higher or lower rate of GST is itself subject to different interpretations. This is again an example of the complex classification issues under the GST regime.

Will the issue of determining correct classification under taxation ever settle?

We have highlighted a few of the classification challenges faced by the various sectors. Classification remains one of the major contentious areas under GST. To get the classification right, various factors play a part: references will need to be made to various general or sector specific dictionaries, allied laws, instructions given by various sector specific regulators and the several rules for interpretation relating to classification, judge made principles relating to classification and interpretation such as strict or purposive interpretation, internal & external aids of interpretation, principle of *pari materia* and *noscitur a sociis*, etc. The marketing and branding of the products also plays a crucial role in determining the



chocolate

[chaw-kuh-lit] *noun*

a preparation of the seeds of cocoa, roasted, husked and ground, often having the ability to shrink your clothes and size of wallet by attracting higher rate of tax.

classification. The product positioning in the market and perception among the trade and customer is relied on by the courts in deciding the classification disputes. At the same time, there is huge pressure on businesses to get the lowest GST rate applicable. This has direct impact on pricing, ability to penetrate the market and legal declarations on the package. Competitors breaking away from the industry norms is a source of disruption for rest of the industry. It puts them in a fix as to whether to stay with their current classification or break rank to compete in the market. The misses in this area are costly: apart from additional tax liability, interest and penal consequences are also attracted. With GST being seamless, mistakes at the manufacturer's end does not remain contained at that level but flows through the entire supply chain leading to tax demands on distributors and contractual disputes with customers. All this means that it becomes imperative for businesses to invest time and effort to determine the product classification correctly and decisively before the launch of any product. |

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ENDNOTES

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12 M/s Parle Agro (P) Ltd v. Commissioner of Commercial Taxes, Trivandrum, 2017-VIL-20-SC

13 It means that, the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.

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