

THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX

(Constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/12/2019-20

Date- 25.10.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

|                         |                                                                                                                              |
|-------------------------|------------------------------------------------------------------------------------------------------------------------------|
| GSTIN Number            | 27AADC53124K1ZD                                                                                                              |
| Legal Name of Appellant | Sun Pharmaceutical Industries Ltd                                                                                            |
| Registered Address      | Sun Pharmaceutical Industries Limited, SUN House,<br>Western Express Highway, Goregaon (E), Mumbai -<br>400063.              |
| Details of appeal       | Appeal No. MAH/GST-AAAR-12/2019-20 dated<br>29.07.2019 against Advance Ruling No. GST-ARA-<br>88/2018-19/B-10 dtd.23.01.2019 |
| Jurisdictional Officer  | The Joint Commissioner of Sales Tax (F-604), Nodal<br>Divisions -B                                                           |

PROCEEDINGS

(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Sun Pharmaceutical Industries Ltd. (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-88/2018-19/B-10 dtd.23.01.2019.



Brief Facts of the Case

- A. M/s Sun Pharmaceutical Industries Limited (hereinafter referred to as 'Appellant') having its corporate head office at, "SUN HOUSE" Western Express Highway, Goregaon(E), Mumbai-400063 is engaged in the business of manufacturing and trading of pharmaceutical products, nutraceutical and allied products falling under Chapter 28 & 30 of the Customs Tariff Act,1975.
- B. The Appellant was registered under the erstwhile tax regime, and was discharging excise duty, service tax and Value Added Tax (VAT) on manufacture of pharmaceutical and nutraceutical products.
- C. Under the current regime, the Appellant is registered as per the GST laws.
- E. The Appellant is, inter alia, engaged in the manufacture and supply of medicaments and other related products. The Appellant is also engaged in business of marketing and supplying of a nutritional powder/food for special dietary use known as 'Prohance' and 'Prohance-D'.

Introduction to "Prohance-D"

- F. Prohance-D is specially designed to serve as a nutritional benefit for people suffering from Diabetes as the name itself suggest that "D" stands for "Diabetes". Prohance-D is sold in powder form which is required to be mixed with drinking water and used as a partial meal replacement or as a Breakfast replacement or as an Evening snack/healthy bedtime snack or as directed by a Physician/dietician for diabetic person. Prohance-D is a specially formulated nutritional powder for Diabetic person and it is also known in the market as "diabetic product" as it is sugar free, low on GI (Glycemic Index) and contains Isomaltulose - a low glycemic carbohydrate that helps to minimize blood sugar spikes (See Exhibit - A to Annexure 4). In other words, Prohance-D is marketed and also sold by the appellant as "Diabetic food" as specifically meant for Diabetic people only.



- G. The above factual position is also supported by specific declaration mentioned on the label of Prohance-D as "Food for people with Diabetes" and "Nutritional Powder for Diabetcs". A copy of the label is enclosed as (Exhibit-B to Annexure-4).
- H. Prohance-D provides all required macro nutrients (fat, protein, carbohydrate, fibers) as well micro nutrients (vitamins, minerals and other nutrients) to a Diabetic person and provides energy from high quality protein and fat and is rich in dietary fiber and MUFA (Mono Unsaturated Fatty Acids) that support heart health. The photo of the labels containing the declaration of the product has been enclosed as "Exhibit – B to Annexure 4".
- I. Further, Prohance-D is manufactured by Independent Third-Party Manufacturer (say ABC Limited) on behalf of the Appellant, under a license issued by the FSSAI. The FSSAI has issued license as a "food for special dietary uses" as recorded in Sr. No. 24 of the license. A copy of the license dated 3rd May, 2018 is enclosed as (Exhibit – C to Annexure-4).
- J. The appellant is dealing with two variants of Prohance-D, namely:-  
Prohance-D - Vanilla flavor; and  
Prohance-D – Chocolate flavor.
- K. The issue in the present case is regarding the determination of correct classification and applicable rate of GST of Prohance – D – Chocolate variant only (hereinafter referred to as 'the product in question') in terms of Notification No. 1/2017-CT(R) dated 30.06.2017 & the corresponding Notification of relevant State GST Act. However, it is to be noted that there is no dispute in the Ruling dated 23.1.2019 passed by Ld. AAR (between the Appellant and the department) regarding the correctness of the classification of Prohance-D – Vanilla variant under Tariff item No.2106 90 91 and the applicable rate of GST in respect of the same in terms of Sr No. 46A of Schedule II to Notification No. 1/2017-CT(R) dated 30.06.2017 & the corresponding Notification of relevant State GST Act.

Application for Advance Ruling



- L. At this juncture it is pertinent to refer to the rate notification under GST for the possible classification of the product in question. Notification No.1/2017-Central Tax (Rate) dated 30.06.2017 provides for applicable rates of GST on the supply of goods. Sl. No. 46A of Schedule – II to Notification No.1/2017- Central Tax (Rate) dated 30.06.2017 reads as under:

| Sch. | Sl. No | Chapter Heading/ Sub-Heading | Description of Goods | Rate of Tax (CGST) |
|------|--------|------------------------------|----------------------|--------------------|
| II   | 46A    | 2106 90 91                   | Diabetic foods       | 6%                 |

- M. Corresponding notification of relevant State GST Act also provides rate of 6% on the aforesaid item.

- N. Therefore, "Diabetic Food" of Heading No. 2106 90 91 of the Customs Tariff Act, 1975 (hereinafter referred to as 'CTA') are covered by Sl. No. 46A of Schedule II and attract effective GST @12%.

- O. Further, it shall be noted that Sl. No. 12C of Schedule – III to Notification No.1/2017-Central Tax (Rate) dated 30.06.2017 reads as under:-

| Sch. | Sl. No | Chapter Heading/ Sub-Heading | Description of Goods                                   | Rate of Tax (CGST) |
|------|--------|------------------------------|--------------------------------------------------------|--------------------|
| II   | 12C    | 1806                         | Chocolates and other food preparation containing cocoa | 9%                 |



Therefore, the "Chocolates and other food preparation containing cocoa" of Heading No. 18.06 are covered by Sl. No. 12C of Schedule III and attract GST @ 18%.

- P. The product in question, namely, Prohance-D – Chocolate variant/flavor is a food product for diabetic patients in chocolate flavor. The said product thus contains 3% of cocoa for flavoring purposes. The addition of cocoa and other relevant ingredients does not alter the intended use of the product as a partial meal replacement for diabetic patients. However, since the product in question contains cocoa which is added only for flavoring, there existed an ambiguity as to the correct classification of the said product between Heading No. 18.06 and Heading No. 21.06 of the Customs Tariff Act, 1975.
- Q. Accordingly, in order to obtain the correct clarification and guidance, the Appellant had filed an application for Advance Ruling in Form No. ARA – 1 before the Learned Authority for Advance Ruling, State of Maharashtra (hereinafter referred to as "Ld. AAR") for obtaining an Advance Ruling on the issue as to what would be the appropriate classification of the Prohance-D – Chocolate variant/flavor. A copy of application filed by the appellant bearing no. Advance Ruling No. 88/2018/GST is enclosed herewith as Annexure-4 collectively.

Advance Ruling dated 23.1.2019 passed by Ld. AAR, Maharashtra

- R. The Ld. AAR, considered the application filed by the appellant and passed Advance Ruling No. GST-AAR-88/2018-19/B-10 dated 23.01.2019 (Annexure-1) and held as follows –
- a) Prohance-D is categorized as 'food' on the ground that Prohance-D is an eligible substance consisting of nourishing and nutritive components such as carbohydrates, fats, proteins, essential minerals and vitamins and can be ingested and digested and provides nutrition to the human body.
- b) Even though the Prohance-D is categorized as 'food', the same cannot be treated/considered as 'diabetic food' classifiable under Tariff Item No.2106 90 91 of CTA on the ground that Prohance-D is advertised/marketed as providing other



- health benefits like providing energy, immune health, heart health, vitamins and minerals and maintains cholesterol levels.
- c) Relying on the information available on internet, it will not be proper/correct to treat / consider the Prohance-D – Chocolate variant as 'diabetic food' as it does not contain high amount of dietary fiber even though it contains gum Arabic and also Prohance-D – Chocolate variant does not contain slow digestion agents.
  - d) Prohance-D – Chocolate variant is not classifiable as 'cocoa preparation' falling under Chapter 18 of the CTA on the ground that the chocolate flavor is used only to attract the end consumer.
  - e) Prohance-D – Chocolate variant is also not classifiable under Chapter 19 of the CTA.
  - e) Prohance – D – Chocolate variant is "Food preparation" classifiable under Chapter Heading No.21.06 as it is meant to be consumed by people by dissolving the same in water or milk.
  - f) Since Prohance – D – Chocolate variant is a combination of various items and could clearly be treated as a 'compound preparation' being in powder form and could be consumed by directly mixing with water or milk. Hence, resulting in a non-alcoholic beverage which is obtained after mixing the powder with water or milk is clearly covered under the description 'Compound preparation for making non-alcoholic beverages' falling under Tariff Item No.2106 90 50 attracting GST @ 18% as per Serial no 23 to the Schedule III of the Notification No. 1/2017-CT(R).
5. Aggrieved by the above ruling passed by the Ld. AAR, the appellant is filing this appeal in respect of wrongful classification of the product in question as 'Compound preparation for making non-alcoholic beverages' under Tariff Item No.2106 90 50 as opposed to the specific description of 'Diabetic foods' covered under Tariff Item No. 2106 90 91, on the following amongst other grounds which are without prejudice to each other.



### Grounds of Appeal

PROHANCE-D – CHOCOLATE VARIANT IS A “DIABETIC FOOD” ONLY AND HENCE CLASSIFIABLE UNDER TARIFF HEADING NO. 2106.90.91 OF CTA.

- 1 Chapter 21 of Custom Tariff Act, 1975 covers “Miscellaneous edible preparation”. Heading No.21.06 under the said Chapter covers “Food preparation not elsewhere specified or included”. In other words, the Chapter Heading No.2106 is residuary heading which covers all the products not specified elsewhere in the tariff. The relevant extract of the said heading is reproduced under for ready reference:

| HS Code    | Description of goods                                                                                                                                         | Unit |
|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| {1}        | {2}                                                                                                                                                          | {3}  |
| 2106       | Food preparations not elsewhere specified or included                                                                                                        |      |
| 2106 10 00 | -- Protein concentrates and textured protein substances.                                                                                                     | Kg   |
| 2106 90    | - Other:                                                                                                                                                     |      |
|            | --- Soft drink concentrates:                                                                                                                                 |      |
| 2106 90 11 | ---- Sharbat.                                                                                                                                                | Kg   |
| 2106 90 19 | ---Other.                                                                                                                                                    | Kg   |
| 2106 90 20 | --- Pan masala                                                                                                                                               | Kg   |
| 2106 90 30 | --- Betel nut product known as “Supari”.                                                                                                                     | Kg   |
| 2106 90 40 | --- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup | Kg   |
| 2106 90 50 | --- Compound preparations for making non-alcoholic beverage.                                                                                                 | Kg   |
| 2106 90 60 | --- Food flavoring material.                                                                                                                                 | Kg   |
| 2106 90 70 | --- Churna for pan.                                                                                                                                          | Kg   |
| 2106 90 80 | --- Custard powder.                                                                                                                                          | Kg   |
|            | --- Other:                                                                                                                                                   |      |
| 2106 90 91 | ---- Diabetic foods.                                                                                                                                         | Kg   |
| 2106 90 92 | ---- Sterilized or pasteurized millstone.                                                                                                                    | Kg   |
| 2106 90 99 | ---- Other.                                                                                                                                                  | Kg   |

- 2 It is clear that Tariff Item No. 21.06 90 91 specifically covers “Diabetic foods”.



