



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On	02.07.2024
Pronounced On	24.10.2024

Coram:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

**W.P.(MD) Nos.12689, 10565, 12626, 12724, 12813, 12835,
13023 & 15533 of 2020, 5414 & 204 of 2021
and W.M.P.(MD)Nos.10791, 9327, 10760, 10813, 10874, 10887, 10971,
13044 of 2020, 4321 & 165 of 2021**

W.P.(MD) No.12689 of 2020:

M/s.Haji K.P.M.Abdul Kareem,
Kuruvi Mark Special Tobacco,
Represented by its Proprietor,
Mr.K.P.M.Abdulkareem,
Pallivasal Street, Parambur,
Pudukottai – 622 104.

...Petitioner

Versus

Assistant Commissioner,
Office of the Assistant Commissioner of GST &
Central Excise,
Pon Nagar, Medical College Road,
Thanjavur – 613 007.

...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari calling for the records on the file of the respondent in GSTI No.33ADZPA2284JIZA and quash the impugned order in Original No.5/2020-GST dated 31.03.2020 passed by the respondent as illegal and without jurisdiction.



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For Petitioner in
W.P.(MD)Nos.12689, 10565,
12626, 12724, 12813, 12835,
13023, 15533 of 2020
& 5414 of 2021 : Mr.R.Sivaraman

For Petitioner in
W.P.(MD)No.204 of 2021 : Mr.Joseph Prabakar

For Respondent in
W.P.(MD)Nos.12689, 10565,
12626, 12724, 12813, 12835,
13023, 15533 of 2020
& 5414 of 2021 : Mr.N.Dilip Kumar,
Senior Standing Counsel

For Respondent in
W.P.(MD)No.204 of 2021 : Mr.R.Nandakumar,
Senior Standing Counsel
Assisted by
M/s.Ragaventhree,
Standing Counsel

COMMON ORDER

The petitioners in W.P.(MD)Nos.10565, 12626, 12689, 12724, 12835 and 15533 of 2020 and 5414 of 2021 have challenged the Orders-in-Originals, dated 31.03.2020. The petitioners in W.P.(MD)No.13023 of 2020 and W.P.(MD)No.12813 of 2021 have challenged the Orders-in-Originals, dated 30.03.2020 and 30.04.2020, respectively.



2. The dispute in these cases arise primarily relate to the classification of “chewing tobacco” marketed by the respective petitioners.

The respective petitioners have challenged the following Orders-in-Originals:-

Table-1

W.P.(MD)Nos.	Date	Order-in-Original No.	Period	Amount
10565 of 2020	31.03.2020	01/2020-GST	July 2017-March 2019	Rs.1,05,60,362/-
12626 of 2020	31.03.2020	03/2020-GST	-do-	Rs.9,35,616 /-
12689 of 2020	31.03.2020	05/2020-GST	-do-	Rs.2,56,642/-
12724 of 2020	31.03.2020	06/2020-GST	-do-	Rs.5,61,498 /-
12835 of 2020	31.03.2020	02/2020-GST	-do-	Rs. 36,04,199/-
15533 of 2020	31.03.2020	04/2020-GST	-do-	Rs.79,19,845 /-
5414 of 2021	31.03.2020	08/2020-GST	-do-	Rs.1,94,730/-
13023 of 2020	30.03.2020	1/2020-GST	-do-	Rs.2,90,61,088/-
12813 of 2021	30.04.2020	02/2020-GST	-do-	Rs.5,52,90,163/-

3. By these Orders, Demand and Levy of Compensation Cess under **Notification No.1/2017 – Compensation Cess (Rate), dated 28.06.2017** issued under Sub-Section (2) to Section 8 of the Goods and Service Tax (Compensation to States) Act, 2017 has been confirmed.



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4. In W.P.(MD)No.204 of 2021, Shri.Arumugam, Proprietor of M/s.Kavi Cut Tobacco, Thanjavur, the petitioner is before this Court wherein he has challenged the Order dated 29.09.2020 passed by the Appellate Authority for Advance Ruling.