3. At this juncture it is first pertinent to refer to the ingredients of the product in question and the function played by the said ingredients. For ease of reference the ingredients as declared on the packaging of the product are extracted as follows:  
Maltodextrin – It is a polysaccharide that is used as a food ingredient. It is produced from starch by partial hydrolysis and is usually found as a white hygroscopic spray-dried powder.
4. Reliance is placed on HSN explanatory notes to Chapter 17.02 which provides the following explanation –  
Malto-dextrins (or dextri-maltoses), obtained by the same process as commercial glucose. They contain maltose and polysaccharines in variable proportions. However, they are less hydrolysed and therefore have a lower reducing sugar content than commercial glucose. The heading covers only such products with a reducing sugar content, expressed as dextrose on the dry substance, exceeding 10% (but less than 20%). Those with a reducing sugar content not exceeding 10% fall in heading 35.05. Malto-dextrins are generally in the form of white powders, but they are also marketed in the form of a syrup (see Part (B)). They are used chiefly in the manufacture of baby food and low-calory dietic foods, as extenders for flavouring substances or food colouring agents and in the pharmaceutical industry as carrier.
5. Sunflower seed oil (High oleic acid) – It is a mono-unsaturated fatty acid rich oil, which help reduce bad cholesterol levels in your blood which can lower your risk of heart disease and stroke. They also provide nutrients to help develop and maintain your body's cells.
6. Calcium caseinate – It is one of the several milk protein derived from casein in skim and 1% milk and is primarily used in meal preparation.
7. Whey protein isolate – It is milk by-product of the cheese-making process, it contains higher percentage of pure protein which can be pure enough to be virtually lactose free, carbohydrate free, fat free, and cholesterol free. They are highly bioavailable, are very quickly absorbed into the body, and have a high concentration of





branched-chain amino acids which are highly concentrated in muscle tissue, and are used to fuel working muscles and stimulate protein synthesis

8. Soy protein isolate - It is a highly refined or purified form of soy protein with a minimum protein content of 90% on a moisture-free basis. It is made from defatted soy flour which has had most of the nonprotein components, fats and carbohydrates removed. It is mainly used to increase protein content, to enhance moisture retention, and as an emulsifier.
9. Isomaltulose (6.1%) – It is a disaccharide carbohydrate composed of glucose and fructose. Isomaltulose is a slowly digested carbohydrate which provides energy for a longer period and avoiding blood sugar spikes.
10. Rapeseed oil - low erucic acid – It is Alpha linolenic acid (omega 3 fatty acid) rich oil. It correct imbalances in modern diets that lead to health problems and help lower the risk of chronic diseases.
11. Fructose - Fructose also known as fruit sugar, is a monosaccharide. Pure, dry fructose is a sweet, white, odorless, crystalline solid, and is water-soluble. It exhibits a sweetness synergy effect when used in combination with other sweeteners. Fructose-sweetened food and beverage products cause less of a rise in blood glucose levels than do those manufactured with either sucrose or glucose.
12. Reliance is placed on HSN explanatory notes to Chapter 17.02 which provides the following explanation –
13. Fructose (C<sub>6</sub>H<sub>12</sub>O<sub>6</sub>) which is present in large quantities, with glucose, in sweet fruits and in honey. Commercially it is produced from commercial glucose (e.g., corn syrup), from sucrose or by hydrolysis of inulin, a substance found mainly in the tubers of the dahlia and the Jerusalem artichoke. It occurs in the form of a whitish, crystalline powder or as a viscous syrup (see Part (B)); it is sweeter than ordinary sugar (sucrose) and is especially suitable for use by diabetics. This heading covers both commercial and chemically pure fructose.
14. Reliance is placed on Kirk-Othmer Encyclopaedia of Chemical Technology Volume 23 at page 556-557, which provides the following –  
Sweeteners



..... Although naturally occurring and yielding ca 4 kcal/g (16.7 kJ/g), the same as sugar, fructose does not cause a fluctuation in blood sugar, ie, glucose levels after ingestion, making fructose a better choice for diabetics (2) Fructose is also more potent than sugar (ca 1.5 times) and therefore can be cost-effective for the food industry, .....

15. Fructo-oligosaccharides - They are made up of plant sugars linked in chains, used as a sweetener for food. They also act as food for "good" bacteria in the intestine.
16. Cocoa powder (3.0%) - It is a powder prepared from the seed embedded in the fruit of the cocoa plant, Theobroma cacao, etc. It is added for flavouring.
17. Gum Arabic – It is used in the food industry as a stabilizer, emulsifier and thickening agent. Gum Arabic, a complex polysaccharide, is a soluble dietary fibre, primarily indigestible to humans and considered non-toxic and safe for human consumption. It is not degraded in the intestine, but fermented in the colour under the influence of microorganisms.

#### Minerals

18. Inulin – It is a soluble fibre, consisting of a group of naturally occurring polysaccharides. Inulins and oligofructose are not digested by human enzymes, making them unavailable for glucose release into the blood stream, ensuring that their consumption does not raise blood glucose levels. It is a preferred sugar substitute for diabetics because it does not cause spikes in blood sugar associated with common sweeteners and can be used to replace sugar, fat, and flour.
19. Antioxidants (Soya lecithin, L-Ascorbic acid, TBHQ) - Antioxidants are said to help neutralize free radicals in our bodies, and this is thought to boost overall health. They protect against the cell damage that free radicals cause, known as oxidative stress.



20. Myo-inositol – It is a carbocyclic sugar and a sugar alcohol with half the sweetness of sucrose (table sugar) and helps to promote proper utilization of the hormone insulin.
21. Choline bitartrate – It is similar to a B vitamin. It is used in many chemical reactions in the body. It is used to prevent liver diseases caused by excessive feeding by vein (by IV).
22. Vitamins, L-Carnitine - L-carnitine is an amino acid (a building block for proteins) that is naturally produced in the body. L-carnitine supplements are used to increase its levels in people whose natural level is too low because they have a genetic disorder, are taking certain drugs because they are undergoing a medical procedure that uses up the body's L-carnitine. It is also used as a replacement supplement in strict vegetarians, dieters, and low-weight or premature infants.
23. Taurine – It is an amino sulfonic acid, but it is often referred to as an amino acid, a chemical that is a required building block of protein.
24. Artificial sweetener (Sucralose) – It is a zero-caloric artificial sweetener and is made from sugar in a multi-step chemical process in which 3 hydrogen-oxygen groups are replaced with chlorine atoms. Sucralose is commonly used as a sugar substitute in both cooking and baking and is calorie-free. Sucralose is 400-700 times sweeter than sugar and does not have a bitter aftertaste. Sucralose is said to have little or no effects on blood sugar and insulin levels. Sucralose may raise blood sugar and insulin levels in people who do not consume artificial sweeteners regularly. However, it probably has no effect on people who regularly use artificial sweeteners.
25. Reliance is placed on HSN explanatory notes to Chapter 29.32 which provides the following explanation –
- Sucralose [1,6-Dichloro-1,6-dideoxy-β-D-fructofuranosyl-4-chloro-4-deoxy-α-D-galactopyranoside]. Odorless, white to almost white crystalline powder. Artificial sweetener mainly used for medicine and food, especially for the treatment and diet of diabetic patients.



26. Acidity regulator (Citric acid) – It is an organic acid which is derived from plant tissues. It is an important metabolic intermediate, used as an acidifying agent.

MEANING OF "FOOD"

27. The term "food" has been defined in Webster's international Dictionary as-  
"nutritive material absorbed or taken into the body of an organism which serve, for purposes of growth, work or repair and for the maintenance of the vital process."
28. Further, the term 'food' has also been defined in New International Dictionary as-  
"Material consisting of carbohydrates, fats, proteins and supplementary (as minerals, vitamins) that is taken or absorbed into the body of an organism in order to sustain growth, repair and all vital processes and to furnish energy for all activity of the organism.
29. The Chamber Twentieth Century dictionary defines "food" as-  
"What one feeds on: that which, being digested, nourishes the body: whatever sustains or promotes growth."
30. The Merriam-Webster online dictionary defines "food" as:  
1 a: material consisting essentially of protein, carbohydrate, and fat used in the body of an organism to sustain growth, repair, and vital processes and to furnish energy; also; such food together with supplementary substances (as minerals, vitamins, and condiments)  
b: inorganic substances absorbed by plants in gaseous form or in water solution  
2: nutriment in solid form
31. It is also a settled legal position that in ordinary and commercial parlance in India, the term 'food' is considered as nutritive material absorbed or taken in the body of an organization for the purpose of growth work or repair and for the maintenance of vital processes and not as a refreshment.



32. In light of the aforesaid legal position and having regard to facts that the ingredients of the product in question (i.e. Whey protein isolate, Maltodextrine, Soy protein isolate, etc.) as mentioned in paragraph A.3 above and that the product in question is used for nourishment purposes, the same has to be treated/considered as 'food' only.
33. Thus, it is submitted that Prohance-D – Chocolate variant is a 'food' in itself.
34. The above submission is also supported by the finding of Ld. AAR in its ruling dated 23.1.2019 at 3rd Para of Page 21 which reads as under:
- .....We find that the subject product is an eligible substance consisting of nourishing and nutritive components such as carbohydrates, fats, proteins, essential minerals and vitamins and can be ingested and digested and provides nutrition to the human body. Hence we have no doubt that the subject product can be categorized as food."*

----- (Emphasis supplied)

35. Once it is clear that Prohance-D – Chocolate variant is 'food' in itself, it is to be seen whether the same would be covered within the meaning of the term "Diabetic foods" as mentioned under Tariff Item No.2106 9091 of the CTA.

#### MEANING OF TERM "DIABETIC FOODS"

36. The term 'Diabetic Food' is not defined under the GST provisions as well as under Harmonized Commodity Description of Coding System (for short referred to as HSN). Further the term 'Diabetic Food' is also neither defined under Chapter notes of any Chapters of CTA nor under the allied law namely Customs Act and Rules made thereunder. In order to understand the ordinary meaning of the term 'Diabetic Food', reference has to be made to the dictionary meanings.
37. The Oxford Dictionary of Food & Nutrition by David A. Bender defines "diabetic foods" as under:



"Diabetic foods - Loose term for foods that are specially formulated to be suitable for consumption by people with diabetes mellitus; generally low in carbohydrate (and specially sugar), and frequently containing \*sorbitol, xylulose, or sugar derivatives that are slowly or incompletely absorbed."