5. By the aforesaid Order dated 29.09.2020, the Appellate Authority for Advance Ruling has upheld Order dated 20.04.2020 of the Authority for Advance Ruling.

6. Earlier, by an Order dated 20.04.2020, the Authority for Advance Ruling had held that the product dealt by the petitioner in W.P.(MD)No.204 of 2021 [Shri.Arumugam, Proprietor of M/s.Kavi Cut Tobacco, Thanjavur] fell under the heading **2403 99 10** of **Customs Tariff Act,1975** and was thus liable to rate of Goods and Services tax Compensation Cess at 160% under Notification No.1/2017-Compensation Cess (Rate), dated 28.06.2017.

7. Aggrieved by the Order dated 20.04.2020 issued under Section 98 of the respective GST enactments (Order No.16/AAR/2020), the said



petitioner filed an appeal before the Appellate Authority for Advance

Ruling under Section 101(1) of the TNGST Act, 2017.

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8. The Appellate Authority, however, affirmed the Original decision through the impugned order dated 29.09.2020 in Appeal No.AAAR/03/2020(AR), leading the petitioner to approach this Court.

9. The petitioner in W.P.(MD) No.204 of 2021 would submit that the product dealt by the petitioners is an unmanufactured product classifiable under Heading **2401 20 90** of the Customs Tariff Act, 1975 as made applicable for the purpose of levy of GST as also Compensation Cess under Notification No.1/2017-Compensation Cess (Rate), dated 28.06.2017 issued under the Goods and Service Tax (Compensation to States) Act, 2017.

10. Conflicting entries in the Schedule to the above said Notification are as under:-



Table-2

Sl. No.	Chapter / Heading / Sub-heading/ Tariff Item	Description of Goods	Rate of goods and services tax compensation cess
5.	2401	Unmanufactured tobacco (without lime tube) – bearing a brand name	71%
26.	2403 99 10	Chewing tobacco (without lime tube)	160%

11. The case of the petitioner in W.P.(MD)No.204 of 2021 appears to be that the Department is demanding higher compensation cess leviable under the Goods and Service Tax (Compensation to States) Act, 2017 at 160% at Serial No.26 to Notification No.1/2017 - Compensation Cess (Rate), dated 28.06.2017, whereas, according to the petitioner the correct Compensation Cess to be paid by the respective petitioners is 71% at Serial No.5 for the products falling under the heading "2401".

12. On the other hand, rest of the petitioners, who have challenged the respective Order-in-Originals would submit that the product dealt by these petitioners are “manufactured products” and are however liable to be classified under Heading **2403 99 90** of the Customs Tariff Act, 1975. The Department on the other hand had classified the product under **2403 99 10** of the Customs Tariff Act, 1975.



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13. Mr.R.Sivaraman, the learned counsel for the petitioners in W.P. (MD) Nos.12689, 10565, 12626, 12724, 12813, 12835, 13023 & 15533 of 2020 and 5414 of 2021 who have challenged respective Order-in-Originals, submitted that these petitioners had adopted classification of the product under the Heading "**2403 99 90**", whereas, the Department has wrongly classified the product under the Heading "**2403 99 10**" in view of the harassment in the hands of the officer enforcing the provisions of the Food Safety & Standards Act, 2006.

14. It is the common submissions of the learned counsels for these petitioners that certain tobacco products came to be banned by the Government of Tamil Nadu under the provisions of the Food Safety and Standards Act, 2006.

15. It is submitted that from 2013 onwards, such manufactured tobacco products have been banned in the State of Tamil Nadu and the said Notification was renewed from time to time.