38. It is submitted that the product in question is a specially designed nutritional powder which substitutes "sugar" by using the Maltodextrin, Fructose, Isomaltulose and Fibers (FOS, Insulin and Gum Arabic) to meet the special dietary requirements of Diabetic people. The product in question contains low carbohydrate and sugar derivatives which slow down the absorption and accordingly answer to the definition provided in the Oxford Dictionary of Food & Nutrition. Further, the product in question being a specially formulated food product, containing replacement for sugar which making it suitable for diabetic people is to be considered as 'Diabetic food' only.
39. In view of the above submissions, it is submitted that the product in question shall be considered as a 'Diabetic Food' as it satisfies the definition of diabetic food as mentioned above.
40. At this stage, it is pertinent to refer to The Food Safety and Standards Act, 2006 (FSSAI) wherein the Third-Party manufacturer is granted the license under the category of "foods for special dietary purposes". The product in question being food for Diabetic people as also declared in the packing label of the product and the same having been certified by the FSSAI. It is pertinent to refer to the relevant provision under FSSAI Act and regulations therein. Further, it is submitted that the Ld. AAR in its ruling dated 23.1.2019 has also relied on the FSSAI Rules to determine the correctness of category declared on the label of the product in question.
41. Relevant provisions under Food Safety and Standards Act, 2006 for the purpose of present appeal.
42. Section 22 of the said Food Safety and Standards Act, 2006 is reproduced below for ready reference:



"22. Genetically modified foods, organic foods, functional foods, proprietary foods, etc.

Save as otherwise provided under this Act and regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, nutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.

Explanation – For the purposes of this section, –

{1} "foods for special dietary uses or functional foods or nutraceuticals or health supplements" means:

(a) foods which are specially processed or formulated to satisfy particular dietary requirements which exist because of a particular physical or physiological condition or specific diseases and disorders and which are presented as such, wherein the composition of these foodstuffs must differ significantly from the composition of ordinary foods of comparable nature, if such ordinary foods exist, and may contain one or more of the following ingredients, namely: -

(i) plants or botanicals or their parts in the form of powder, concentrate or extract in water, ethyl alcohol or hydro alcoholic extract, single or in combination;

(ii) minerals or vitamins or proteins or metals or their compounds or amino acids (in amounts not exceeding the Recommended Daily Allowance for Indians) or enzymes (within permissible limits);

(iii) substances from animal origin;

(iv) a dietary substance for use by human beings to supplement the diet by increasing the total dietary intake;



(b) (i) a product that is labelled as a "Food for special dietary uses or functional foods or nutraceuticals or health supplements or similar such foods" which is not represented for use as a conventional food and whereby such products may be formulated in the form of powders, granules, tablets, capsules, liquids, jelly and other dosage forms but not parenterals, and are meant for oral administration;

(ii) such product does not include a drug as defined in clause (b) and ayurvedic, sidha and unani drugs as defined in clauses (a) and (h) of section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940) and rules made thereunder;

(iii) does not claim to cure or mitigate any specific disease, disorder or condition (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act;

(iv) does not include a narcotic drug or a psychotropic substance as defined in the Schedule of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and rules made thereunder and substances listed in Schedules E and EI of the Drugs and Cosmetics Rules, 1945;

(2) "genetically engineered or modified food" means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology;

(3) "organic food" means food products that have been produced in accordance with specified organic production standards;

(4) "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe;

Provided that such food does not contain any of the foods and ingredients prohibited under this Act and regulations made thereunder."





43. Further, the Notification dated 23rd December 2016 (Annexure - 5) issued by the Food Safety and Standards Authority of India (hereinafter referred to as "FSSAI") Regulation No.8 states that:

49. Food for special dietary use, other than infants, and those products intended to be taken under medical advice. –

(1) No food business operator shall manufacture, formulate or process an article of food for special dietary use unless-

(i) specifically processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions, namely: -

(a) low weight, obesity, **diabetes**, high blood pressure;

(b) pregnant and lactating women; and

(c) geriatric population and celiac disease and other health conditions.

(ii) The food business operator shall clearly indicate on the label whether or not the food for special dietary use is to be taken under medical advice;

(iii) A food business operator may manufacture or sell an article of food for special dietary use in single use packaging or in dosage form, namely, granules, capsules, tablets, pills, jelly, semi-solid and other similar forms,

sachets of powder, or any other similar forms of liquids and powders designed to be taken in measured unit quantities with a nutritional or physiological effect;

(iv) A food business operator may formulate an article of food for special dietary use in formats meant for oral feeding through a enteral tubes but shall not be used for parenteral use;

(v) An article of food for special dietary use shall not include the normal food which is merely enriched or modified with nutrients and meant for mass consumption, intended for improvement of general health for day to day use and do not claim to be targeted to consumers with specific disease conditions and also not include the article of food intended to replace complete diet covered under food for special medical purpose specified in regulation 9.



(2) (i) The articles of food for special dietary use shall contain any of the ingredients specified in Schedules I or Schedule II or Schedule III or Schedule IV or Schedule VI or Schedule VII or Schedule VIII. (ii) A food business operator may use the ingredients specified in the Schedules referred to in clause (i) of sub regulation (2) in manufacturing food for special dietary use without prejudice to modifications for one or more of these nutrients rendered necessary by the intended use of the product.

..... Emphasis Supplied

50. Schedule VIII of the Notification stated above is extracted below for ready reference:

#### Schedule – VIII

[See regulations 3.(13), 6.(2)(i), 7.(2)(i), 8.(2)(i), 9.(2)(i) and 11.(1)(i)]

#### List of prebiotic compounds

| Sr. No. | Prebiotic Compounds                                                    |
|---------|------------------------------------------------------------------------|
| 1.      | Polydextrose                                                           |
| 2.      | Soybean oligosaccharides                                               |
| 3.      | Isomalto-oligosaccharides                                              |
| 4.      | Fructo-oligosaccharides                                                |
| 5.      | Gluco-oligosaccharides                                                 |
| 6.      | Xylo-oligosaccharides                                                  |
| 7.      | Inulin                                                                 |
| 8.      | Isomaltulose                                                           |
| 9.      | Gentio-oligosaccharides                                                |
| 10.     | Lactulose                                                              |
| 11.     | Lactoferrin                                                            |
| 12.     | Sugar alcohols such as lactitol, sorbitol, maltitol, inositol, isomalt |
| 13.     | Galacto-oligosaccharides                                               |

Note:- The Food Authority may add any new specific prebiotic after proper scientific evaluation and include in this Schedule.

PAWAN AGARWAL, Chief Executive Officer



51. A combined reading of the above provisions clarifies that FSSAI recognised "food for special dietary uses" (specially processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions such as diabetes) as a separate category of 'foods'. FSSAI streamlines the purview of the said foods by providing a list of ingredients that must be contained for any food to qualify as a "food for special dietary uses".
52. In view of the above, it is submitted that the product in question is a specially designed nutritional powder to meet the special dietary requirements of Diabetic people. It is pertinent to note that the ingredients like Isomaltulose, FOS – Fructo-oligosaccharides and Inulin are covered under Schedule – VIII of the Notification dated 23.12.2016 as prescribed by FSSAI. Thus, the product in question is treated as a "food for special dietary uses" under FSSAI as is registered as the same. This fact is also not in dispute and admitted by the Ld. AAR in its Ruling dated 23.1.2019.
53. The product in question also has other features also like it being sugar (sucrose) free, having low GI, having high fiber, being rich in MUFA. Thus, in this respect, it can be concluded that the product in question is a 'diabetic food' to meet the special dietary requirements of Diabetic people. The Ld. AAR has not disputed the said facts and the conclusion that the product is food which is meant for diabetic persons.
54. In light of the aforesaid submissions, the fact that the product in question is a food product which answers the description of product designed for a person suffering from diabetes and that the product is a partial meal replacement, is not a matter of dispute. The said facts are also been relied on by the Ld. AAR while finding that the product in question assists diabetics in replacing a meal or part of it. For ease of reference the relevant extract of the ruling is extracted as under:  
"In view of the above it can be said that the subject product, Prohance-D is different from the parent product is as much as it contains extra ingredients as mentioned in (i) to (iv) above, ingredients which along with the other regular ingredients may assist diabetic in replacing a meal or part of it."



55. On this count alone, it is submitted that the portion of the Ruling dated 23.1.2019 passed by Ld. AAR by which the product is classified as preparation for making beverage is incorrect and is liable to be set aside.

MERELY MENTIONING / DECLARING OTHER HEALTH BENEFITS ON THE LABEL OF PROHANCE-D WILL NOT EXCLUDE/TAKE AWAY THE PRODUCT IN QUESTION FROM BEING A "DIABETIC FOOD".

56. Before going into the discussion as to whether the product in question is suitable for diabetic person or not, we will first discuss the meaning and symptoms of diabetes which the root cause of the entire issue.
57. The term 'diabetes' has not been defined under the GST laws, Explanatory Notes to HSN and under the CTA and rules made thereunder. Thus, we have to take recourse of dictionary meanings of term 'diabetes'.
58. The Oxford Dictionary of Food & Nutrition by David A. Bender described 'diabetes' as:  
"there are two distinct conditions: diabetes insipidus and diabetes mellitus. The later condition is more common and is generally referred to simply as diabetes or sugar diabetes. Haemochromatosis is known as bronze diabetes.  
Diabetes insipidus is a metabolic disorder characterized by extreme thirst, excessive consumption of liquids and excessive urination, due to failure of secretion of the antidiuretic hormone.  
Diabetes mellitus is a metabolic disorder involving impaired metabolism of glucose due to either failure of secretion of hormone insulin (insulin dependent diabetes) or impaired responses of tissues to insulin (non-insulin dependent diabetes). If untreated, the blood concentration of glucose rises to abnormally high levels (hyperglycaemia) after a meal and glucose is excreted in the urine (glucosuria). Prolonged hyperglycaemia may damage nerves, blood vessels, and kidneys, and lead to development of cataracts, so effective control of blood glucose level is important.



Type I diabetes mellitus develops in childhood (juvenile onset diabetes) and is due to failure to secrete insulin and hence is called insulin dependent diabetes. Treatment is by injection of insulin (originally purified from beef or pig pancreas, now biosynthetic human insulin), together with restriction of the intake of sugars. Type II diabetes mellitus generally arises in middle age (maturity onset diabetes) and is due to resistance of the tissues to insulin action; secretion of insulin by the pancreas may be normal or higher than normal. It is referred to as non-insulin dependent diabetes and can sometimes be treated by restricting the consumption of sugars and reducing weight, or by the use of oral drugs which stimulate insulin secretion and/ or enhance the insulin responsiveness of tissues (sulphonylureas and biguanides). It is also treated by injection of insulin to supplement secretion from the pancreas and overcome the resistance. Impairment of glucose tolerance similar to that seen in diabetes mellitus sometimes occur in late pregnancy, when it is known as gestational diabetes. Sometimes pregnancy is the stress that precipitates diabetes, but more commonly the condition resolves when the child is born.

Renal diabetes is the excretion of glucose in the urine without undue elevation of the blood glucose concentration. It is due to reduction of the renal threshold which allows the blood glucose to be excreted."

59. The WHO Report defines 'Diabetes' as under:-

#### 2.1 Definition

The term diabetes mellitus describes a metabolic disorder of multiple aetiology characterized by chronic hyperglycaemia with disturbances of carbohydrate, fat and protein metabolism resulting from defects in insulin secretion, insulin action, or both. The effects of diabetes mellitus include long—term damage, dysfunction and failure of various organs. Diabetes mellitus may present with characteristic symptoms such as thirst, polyuria, blurring of vision, and weight loss. In its most severe forms, ketoacidosis or a non-ketotic hyperosmolar state may develop, and lead to stupor, coma and, in absence of effective treatment, death. Often symptoms are not severe, or may be absent, and consequently hyperglycaemia sufficient to cause pathological and functional changes may be present for a long time before the diagnosis is made. The long—term effects of diabetes mellitus include progressive development of the specific complications of retinopathywith



potential blindness, nephropathy that may lead to renal failure, and/or neuropathy with risk of foot ulcers, amputation, Charcot joints, and features of autonomic dysfunction, including sexual dysfunction. People With diabetes are at increased risk of cardiovascular, peripheral vascular and cerebrovascular disease. Several pathogenetic processes are involved in the development of diabetes. These include processes which destroy the beta cells of the pancreas with consequent insulin deficiency, and others that result in resistance to insulin action. The abnormalities of carbohydrate, fat and protein metabolism are due to deficient action of insulin on target tissues resulting from insensitivity or lack of insulin.

60. The Ld. AAR has erred in holding that the product in question cannot be treated as a "diabetic food" alone on the ground that the said product can be used to treat and cure/prevent other health benefits such as providing Energy, Immune health, Heart health, Vitamins and Minerals and maintains cholesterol levels, as mentioned on the label.
61. It is submitted that the above allegation / finding of the Ld. AAR is totally incorrect and perverse. The Ld. AAR has in fact failed to understand the manufacturing process of Prohance – D – Chocolate variant and its chemical composition to arrive at the conclusion that the Prohance – D – Chocolate variant will not be specifically covered under Tariff Item No.2106 9091 of the CTA as 'Diabetic Foods'.
62. It is submitted that merely mentioning the other health benefits on the label of the product in question does not exclude it/take it away from the product in question to be considered / treated as a 'diabetic food'. In reality, the other health benefits mentioned on the label are actually for the patients who are suffering from diabetics only.
63. The above submission can be explained better by dealing with each and every consequences/effect which can be caused to a diabetic person:  
Diabetes and coronary heart disease are closely related. Diabetes contributes to high blood pressure and is linked with high cholesterol which significantly increases



the risk of heart attacks and cardiovascular disease. Similar to how diabetes affects the heart, high blood pressure and cholesterol raises the risk of strokes.

64. High blood glucose levels can cause damage to all parts of the cardiovascular system. For this reason, there is a close link between diabetes and cardiovascular problems.
65. Excess blood sugar decreases the elasticity of blood vessels and causes them to narrow, impeding blood flow. This can lead to a reduced supply of blood and oxygen, increasing the risk of high blood pressure and damage to large and small blood vessels.
66. High blood pressure is a risk factor for heart disease. According to the Centers for Disease Control and Prevention (CDC), 74 percent of adults with diabetes have hypertension.
67. Damage to large blood vessels is known as macrovascular disease, while microvascular disease refers to damage to small blood vessels.  
Complications from macrovascular disease include:
  - a. heart attack
  - b. stroke
  - c. peripheral arterial diseaseMicrovascular disease can lead to problems with the:
  - a. Eyes
  - b. Kidneys
  - c. nervous system
68. Diabetes may also result in tiredness. The tiredness is the result of having an imbalance between one's level of blood glucose and the amount or effectiveness of circulating insulin.
69. People with diabetes are more prone to having unhealthy high cholesterol levels, which contributes to cardiovascular disease (CVD). By taking steps to manage



cholesterol, individuals can reduce their chance of cardiovascular disease and premature death.

70. Diabetes tends to lower "good" cholesterol levels and raise triglyceride and "bad" cholesterol levels, which increases the risk for heart disease and stroke. This common condition is called diabetic dyslipidemia. Diabetic dyslipidemia means your lipid profile is going in the wrong direction. It's a deadly combination that puts patients at risk for premature coronary heart disease and atherosclerosis.
71. From the above consequences/effect which can be caused to a diabetic person, it is evident that diabetes can lead to serious health complications including heart disease, blindness, kidney failure, and lower-extremity amputations, high cholesterol, tiredness etc.
72. At this stage, it is relevant to refer and rely on Rule 106 of the Drugs and Cosmetics Rules, 1945 which reads as under:
106. Diseases which a drug may not purport to prevent or cure.-(1) No drug may purport or claim to prevent or cure or may convey to the intending user thereof any idea that it may prevent or cure, one or more of the diseases or ailments specified in Schedule J.
- (2) No drug may purport or claim to procure or assist to procure, or may convey to the intending user thereof any idea that it may procure or assist to procure, miscarriage in women.
73. Further, attention is invited to Schedule – J of the Drug and Cosmetics Rules, 1945 (as mentioned in Rule 106) which lists out certain diseases and ailments which a drug may not purport to prevent or cure or make claims to prevent or cure. Out of all the diseases and ailments, it is submitted that Diabetes is one of the diseases or ailments which alone cannot be cured by drug or medicine and hence the same required to be cured or prevented by taking adequate nutritional supplements. The relevant portion of the Schedule J is extracted as under:

#### SCHEDULE J





[See Rule 106]

DISEASES AND AILMENTS (BY WHATEVER NAME DESCRIBED)  
WHICH A DRUG MAY NOT PURPORT TO PREVENT OR CURE  
OR MAKE CLAIMS TO PREVENT OR CURE

- |                                                         |                                                                                             |
|---------------------------------------------------------|---------------------------------------------------------------------------------------------|
| 1. AIDS                                                 | 30. Improvement in size and shape of the sexual organ and in duration of sexual performance |
| 2. Angina Pectoris                                      |                                                                                             |
| 3. Appendicitis                                         |                                                                                             |
| 4. Arteriosclerosis                                     | 31. Improvement in the strength of the Natural teeth                                        |
| 5. Baldness                                             | 32. Improvement in vision                                                                   |
| 6. Blindness                                            | 33. Jaundice/Hepatitis/Liver disorders                                                      |
| 7. Bronchial Asthma                                     | 34. Leukaemia                                                                               |
| 8. Cancer and Benign Tumour                             | 35. Leucoderma                                                                              |
| 9. Cataracts                                            |                                                                                             |
| 10. Change in colour of the hair and growth of new hair | 36. Maintenance or improvement of the capacity of the human being for sexual pleasure.      |
| 11. Change of foetal sex by drugs                       |                                                                                             |
| 12. Congenital malformations                            | 37. Mental retardation, subnormalities and growth                                           |
| 13. Deafness                                            |                                                                                             |
| 14. Diabetes                                            | 38. Myocardial infarction                                                                   |
| 15. Diseases and disorders of uterus                    | 39. Obesity                                                                                 |
| 16. Epileptic fits and psychiatric disorders            | 40. Paralysis                                                                               |
| 17. Encephalitis                                        | 41. Parkinsonism                                                                            |
| 18. Fairness of the skin                                | 42. Piles and Fistulae                                                                      |
| 19. Form, structure of breast                           | 43. Power to rejuvenate                                                                     |
| 20. Gangrene                                            | 44. Premature ageing                                                                        |
|                                                         | 45. Premature greying of hair                                                               |



- |                                                          |                                                               |
|----------------------------------------------------------|---------------------------------------------------------------|
| 21. Genetic disorders                                    | 46. Rheumatic Heart Diseases                                  |
| 22. Glaucoma                                             | 47. Sexual Impotence, Premature Ejaculation and spermatorrhea |
| 23. Goitre                                               | 48. Spondylitis                                               |
| 24. Hernia                                               | 49. Stammering                                                |
| 25. High/Low Blood Pressure                              | 50. Stones in gall-bladder, kidney, bladder                   |
| 26. Hydrocele                                            | 51. Varicose Vein                                             |
| 27. Insanity                                             |                                                               |
| 28. Increase in brain capacity and improvement of memory |                                                               |
| 29. Improvement in height of children/ adults            |                                                               |

74. In view of the above submissions and Schedule J, it is clear that diabetic person cannot be treated / cured from drug or medicine alone. The diabetic person has to rely and depend on other nutritional food products or health food supplements to get rid or control the diabetes. Thus, it is prudent that any product which is specifically made for diabetic person should also contain the ingredients to cover other health related benefits apart from controlling the sugar spikes of a diabetic person to meet his / her special dietary requirements.

75. The finding of the Ld. AAR is totally incorrect and perverse to say that product in question is marketed to treat or prevent the other health related benefits and hence the same cannot be treated as suitable for people suffering from diabetes alone. In other words, the Ld. AAR is totally incorrect to held that presence of essential ingredients in Prohance-D which can also treat the other health related problems will not be considered as "diabetic food" only, when precisely the benefits as mentioned on the label is very much essential and required for treatment and prevention of other connected health symptoms for patients suffering from diabetes. It is submitted that the diabetic person cannot be forced to buy different products for controlling or preventing various consequences/effect of diabetes. In fact, the product in question is ONE STOP SHOP for a diabetic person.



76. On this count alone, it is submitted that the portion of the Ld. AAR ruling dated 23.1.2019 mentioning of other health benefits on the label of the product will make the product of general use and not exclusive for 'diabetic people' is totally incorrect and perverse. Thus, it is submitted that the portion of the Ruling dated 23.1.2019 passed by Ld. AAR which is against the appellant is incorrect and accordingly shall be set aside.

THE LD. AAR HAS ERRED IN HOLDING THAT THE PROHANCE-D (CHOCOLATE FLAVOUR) DOES NOT CONTAIN HIGH DIETARY SUPPLEMENTS AS REQUIRED IN DIABETIC FOODS.