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16. It is submitted that during the period in dispute, Notification dated 23.05.2017 was issued by the Government of Tamil Nadu which was gazetted in Tamil Nadu Government Gazette No.146. It is submitted that the Government of Tamil Nadu banned the manufacture, storage, transport, distribution and/or sale of Gutkha, Panmasala, **Chewing Tobacco** and other food products containing tobacco or nicotine as ingredient, by whatsoever name which was available in the market in the whole State of Tamil Nadu.

17. It is submitted that though the said Notification dated 23.05.2017 of Government of Tamil Nadu do not apply for these petitioners, they were forced to alter their process and classification to avoid harrasment. The text of the said Notification reads as under:-

"THE COMMISSIONER OF FOOD SAFETY AND DRUG ADMINISTRATION, TAMIL NADU.

BAN OF MANUFACTURE, STORAGE, SALE OR DISTRIBUTION OF PANMASALA, GUTKHA CONTAINING TOBACCO AND NICOTINE AS INGREDIENTS IN THE STATE OF TAMIL NADU FOR FURTHER PERIOD OF ONE YEAR FROM 23RD MAY 2017 UNDER THE FOOD SAFETY AND DRUG ADMINISTRATION ORDER.

(No. 1418/2013/S1/FSSA.)

No. VI(1)/155(a)/2017.



WHEREAS regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, made by the Food Safety and Standards Authority of India in exercise of the powers conferred by clause (i) of sub-section (2) of section 92, read with section 26 of the Food Safety and Standards Act, 2006 (Central Act 34 of 2006) provides that tobacco and nicotine shall not be used as ingredients in any food products, as they are injurious to health;

AND WHEREAS, Gutkha and Panmasala are food products in which tobacco and nicotine are widely used as ingredients now-a-days;

AND WHEREAS, it is expedient to prohibit Gutkha and Panmasala in the State of Tamil Nadu, being food products in which tobacco and nicotine are widely used as ingredients;

AND WHEREAS Chewing Tobacco is processed by the manufactures along with the eatables and the same is meant for chewing purpose and the said product is supposed to be used by keeping it inside the mouth and chewing it. The act of chewing ensures that chemicals go in to the saliva and becomes part of the human digest system, the said food article if consumed will endanger human health and well-being and whereas if consumption of these food articles is allowed with out prohibition the well-being of current and future generations will be compromised and hence it is to be prohibited.

NOW, THEREFORE, in exercise of the powers conferred by clause (a) of sub-section (2) of section 30 of the Food Safety and Standards Act, 2006. (Central Act 34 of 2006), the Commissioner of Food Safety of the State of Tamil Nadu, in the interest of public health, hereby prohibits the manufacture, storage, transport, distribution or sale of Gutkha, Panmasala, Chewing Tobacco and any other food products containing tobacco or nicotine as ingredients, by whatsoever name it is available in.



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the market, in the whole of the State of Tamil Nadu for a further period of one year with effect from 23rd May 2017."

18. It is submitted by the learned counsel for the petitioners that to avoid litigations and closure of their Units, in view of the above Notification, which was first issued in the year 2013 which was extended periodically, the dealers started adopting different classification, as a result of which, divergent classification have been adopted for the same product.

19. Mr.R.Sivaraman, learned counsel for the petitioners submitted that the products dealt by these petitioners merit classification under the heading "**2403 99 90**", Customs Tariff Act, 1975 as **“Others”** whereas, the Department has classified the same under the heading "**2403 99 10**" as **“Chewing Tobacco”**.

20. According to Mr.Joseph Prabakar, the learned counsel for the petitioner in W.P.(MD)No.204 of 2021, the product dealt by the said petitioner was nothing but an agricultural product and is classifiable under Chapter Heading "**2401 20 90**" in terms of Harmonized System of



Nomenclature (HSN) as an **"unmanufactured tobacco, partly or wholly stemmed or stripped"**.