77. The Ld. AAR in its ruling dated 23.1.2019 has erred in holding that the product in question is not a 'diabetic food' by placing heavy reliance on the information obtained from the "internet".
78. It is submitted that the finding of the Ld. AAR is totally erroneous. This is for the reason that the guidelines under FSSAI Act and regulations prescribes that a product containing at least 6g fiber per 100g is rich in fiber. Therefore, it is submitted that the product in question containing fiber (FOC/insulin/Acacia gum) content of 8.1 g per 100g powder, is no doubt a rich in fiber content as per the Sr No. 14 to the Schedule I of the Food Safety and Standards (Advertising and Claims) Regulations, 2018.
79. On this count alone, it is submitted that the portion of the Ruling dated 23.1.2019 passed by the Ld. AAR to the extent of rejecting the classification of the product in question under Tariff item No. 2106 90 91 as 'Diabetic foods' on the ground that Prohance – D Chocolate variant does not contain high fiber content, should be set aside.
80. It is further submitted that the information and the source of such information which formed the basis to decide the classification of the product in question has not been reproduced nor informed in the ruling. In other words, the appellants were not put to notice of the document or evidence being relied upon against



them. On this ground alone, the appellant submit that the portion of the Ruling dated 23.1.2019 passed by the Ld. AAR which is against the appellant should be set aside.

81. The observation of the Ld. AAR that the product in question should have high fiber content as required in diabetic food, is totally erroneous without any basis and illegal on the face of it. It is submitted that the fact that the product in question has fiber content is not a matter of contention at all in the entire appeal and it is an admitted fact.
82. It is submitted that the placing heavy reliance on the internet for coming to any conclusion is not tenable in law specially when the issue involved is regarding the classification of the goods under GST regime. The reference to Explanatory notes would be made wherever required in relation to the respective products. It is submitted that the Custom Tariff is generally based on the tariff classification adopted by World Customs Organization in its HSN. Hence, wherever a Chapter of Custom Tariff is fully aligned with the corresponding Chapter of HSN, the HSN explanatory notes explaining the scope of headings of that Chapter would have persuasive value in the determination of scope of headings of correspondence Chapter of Customs Tariff. The aforesaid position has been laid down by the Hon'ble Supreme Court in the following decisions:
- (a) Coen Bharat Limited Vs. CCE – 2007 (217) ELT 165 (SC)
  - (b) CCE Vs. Bakelite Hylam Limited – 1997 (91) ELT 13 (SC)
83. Accordingly, the Ld. AAR should have placed reliance on Explanatory notes to HSN in order to understand and ascertain the correct classification of the products in question.
84. On this count alone, it is submitted that the portion of the Ruling dated 23.1.2019 passed by the Ld. AAR to the extent of rejecting the classification of the product in question under Tariff item No. 2106 90 91 as 'Diabetic foods' being an unreasoned order and shall be set aside.



THE LD. AAR ERRED IN CLASSIFYING THE PRODUCT IN QUESTION AS A "COMPOUND PREPARATION FOR MAKING NON-ALCOHOLIC BEVERAGE"

85. The Ld. AAR has erred in holding that the product in question is a "Compound preparation for making non-alcoholic beverages" based on observation that food preparation is meant to be consumed by dissolving the same in water or milk. Based on the observation that the product being a combination of various items could clearly be treated as a 'compound preparation' and the product being in powder form could be consumed by direct mix with water or milk.
86. It is submitted that the above finding is totally incorrect. Having solely been based on the observation that the product being a powder is to be mixed in water or milk and consumed.
87. The term 'Compound preparation' has neither defined under GST provisions nor under the HSN Chapter notes. The Ld. AAR has also failed to provide any detailed reasoning for the classification of the product as a 'compound preparation'. The sole basis for categorizing the product as a 'compound preparation' that Prohance - D is a combination of various items, is totally incorrect.
88. It is submitted that the Ruling dated 23.1.2019 passed by the Ld. AAR to the extent classifying the product in question as a 'Compound preparation for making non-alcoholic beverage' under Tariff Item No. 2106 90 50 instead of 'Diabetic Foods' under Tariff Item No. 2106 90 50, being an unreasoned order and the same should be set aside on this ground alone.

PROHANCE-D – CHOCOLATE VARIANT/FLAVOUR AFTER MIXING WITH WATER DOES NOT RESULT INTO A "BEVERAGE"

89. At this juncture it is pertinent to refer to the meaning of the term 'Beverage'. Under the GST provisions, the term 'beverage' has not been defined. Thus, the meaning of term 'beverage' is to be derived from the dictionary meaning.



90. The term 'Beverage' has been defined in The Random House Dictionary of the English Language as-
- "A drink of any kind, other than water such as tea, coffee, beer, milk, etc."
91. In Encyclopaedia Britannica (Mycropedia), page 1095, 'Beverage' has been described as-
- "Liquid prepared for human consumption including types made by an infusion such as tea and coffee, fruit juices and other juices extracted from plants, such carbonated drinks as ginger ale and root beer, and alcoholic beverages, including wine, made by a fermentation process, and distilled liquor, requiring both fermentation and distillation."
92. It submitted that for determination whether a product is a 'beverage' or 'food', the crucial deciding factor should be the "principal purpose" for which it is intended to be used. If the product is used for the purpose of quenching one's thirst or refreshment purpose, then the same would be classifiable as a 'beverage'. However, if the product has nutritional value assigned to it and the principle function of the product is to provide nutrition, then it shall rightly be qualified as a 'food' product and not as a 'beverage'.
93. It is submitted that the mixing of any food product with water or milk cannot be the criteria to conclude that the resultant product will loses its original identity and become beverage or non-alcoholic beverage. This portion of the submission is supported by the umpteen decisions wherein the judicial forums clearly held that if the product is used for the purpose of quenching one's thirst or refreshment purpose then only the same would be classifiable as a 'beverage'. Further the aforesaid decisions also held that if the product has nutritional value assigned to it and the principle function of the product is to provide nutrition and nourishment, then it shall rightly be qualified as a 'food' product and not as a 'beverage'.
94. It is submitted that merely for the reason that a product can be consumed as a drink after dilution with water, cannot be a basis for classification under Chapter 21 as a preparation for beverage. The said product even if is to be consumed after mixing



in water/milk in the liquid form would still be a food replacement in liquid form and not a beverage.

95. It is submitted that the merely because the recommend used of the product is with "water" after making it into a semiliquid form for consumption, the said product does not loses its original identity and become beverage or non-alcoholic beverage. Hence the classification of the product as a compound preparation for non-alcoholic beverage is erroneous.

96. Further, reference is invited to The Food Safety and Standards (Food Products and Food Additives) Regulations, 2011, wherein under Appendix A to the regulations, a broad list of Non-alcoholic ('Soft') beverages have been categorically stated in Para 14.1. The extract of the said Para is extracted as under:

14.0 Beverages, excluding dairy products

14.1 Non- Alcoholic ("Soft") beverages

14.1.1 Waters

14.1.1.1 Natural mineral waters and source waters

14.1.1.2 Table waters and soda waters

14.1.2 Fruit and vegetable juices

14.1.2.1 Fruit juices

14.1.2.2 Vegetable juices

14.1.2.3 Concentrates of fruit juices

14.1.2.4 Concentrates of vegetable juices

14.1.3 Fruit and vegetable nectars

14.1.3.1 Fruit nectar

14.1.3.2 Vegetable nectar

14.1.3.3 Concentrates of fruit nectar

14.1.3.4 Concentrates of vegetable nectar

14.1.4 Water-based flavoured drinks, including "sport", energy, or "electrolyte" drinks and articulated drinks

14.1.4.1 Carbonated water-based flavoured drinks

14.1.4.2 Non-carbonated water-based flavoured drinks, including punches and ades



14.1.4.3 Concentrates (liquid or solid) for water-based flavoured drinks

14.1.5 Coffee, coffee substitutes, tea, herbal infusions, and other hot cereal and grain beverages, excluding cocoa.

97. It is submitted that the product in question either in the current state (powder form) or in the form after adding the water to it would not fall under any of the category of 'non-alcoholic beverages' listed above.
98. It is submitted that the product in question cannot be consumed for refreshment purpose or recreational purposes, hence the same shall not be classifiable as a 'beverage' at all.
99. It is further submitted that the license for manufacture of the product in question as granted by FSSAI is under the heading 'Food for special dietary use' and not under the heading 'Non-alcoholic Beverage'. Hence the product in the question is a food preparation and not a beverage or a preparation for making of a potential beverage, as per the regulation of FSSAI. Had the intention of FSSAI to categorize the product as similar to product in question under 'Non-alcoholic Beverage', in such case, FSSAI should have clearly mentioned the said product under Para No.14.0 of The Food Safety and Standards (Food Products and Food Additives) Regulations, 2011.
100. It is submitted that the product in question is a nutritional product/food replacement which needs to be consumed in measured quantity. The directions for use on the label of the product too prescribe that it should be consumed as prescribed by the dietician. Hence, the product in question cannot be called a 'beverage' which in its common understanding can be consumed in unrestricted quantities for pleasure. Hence, the classification of the product in question as a compound preparation for non-alcoholic beverage is erroneous.
101. Thus, it is submitted that the product in question is a 'food preparation' rightly classifiable as 'Diabetic foods' under Tariff Item No.2106 90 91 of the CTA. Hence, it is submitted that the Ld. AAR has erred in classifying the product in question as 'Compound preparations for non-alcoholic beverages', in light of the fact that the said product would not form a 'beverage' after mixing with water and would continue to remain as 'food' alone in liquid/semi-solid form.





102. Once it is clear that the product in question is not a 'beverage' at all, then the question of categorizing the product in question as "compound preparation for making of non-alcoholic beverage" will not arise at all.

THE PRODUCT IN QUESTION HAVING BEEN HELD TO BE FOOD CANNOT BE SUBSEQUENTLY BE CLASSIFIED AS 'COMPOUND PREPARATION FOR MAKING A NON-ALCOHOLIC BEVERAGE'

103. At this juncture it is pertinent to note that the Ld. AAR has indeed observed that the product in question is 'food' and has further held that the product is a 'food preparation'. For ease of reference the relevant finding of the Ld. AAR is extracted as under:

*We find that Chapter 2106 of the tariff specially covers 'Food preparation not elsewhere specified or included' and in view of the submissions made by the applicant it is clear that "Prohance-D (Chocolate)" is a food preparation which is meant to be consumed by people by dissolving the same in water or milk. It is thus a "food preparation", squarely covered under Chapter Heading 2106 of the Customs Tariff.*

104. In light of the fact that the Ld. AAR has specifically time and again observed in the ruling that the product in question is a 'food' and 'food preparation'. The finding of the Ld. AAR that the result of the product in question after mixing with water or milk would be a beverage is contradictory. The product in question can either be a 'food' or a 'beverage' and cannot be both. The Ld. AAR having observed that the goods are food cannot contradictorily classify the product in question as a preparation for beverage, since it would amount to blowing hot and cold.

RELEVANT GUIDELINES ISSUED BY FDA SUPPORTS THE APPELLANT'S SUBMISSION.

105. It is submitted that the product in question is admittedly being marketed as a "partial meal replacement/supplement for diabetic patients" containing additional ingredients for the special dietary needs of the diabetic patients. The product in question being "food for diabetic" as per the FSSAI standards and is to be consumed



in specified dosage. It is submitted that the product in question clearly fulfills all the conditions prescribed by the guidance material for classification as a "dietary supplement product" and not a beverage.

106. To support the above submission, reference is invited to the "*Guidance for Industry: Distinguishing Liquid Dietary Supplements from Beverages*" issued by the Food and Drug Administration (FDA) to help dietary supplement and beverage manufacturers and distributors determine whether a "product in liquid form" is properly classified as a 'dietary supplement' or as a 'beverage'. The guidance provides certain basis for distinguishing beverages from liquid dietary supplements, relevant extract of the same are as follows:

Labeling and advertising - a product that bears a Supplement Facts panel may still be a beverage if it also bears statements that the product is intended to "refresh" or "rehydrate" because such statements represent the product for use as a beverage.

Product name - Product or brand names that use conventional food terms such as "beverage," "drink," "water," or "soda" represent the product as a beverage.

Product packaging - Packaging is used to market a product as well as to contain, hold, and preserve the product. Packaging can convey messages about how the product is to be used.

Serving size and recommended daily intake - Even if a product is not expressly represented as an alternative to a beverage, when the practical result of the labeled serving size and/or total recommended daily intake is that the product is used as a beverage or replaces beverages that serve as ordinary sources of drinking fluid, FDA would generally consider the product to be represented for use as a beverage.

Recommendations and directions for use - Dietary supplements are defined as products that, among other requirements, are intended to supplement the diet. [See section 201(ff) (1) of the FD&C Act [21 U.S.C. 321(ff) (1)].) In contrast, beverages generally are intended, for example, to quench thirst or otherwise provide a source of fluids (e.g., water, soda), provide nutritive value (e.g., milk, orange juice), or provide taste and aroma (e.g., hot cocoa). Recommendations or directions to use a product as a thirst quencher can be considered recommendations or directions to use that product as a beverage, replacing other



beverages such as fruit juice, water, or soda, and thus represent the product as a beverage. In contrast, recommendations or directions to use a liquid product to supplement the diet in a manner consistent with other dietary supplements (e.g., by taking one tablespoon three times a day) could be a factor in determining that the product is not represented as a beverage, even if the packaging is similar to packaging used for beverages.

**Marketing practices** - Examples of marketing practices that may represent a product in liquid form as a conventional food include labeling, advertising, or other promotional activities that favorably compare the product to a category of beverages (e.g., sodas), market the product as an accompaniment to a meal, or market the product based on typical beverage criteria like taste, refreshment, and thirst-quenching ability; the use of metatags that result in the product's appearing in the results of an electronic search for sodas, juices, or other beverages; and paying for the product to be displayed in the beverage section of retail stores. However, simply recommending that a liquid product be taken with a meal would not generally be considered to represent the product as a conventional food, as many dietary supplements should be taken with food for best absorption. Moreover, promoting a product as a substitute for a beverage would not always represent the product as a conventional food.

**Composition** - FDA recognizes that there are areas of overlap between the ingredients of some dietary supplements and conventional foods. However, in light of Congress's findings in the Dietary Supplement Health and Education Act of 1994 (DSHEA), which focused on the value of dietary supplements in improving nutrition, promoting long-term health and quality of life, and reducing the risk of chronic diet-related diseases, the agency does not believe that Congress intended the overlap in composition between dietary supplements and conventional foods to be total. Moreover, the dietary supplement provisions of the FD&C Act (added by DSHEA) are premised on the concept of dietary supplements as products that are marketed and consumed for nutrition and health benefits, and specifically authorize supplements to be marketed for those purposes (see section 403(r)(6) of the FD&C Act [21 U.S.C. 343(r)(6)]).

**Other representations about a product** - Other representations about a product include, for example, representations in publicly available documents, such as



statements made in filings with government agencies such as the U.S. Securities and Exchange Commission or the U.S. Patent and Trademark Office.

107. The above guidelines provide that a powdered premix products and liquid concentrates can also be "dietary supplements". The relevant extract of the guidance is extracted as under:

Powdered premix products that are intended to be added to water or other liquids have long been marketed as dietary supplements. If properly labeled as a dietary supplement, a product of this type is unlikely to be confused with beverage mixes or used as a substitute for a beverage mix. Powdered premixes may bear directions recommending that the premix be added to a liquid as a convenient delivery system, for other reasons of convenience or stability (e.g., if the ingredients are not stable in aqueous solutions), or to mask the taste of certain ingredients. We generally do not view such products as beverages when they are labeled as dietary supplements, provided that they are not otherwise represented as being for beverage use or as alternatives to beverages. Likewise, we generally would not view liquid concentrates that are added to water or other liquids as beverages when they are labeled as dietary supplements, provided that they are not otherwise represented for beverage use or as alternatives to beverages. An example of a product represented for beverage use would be chocolate syrup labeled with the statement "Delicious in milk or over ice cream." In addition, a product labeled as a powdered lemonade mix would be considered to be a conventional food because lemonade is a beverage.

108. In view of the above submissions, it is submitted that the product in question is rightly classifiable as 'Diabetic foods' being a "dietary supplement" for diabetic patients and not a "beverage". Thus, it is submitted that once it is clear that the product in question is not a beverage at all, then the question of categorizing the product in question as "compound preparation for making of non-alcoholic beverage" will not arise at all.

IN COMMERCIAL/MARKET PARLANCE TOO THE PRODUCT IN QUESTION IS IDENTIFIABLE AS "DIABETIC FOOD" AND NOT AS A PREMIX FOR A BEVERAGE.



109. In the alternative, it is submitted that the product in commercial/market parlance is identified as a food for diabetic patients and not as a beverage. Further the same is also highlighted by the packaging label of the product which reads as 'FOOD FOR SPECIAL DIETARY USE' and 'Food for people with Diabetes'.
110. In common parlance if a customer were to ask the shopkeeper for a premix for a beverage, the shopkeeper would not give the customer the product in question. However, the customer if approaches the shopkeeper to buy food products for a diabetic patient, then only would the shopkeeper provide the customer with the product in question.
111. Further it is also submitted that the term 'diabetic food' shall construe to mean diabetic foods in all its forms as there is no restrictive meaning attached to the term. Further in common parlance any food engineered to suit the needs of a diabetic person is referred to as a diabetic food. Through various judicial pronouncements of the Hon'ble Supreme Court in the past it has been established that "in all its forms" shall have an impliedly wide meaning, placing reliance on the case of Indian Carbon Ltd. vs. Supdt. Of Taxes reported at AIR 1972 SC 154 the court read down Section 14(i) of the Central Sales Tax Act, 1956 and held that coke in all its forms shall include petroleum coke as well. Further in the case of Mineral Sales Corpn. v. C.S.T. reported at [46 STC 208(All)] the Hon'ble court observed that the phrase "in all forms" has a wider connotation than the phrase "of all kinds" and shall imply all the various forms in which a thing manifests itself.
112. Accordingly, it is submitted that the product in question is rightly classifiable under Tariff Item No. 2106 9091 as 'Diabetic foods' and not under Tariff Item No. 2106 9050 as 'Compound preparation for non-alcoholic beverage'.

SPECIFIC ENTRY REGARDING SPECIFIC ITEM TO BE PREFERRED TO A GENERAL ENTRY – "PROHANCE -D" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 90 91 OF THE CUSTOMS TARIFF ACT, 1975



113. In the alternative, the Tariff Item No. 2106 90 50 and 2106 90 91 are competing entries, hence reliance shall have to be placed on the General Rules of Interpretation to determine the appropriate classification of the product.

114. As stated above, Rule 3(a) of the General Rules of Interpretation states that a specific heading must be preferred over a general heading.

115. The same principles was laid down in the case of Shanti Surgical Pvt. Ltd. v. Commissioner of C. Ex. Kanpur 2017 (6) G.S.T.L. 164 (Tri. – All.) which states as under:

*"In my opinion the basics of the classification are that initially an attempt should be made to search a specific entry where the goods can be classified as per the nomenclature and the constituent material. In case no specific entry is available the next attempt should be to find the nearest entry where the goods can be classified. In case both the attempts turn to be futile then the attempt should be made to consider the end uses, the inclusion and exclusion clauses provided in the section notes, the chapter notes and the explanatory notes given the HSN. While doing so the interpretation of the said Note will depend upon the context in which the entries have been worded. If an entry is clearly worded and is broad in character, the same would lead to the conclusion. An entry is to be given its ordinary meaning. If any goods fit in within one entry, the same for any purpose would not be held to be included in the other and in particular the residuary."*

116. The same position was re-iterated in the case of Rajdhani Seeds Corporation v. Commr. Of Cus. Nava Sheva 2006 (198) E.L.T. 449 (Tri. – Del.) in which the six-digit specific entry was preferred over general entry for the classification of "cloves".

117. In order to determine the specific entry between Tariff Item No. 21.06 9050 and Tariff Item No. 21.06 9091, it is pertinent to refer to the HSN Explanatory notes.

118. As discussed above, the relevant extract of the HSN explanatory note to Chapter Heading 21.06 is extracted as under:

The heading includes, inter alia:



(7) *Non-alcoholic or alcoholic preparations (not based on odiferous substances) of a kind used in the manufacture of various non-alcoholic or alcoholic beverages. These preparations can be obtained by compound vegetable extracts of heading 13.02 with lactic acid, tartaric acid, citric acid, phosphoric acid, preserving agents, foaming agents, fruit juices, etc. The preparations containing (in whole or in part) the flavoring ingredients which characterized a particular beverage. As a result, the beverage in question can usually be obtained simply by diluting the preparation with water, wine or alcohol, with or without the addition, for example, of sugar or carbon dioxide gas. Some of these products are specially prepared for domestic use; they are also widely used in industry in order to avoid the unnecessary transport of large quantity of water, alcohol, etc. As presented, these preparations are not intended for consumption as beverages and thus can be distinguished from the beverages of Chapter 22.*"

119. In the case of Commissioner of C.Ex., Mysore v. Anurag Foods & Appliances Ltd, reported at 2009 (234) E.L.T. 641 (Tri. – Chennai) it was held that Residuary entry is to be preferred only after it is exhaustively shown that the product was not covered in any specific heading.
120. Tariff Item No. 2106 9091 of the CTA specifically covers "Diabetic Foods". Thus, "Diabetic Foods" falls under the first interpretation of Chapter Heading 2106 and Tariff Item No. 2106 9091 is deemed to be the "specific entry" for the classification of "Diabetic Foods".
121. In light of the same, it is pertinent to peruse that Tariff Item No. 2106 9091 of the CTA is more specific than Tariff Item No. 2106 9050 which is general in nature.
122. Further the Ld. AAR has also admittedly observed that the product in question contained extra ingredients which along with the other regular ingredients may assist diabetics in replacing a part of the meal.



123. It has also been established that Tariff Item No.2106 9091 is the "specific entry" for classification of "Diabetic Foods", it is pertinent to analyze whether "Diabetic Foods in powder form" shall also remain to be classifiable under the said Heading.