21. The learned counsel in W.P.(MD)No.204 of 2021 would submit that the product in question was an **"unmanufactured tobacco"** and therefore, it would come within purview of Heading "2401" of HSN. It is submitted that Heading "2401" of HSN does not cover unmanufactured tobacco in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or stemmed/stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape, but not tobacco ready for smoking). In this connection, a reference was made to the following extracts from the HSN:-

"24.01 Unmanufactured tobacco; tobacco refuse."

2401.10	Tobacco, not stemmed/stripped
2401.20	Tobacco, partly or wholly stemmed/stripped
2401.30	Tobacco refuse

This heading covers:

Unmanufactured tobacco in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or



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stemmed/stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape, but not tobacco ready for smoking).

Tobacco leaves, blended, stemmed/stripped and "cased" ("sauced" or "liquored") with a liquid of appropriate composition mainly in order to prevent mould and drying and also to preserve the flavour are also covered in this heading.

Tobacco refuse, e.g., waste resulting from the manipulation of tobacco leaves, or from the manufacture of tobacco products (stalks, stems, midribs, trimmings, dust, etc.)."

22. It is submitted that the tobacco leaves are procured from farmers and are poured into a slurry of jaggery water, cured and packed. Therefore, it is submitted, that simple activity carried out by these respective petitioners do not amount to manufacture to merit classification under Head 2403 of Custom Tariff Act, 1975 in the hands of these petitioners.

23. It is further submitted that the Circular/Notification, dated 23.05.2017, issued by the Commissioner of Food Safety under the provisions of the Food Safety and Standards Act, 2006 was subject matter of a challenge before this Court in **W.P.(MD)No.18115 of 2021 etc. batch [E.S.Mydeen and Co., Rep. by its Managing Partner E.S.M.P.Kaleel,**



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Kumbakonam vs. The Designated Officer (Thanjavur District), Tamil Nadu Food Safety and Drug Administration, Thanjavur and another].

24. It is submitted that this Court allowed the said Writ Petitions vide order dated 18.07.2022 and clarified that above Circular would not apply to unmanufactured chewing tobacco products. A reference was made to the following passages from the above said order.

"5. I carefully considered the rival contentions and went through the materials on record.

6. The first objection raised by the learned Additional Advocate General that the petitioners have subjected the raw tobacco leaves to manufacturing process need not detain me in view of the authoritative decision of the Hon'ble Division Bench of the Madras High Court reported in (1963) 2 MLJ 71 (Pachiappa Chettiar V. State of Madras). The Hon'ble Division Bench had held that the sprinkling of jaggery water, drying tobacco in the shade and subjecting it to the process of bulking would not convert raw tobacco into some other product and that cutting the same also will not mean that there is a process of manufacture. In any event, the concept of manufacturing process that may have some relevance under some other statute would not have any relevance or application to the case on hand.

7. The core argument of the respondents is that the Regulation 2.3.4 of Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations 2011 has been violated in the instant case. I have to see whether there is any merit in this contention. Section 3(1)(j) of the



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Food Safety and Standards Act 2006 is as follows:-

"Food" means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;"

Regulation 2.3.4 of Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations 2011 is as follows:-

"2.3.4 : PRODUCT NOT TO CONTAIN ANY SUBSTANCE WHICH MAY BE INJURIOUS TO HEALTH

Tobacco and nicotine shall not be used as ingredients in any food products."

8. The only question that arises for consideration is whether conjoint reading of the aforesaid provisions as applied to the factual matrix can trigger the jurisdiction of the respondent authorities under the aforesaid Act. I am more than satisfied that the products dealt with by the petitioners herein would fall within the definition of the term 'food' under Section 3(1)(j) of the Act. Even a chewing gum is also included within the concept of the said definition. Therefore, the applicability of Section 3(1)(j) of the Act to the item on hand is not in doubt. If the petitioners have used tobacco or Nicotine as an ingredient in any food product, certainly



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Regulation 2.3.4 of the Regulations would directly come into play. But in this case, the tobacco leaf itself is a food product.