124. It has already been established in the case of Indian Carbon Limited v. S. Taxes reported at AIR 1972 SC 154 that a "goods in all its forms" are classifiable under the Chapter Heading under which the principal good is classifiable. In the present matter, "Diabetic Foods" is classifiable under Tariff Item No.2106 9091 of the CTA. Applying the principal in the said judgment to the present facts, it can be concluded that "Diabetic Foods" in all forms shall be classifiable under Tariff Item no. 2106 9091 of CTA.

125. Thus, even if there existed two competing entries for the classification of the product:

- (i) Tariff Item No. 2106 9050 of the CTA which is a "general entry" for Compound preparations for making non-alcoholic beverages.
- (ii) Tariff Item no. 2106 9091 of the CTA which a "specific entry" for "Diabetic Foods" in all forms.

126. As per Rule 3(a) of the General Rules of Interpretation, the heading which provides the most specific description and provides for the essential characteristic of the product shall be preferred to headings providing a more general description.

127. In light of the same, it is humbly submitted that Tariff Item no. 2106 9091 provides the most specific description for the product and thus, is classifiable under the said heading.

SPECIFIC HEADING SHOULD BE PREFERRED AND IF THERE ARE TWO SPECIFIC HEADINGS, TO WHICH A PRODUCT CAN BE REFERRED, THE ONE OCCURRING SUBSEQUENTLY WILL PREVAIL – "PROHANCE – D (CHOCOLATE)" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 9091 OF THE CTA.





128. In the alternative, if both of the entries under consideration are found to be "specific in nature", the classification of the product shall be subject to Rule 3(b) and Rule 3(c) of the General Rules of Interpretation which states as under:

**RULE 3**

*When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:*

*(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.*

*(a) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(2), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.*

*(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.*

*(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.*

129. Rule 3(b) of the General Rules of Interpretation is applicable to mixture and composite goods. Thus, the same cannot be used to determine the classification of the product.



130. Rule 3(c) on the other hand states that when classification cannot be determined by applying Rule 3(a) & 3(b) of the General Rules of Interpretation, then the product under question shall be classifiable under the heading which occurs last in numerical order among those which equally merit consideration.

131. The same principal was upheld in the case of Union of India v. Pesticides MFG. & Formulators Association of India reported at 2002 (146) E.L.T. 19 (S.C.).

132. Applying the said principal in the present matter, the latter of the competing headings is Tariff Item No.21.06 9091 should be applied in the present case.

133. In view of the same, it is humbly submitted that the product is classifiable under Tariff Item No.2106 9091 of CTA.

WHEN THERE ARE TWO COMPETING ENTRIES, THE HEADING BENEFICIAL TO THE ASSESSEE IS TO BE ADOPTED – "PROHANCE – D (CHOCOLATE)" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 9091 OF CTA

134. In furtherance to the above stated arguments, cognizance must be placed on the landmark judgment in the case of Commissioner of Central Excise vs. Minwool Rock Fibres Ltd. reported at 2012 [278] ELT 581 (S.C.). In the said case, the court held as under:

*"We have already noticed the relevant entries to which we are concerned with in this appeal. No doubt there is a specific entry which speaks of Slagwool and Rockwool under Sub-heading No. 6803.00, but there is yet another entry which is consciously introduced by the Legislature under sub-heading No. 6807.10, which speaks of goods in which Rockwool, Slagwool and products thereof are manufactured by use of more than 25% by weight of blast furnace slag. It is not in dispute that the goods in question are those goods in which more than 25% by weight of one or more of red mud, press mud or blast furnace slag is used. If that be the case, then, in a classification dispute, an entry which is beneficial to the assessee requires to be applied and the same has been done by the adjudicating authority, which has been confirmed by the Tribunal.*



135. In the said case, both the competing entries dealt with the same product i.e. "Slagwool" but with certain different specification. The latter of the two entries was specifically introduced on a later date with a lower rate of duty payable on the same. In analysing the appropriate classification of the slagwool in question, the Tribunal was of the view that in such type of disputes about competing entries, an entry which is beneficial to the assessee requires to be applied.
136. In the present matter, the two entries under consideration is Tariff Item No. 2106 9050 which covers "Compound preparation for making non-alcoholic beverages" and Tariff Item no. 2106 9091 which covers "Diabetic Food". The product being a preparation for diabetic patient which is dissolved in water before consumption, can be contended to satisfies both the entries.
137. It is pertinent to note that although the essential characteristic of the product is "Diabetic Food" and the product being sold in powder form which can be consumed with water for better swallowability cannot be ignored, thus making Tariff Item No. 2106 9050 and Tariff Item no. 2106 9091 competing entries.
138. In such a scenario, reliance can be placed on the judgment in the case of Minwool Rock Fibres Ltd (supra). As per Notification 1/2017 – C.T. (Rate) dated 28.06.2017, as amended from time to time, "Diabetic Food" covered under Tariff Item no. 2106 9091 attracts GST at the rate of 12% and "Compound preparation for making non-alcoholic beverages" covered under Tariff Item No. 2106 9050 attracts GST at the rate of 18%.

| Sch. | Sl. No. | Chapter Heading/ Sub-Heading | Description of Goods                                                                                | Rate of Tax (CGST) |
|------|---------|------------------------------|-----------------------------------------------------------------------------------------------------|--------------------|
| II   | 46A     | 2106 90 91                   | Diabetic foods                                                                                      | 6%                 |
| III  | 23      | 2106                         | Food preparations not elsewhere specified or included [other than roasted gram, sweetmeats, batters | 9%                 |



|  |  |  |                                                                                                                                                                        |  |
|--|--|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
|  |  |  | including idli/dosa batter, namkeens, bhujia, mixture, chabena and similar edible preparations in ready for consumption form, khakhra, chutney powder, diabetic foods] |  |
|--|--|--|------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|

139. It is further noted that the specific entry with respect to "Diabetic Food" was introduced in CTA in the year of 2005 in Central Excise Tariff Act, 1975 & 2003 in the Customs Tariff Act, 1975 and the preferential lower rate of GST was attributed to the same in November 2017.

140. Applying the principle laid down in the above stated judgment, when there are two competing entries, and there is a classification dispute, the entry which is beneficial to the assessee is required to be applied, which in this case is Tariff Item no. 2106 9091.

141. In light of the same, it is humbly submitted that the product is classifiable under Tariff Item no. 2106 9091 of the CTA.

THE HEADING APPROPRIATE TO THE GOODS TO WHICH THEY ARE MOST AKIN IS TO BE ADOPTED – "PROHANCE – D (CHOCOLATE)" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 9091 OF CTA

142. In the alternative, if the classification is not possible by any of the preceding General rules of interpretation, namely 1, 2 & 3, the classification of the product shall be subject to Rule 4 of the General Rules of Interpretation which states as under:

*Rule 4*

*Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.*



143. The same principles was laid down in the case of Collector of Central Excise, Bombay, v. K.W.H. Heloplastics Ltd reported in 1998 (97) E.L.T. 385 (S.C.) which states as under:

*"7. .... Under such circumstances, it would have been more appropriate for the Tribunal to have applied Rules of Interpretation of the Excise Tariff, Rule 4 whereof provides that the goods which cannot be classified in accordance with Rules 1, 2 and 3 of the Rules, they shall be classified under heading appropriate to the goods to which they are most akin.*

*8. Apparently, Rules 1, 2 and 3 are not applicable for resolving the dispute and, as such, what was required to be done by the Tribunal in the present case was, to find out the relationship of goods manufactured by the respondents with the description of goods under disputed headings of the classification list, as contended by the parties. The relationship of goods with particular heading depends upon the description, purpose and use of the goods. Note 11(a) of Chapter 39 of the Act, provides that Heading 39.25 applies also to reservoir, tanks, including septic tank, vats and similar containers. The purpose and use of these goods is to hold liquids or something in liquid form in process of manufacture as in tanning and dyeing etc., and thus can be used and are capable of being used for water storage in connection with raising of construction or mixing construction materials. It is not disputed that the goods manufactured by the respondent are tanks and vats. The description and usage of tanks and vats manufactured by the respondent tallies with the description of goods given in Note 11(a) of Chapter 39 of the Act. We, therefore, find relationship between the goods manufactured by the respondent with the Heading 39.25. Once it is established that the description of the goods manufactured by the respondent are akin to description of goods given under Heading 39.25 and sub-heading 3925.10, there is no difficulty in holding that the tanks and vats manufactured by the respondent would fall under Heading 39.25 of the Tariff. We accordingly hold that tanks and vats manufactured by the respondent are classifiable as "builders ware of plastics" and the view taken by the Tribunal that the classification of goods, i.e., tanks and vats would be appropriate under sub-heading 3926.90 of the classification list, and are exempt from excise duty, is erroneous."*



144. It being an admitted fact that the product in dispute is meant primarily for diabetic persons as a partial meal replacement. Further the Ld AAR also having acknowledged the fact that the product is meant for diabetics as a partial meal replacement. The product in question is most akin to 'diabetic food' in terms of the usage.

145. The product in question being not bought and sold as a premix for a beverage to be consumable by the public at large is in no way synonymous or akin to a compound preparation for making non-alcoholic beverages.

146. In light of the above submission, applying the principles of Rule 4 of the general rules of interpretation, it is humbly submitted that the product is classifiable under Tariff Item no. 2106 9091 of the CTA.

THE SUB-HEADING CAN BE COMPARED AT THE SAME LEVEL FOR CLASSIFICATION OF GOODS – "PROHANCE – D (CHOCOLATE)" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 9091 OF CTA

147. In the alternative, the Tariff Item No. 2106 90 50 and Tariff Item No. 2106 90 91 are parts of different sub-headings. The Heading "Compound preparation for making non-alcoholic beverages" figures under three dash "---" at 2106 90 50, whereas "Diabetic Food" figures under four dash "----" at 2106 9091 as a sub-classification under 'other' figure under three dash "---" with both 'other' and Compound preparation for making non-alcoholic beverages being sub classified under "Other" figuring under single dash "-" at 2106 90.

148. Reference in this regard is invited to the Rule 6 of the general rule of interpretation which states that the sub-headings can be compared at the same level. For ease of reference the rule is extracted as under:

*Rule 6*

*For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding*



that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

149. The Ld. AAR erred in comparing the entry under different sub-headings namely "Compound preparations for making non-alcoholic beverages" figuring under three dash "---" and "Diabetic Food" figuring under four dash "----", without concluding whether the product would fall under 'other' figuring under three dash "---" or 'Compound preparation for making non-alcoholic beverage'.
150. The product in question not answering the description under Tariff Item No. 2106 9050 as "Compound preparation for making non-alcoholic beverages", should rightly be classified as 'other' as 'Diabetic foods' under Tariff Item No. 2106 9091.

THE RULING SHALL ONLY BE APPLICABLE TO THE PRODUCT PROHANCE-D (CHOCOLATE FLAVOUR).

151. Without prejudice to the above submissions, it is submitted that the ruling dated 23.01.2019 is only for the product Prohance-D (Chocolate Flavour). The said submission being supported by the Ld. AAR's observation in the 2nd para of page 20 of the ruling, which is extracted as under:

*They are classifying the vanilla variant of their product as diabetic food and their query is regarding classification only in respect of the chocolate variant of their product where chocolate flavor is used in order to make the said product appealing to the end consumer, without altering the diabetic nature of the same.*

152. It is accordingly submitted that the classification of the vanilla variant of the product in question was never a point of dispute. Hence the ruling dated 23.01.2019 shall be only applicable to the product in question and not the vanilla variant supplied by the appellant.



THE LD. AAR HAS FAILED TO PERUSE THE DECLARATION ON THE LABEL OF PROHANCE-D (CHOCOLATE FLAVOR) THAT IT IS "FOOD FOR PEOPLE WITH DIABETES".

153. It is further submitted that the appellant is already supplying another food product for general dietary supplement namely 'Prohance'. Hence if 'Prohance – D' was meant to be a general dietary supplement, there would have been no need for the appellant to retail an entirely different product. It is reiterated that the 'Prohance – D' is manufactured taking into consideration specific needs for diabetes.
154. Further, the Ld. AAR has failed to peruse that the label of the product in question too highlights the fact that the product is "Food for special dietary use" and "Food for people with diabetes." Further the said declaration also being supported by the FSSAI license, the Ld. AAR should have on this count alone classified the product in question as a 'Diabetic food' classifiable under Tariff Item No. 2106 90 91.
155. In view of the above, the impugned Advance Ruling dated 23.01.2019 is liable to be modified to the extent it proposes to classify the product under Tariff Item No. 2106 90 50 and dismisses the rightful classification under Tariff Item No. 2106 90 91.

PRAYER

156. In view of the foregoing, it was prayed as under: -
- Modify the portion of impugned Advance ruling No. GST-AAR-88/2018-19/B-10 dated 23.01.2019 which is against the appellant and allow the appeal, with consequential reliefs to the Appellant;
  - Declare that the product 'Prohance-D' as a "Diabetic food" is classifiable under Tariff Item No. 2106 90 91 if the CTA and liable to GST @12%; and
  - Pass such other order or orders as may be deemed fit and proper in the facts and circumstances of the case.

Personal Hearing





157. A personal Hearing in the matter was conducted on 14.10.2019, which was attended by Shri R. Nambirajan, on behalf of the Appellant, wherein he reiterated the written submissions, and relied upon various legal provisions in support of the contentions, put forth by the Appellant. The Department was represented by Ms. Manjiri Phansalkar, the Jurisdictional Officer in the instant matter, wherein she maintained the earlier stance taken by the Department before the Advance Ruling Authority.

#### Discussions and Findings

158. We have gone through the facts of the case, documents on record and submission made by both the appellant as well as jurisdictional officer. The appellant is engaged in the production and making of nutritional powder for special dietary use called Prohance-D. The appellant is dealing with two variants of Prohance-D - namely Prohance-D - Vanilla flavor and Prohance-D Chocolate flavor. The issue in the present case is regarding the determination of the correct classification and applicable rate of GST on Prohance-D Chocolate variant. The appellant has stated that Prohance-D is a nutritional powder -special dietary use for people with Diabetics. The said product is sold in powder form and is required to be mixed with drinking water and used as partial meal replacement/breakfast replacement/evening snack/healthy bedtime snack or as directed by Physician/Dietician for diabetics. Though the appellant proposes to manufacture two variants of the product, the application is filed with AAR to issue a ruling on the classification of the Chocolate variant.

159. Notification No.1/2017-Central Tax (Rate) dated 30.06.2017 provides for applicable rate of GST on the supply of goods. Sr. No.46A of Schedule-II to Notification No.1/2017- Central Tax (Rate) dated 30.06.2017 reads as under: -

| Schedule | Sl. No. | Chapter Heading/Sub-Heading | Description of goods | Rate of tax (CGST) |
|----------|---------|-----------------------------|----------------------|--------------------|
| II       | 46A     | 21069091                    | Diabetic foods       | 6%                 |

The issue before the AAR was whether the subject product is a 'diabetic food' or not and if not, whether it can be considered as product of cocoa or a compound preparation for making nonalcoholic beverages. The AAR agreed with the contention of the appellant that it is a 'food' as it is an edible substance consisting of nourishing and nutritive



components such as carbohydrates, fats, proteins, essential mineral and vitamins and can be ingested and digested and provides nutrients to the human body. However, though the AAR held that the product is a 'food', it held that it is not a diabetic food. Though they agreed with the contention of the appellant that it will not be classifiable under Chapter 18-19 of the Tariff as 'Cocoa and Cocoa preparation, they instead classified the product under Chapter heading 2106 of the CT under 'food preparations not elsewhere specified or included' under the specific heading 21069050 having description 'Compound preparation for making non-alcoholic beverages'. The AAR denied classification of the product as a 'diabetic food' on the grounds that it is advertised as to provide energy, immune health, heart health, vitamins and minerals and has various other health benefits and therefore to treat the same as 'diabetic foods' will not be proper. It also held that, as per information available on the inter-net diabetic food, 'diabetic food' means something which should contain high amount of dietary fiber and some slow digestion agents and as the impugned product does not have any extra fiber, it has no substance which helps in slowing down of food. Thirdly, it has reasoned that Prohance-D Chocolate variant is only different from the parent product in that it contains some extra ingredients like Isomaltulose, Gum Arabic, Inulins, Myo-inositol, Sucralose, Fructose.

160. The appellant has given the composition of the impugned product vis-a-vis the composition of 'Prohance' which is marketed as a normal food supplement and not as a 'diabetic food'.

| PROHANCE INGREDIENTS                                   | PROHANCE-D INGREDIENTS                                 |
|--------------------------------------------------------|--------------------------------------------------------|
| MALTODEXTRIN                                           | MALTODEXTRIN                                           |
| SUNFLOWER SEED OIL (HIGH OLEIC ACID)                   | SUNFLOWER SEED OIL (HIGH OLEIC ACID)                   |
| CALCIUM CASEINATE                                      | CALCIUM CASEINATE                                      |
| WHEY PROTEIN ISOLATE                                   | WHEY PROTEIN ISOLATE                                   |
| SOY PROTEIN ISOLATE                                    | SOY PROTEIN ISOLATE                                    |
| RAPESEED OIL (LOW ERUCIC ACID FRUCTO-OLIGOSACCHARIDES) | RAPESEED OIL (LOW ERUCIC ACID FRUCTO-OLIGOSACCHARIDES) |
| COCOA POWDER 3%                                        | COCOA POWDER 3%                                        |
| MINERALS                                               | MINERALS                                               |
| SUNFLOWER SEED OIL                                     | SUNFLOWER SEED OIL                                     |
| ANTIOXIDANTS (SOYA LECITHIN, L-                        | ANTIOXIDANTS (SOYA LECITHIN, L-ASCORBIC ACID,          |



|                                 |                                 |
|---------------------------------|---------------------------------|
| ASCORBIC ACID, TBHQ]            | TBHQ]                           |
| CHOLINE BITARTRATE              | CHOLINE BITARTRATE              |
| VITAMINS                        | VITAMINS                        |
| TAURINE                         | TAURINE                         |
| L-CARNITINE                     | L-CARNITINE                     |
| ACIDITY REGULATOR (CITRIC ACID) | ACIDITY REGULATOR (CITRIC ACID) |
| SUGAR                           | ISOMALTULOSE                    |
|                                 | GUM ARABIC                      |
|                                 | INULIN                          |
|                                 | MYO-INOSITOL                    |
|                                 | SUCRALOSE                       |
|                                 | Fructose                        |

161. It is seen from the above table that Prohance-D Chocolate contains some extra special ingredients which differentiate from the normal Prohance. All the ingredients in it especially Isomaltulose, Gum Arabic, Inulins, Myo-Innositol, Sucralose, Fructose are sugar replacements or sugar substitute. Gum Arabic is used as a 'soluble dietary fiber'. The fact that these products are used in the Prohance-D shows that it is specially meant for people suffering from diabetes and is also marketed as meal replacement for diabetics.

162. As per the definition of 'Diabetic food' in the 'Dictionary of Food and Nutrition' by David Bander, it covers foods that has specially formulated for people suffering from diabetics. In the present case, the impugned product though generally contributes to the well being of patient is specially formulated for diabetic patients as is evident from the fact that it contains certain sugar replacements which are not found in the normal Prohance. It is therefore specially directed for diabetics. In such a scenario, whether a normal person not suffering from Diabetes would opt for the Prohance-D variant as a meal replacement? The answer is no. Such a person would opt for Prohance and not for Prohance-D as it can be normally expected that only a diabetic patient would go for the Prohance-D variant. This makes it very clear that that the product is formulated for diabetic patients, is



targeted at that particular segment and therefore, can be termed as a 'diabetic food'.

163. Let us have a look at the explanatory notes given in the HSN. Under the Heading 2106, the following is given: -

"The heading includes

(1) to (8) ...

(9) Sweets, gums and the like (for diabetics in particular) containing synthetic sweetening agents (e.g. Sorbitol) instead of sugar."

This heading 2106 does cover food intended for diabetic patients. It is true that the heading 2106 also covers 'Compound preparation for making nonalcoholic beverages' under which heading is the product classified by the AAR. Heading 2106 covers both the descriptions and the Explanatory Notes to the HSN do not make it clear as to which product category the explanatory note given above applies. It is only under Customs Tariff Act that the category for 'diabetic foods' is carved out under the Heading 2106. But the very fact that the explanatory note explains what a diabetic food gives an indication as to what is intended to be covered by it. The intention is that foods which contains sugar replacement or sugar substitutes are meant to be covered by heading 2106 and such food may be products like sweets and gums also. In the instant case, the impugned product also contains sugar substitutes and therefore it will be covered by the term 'diabetic food'.

164. The AAR has also observed that the product is not a diabetic food because it does not contain high amount of dietary fiber and although the fact that it contains Gum Arabic, Gum Arabic is not a great source of dietary fiber. However, the AAR has not given any references in support of the statement that 'Diabetic Foods' have to contain dietary fibre. Also, it is felt that such a qualification would not be required to classify a product as diabetic food. As the HSN also considers food containing sugar replacements as diabetic food, the above product would also classify in it.

In view of the above deliberation, we proceed to pass the following order.

#### ORDER

(Under Section 101(1) of the CGST Act, 2017 and MGST Act, 2017)



For reasons discussed in the body of the Order, the Order of the AAR classifying the product Prohance-D (Chocolate) under heading 21069050 is hereby set aside. The product would instead classify as a diabetic food covered under chapter heading 21069091.

  
(Rajiv Valota)  
Member



  
(Sungita Sharma)  
Member

- Copy to-
1. The Appellant
  2. The AAR, Maharashtra
  3. The Pr. Chief Commissioner, CGST and C. Ex., Mumbai
  4. The Commissioner of State Tax, Maharashtra
  5. The Jurisdictional Officer
  7. The Web Manager, [WWW.GSTCOUNCIL.GOV.IN](http://WWW.GSTCOUNCIL.GOV.IN)
  8. Office copy.