*9. I went through the test reports of the respondents. A mere look at the same would reveal that on account of the sprinkling of jaggery water, there has been no change in the Nicotine content. Jaggery water is sprayed only to ensure that the leaf does not turn brittle. In other words, the Nicotine content in the tobacco remains the same before and after the liquoring process. Nicotine is inherent in the product itself. It is not as if the petitioners have added Nicotine as an ingredient in the food product. The State has not prohibited the cultivation of tobacco as it has done in the case of Ganja. There is even Central Tobacco Research Institute located in Veda sandur, Dindigul which trains the tobacco farmers regarding tobacco cultivation. Applying the ratio laid down by the Hon-ble Division Bench in **Pachiappa Chettiar** case, I hold that the petitioners are dealing only with unmanufactured tobacco and that they have not been mixing the same in any food product.*

10. At this stage, the learned Additional Advocate General would draw my attention to Article 47 of the Constitution of India which reads as follows:-

"47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health.-The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

He would contend that consumption of tobacco is causing serious health hazard and that it is injurious to public health and that this Court should not lose sight of Article 21 of the Constitution while considering the case.



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11. *The above contention of the State would have impressed me if the State has enforced Article 47 in its totality. Unfortunately, that is not the case. The State has monopolized the privilege of selling liquor. The government of Tamil Nadu is raising huge revenue through liquor sale. Tamil Nadu State Marketing Corporation (TASMAC), a wholly government owned company, has thousands of retail outlets throughout the State. The argument of the State anchored on Article 47 is like devil quoting the scripture or pot calling the kettle black. I am not rejecting this contention on the ground of whataboutery. Nicotine is inherent in tobacco and its content in the tobacco leaf has not gone up on account of spraying of jaggery water. Regulation 2.3.4 only mandates that tobacco and nicotine shall not be used as ingredients in any food products. Since the petitioners are dealing only with unmanufactured tobacco, they have not breached any of the statutory provisions.*

12. *In this view of the matter, the impugned orders and notices are quashed. The writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed."*

25. I have considered the submissions made by the learned counsel for both sides.

26. The dispute in these cases relate to payment of Compensation Cess under **Notification No.1/2017- Compensation Cess (Rate), dated 28.06.2017** issued under **sub-Section (2) to Section 8 of the Goods and Services Tax (Compensation to States) Act, 2017.**



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27. Under **Notification No.1/2017 – Central Tax (Rate)**, dated **28.06.2017**, the classification "Tariff item", "sub-heading", "heading" and "chapter" shall mean respectively a tariff item, sub-heading, heading and chapter as specified in the First Schedule to the Customs Tariff Act, 1975 has to be adopted.

28. As per **Explanation – IV** to the above Notification, the rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall, so far as may be, apply to the interpretation of the said Notification.

29. There is no differentiation in the rates, for the purpose of levy of respective GST on products either under Tariff Heading 2401 or Tariff Heading 2403 in terms of Notification No.1/2017 – Central Tax (Rate), dated 28.06.2017.



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30. For the purpose of Compensation Cess under Schedule to GST (compensation to State) Act, 2017, these products are subject to different rate as mentioned in table below:-

Table-4

Classification	W.P.(MD) No. 204 of 2021	Other than the petitioner in W.P.(MD) No.204 of 2021	Classification adapted by the Department
Classification Prior to GST- under CET Act, 1985	2403 99 10	2403 99 10	2403 99 10
Rate under the Notification No. 1/2017 Compensation Cess(rate) dated 28.06.2017	@71% at Sl.No.5	96% at Sl.No.37	160% at Sl.No.26

31. The product under Heading 2401 and 2403 attract GST at 14% under Notification No.1/2017 – Central Tax (Rate), dated 28.06.2017. Similar notification has been issued by the State Government in GO.MS.No. 62, Commercial Taxes and Registration (B1), 29th June 2017, Aani-15, **Hevilambi**, Thiruvalluvar Aandu-2048.

32. Relevant portion of Notification No.1/2017 – Central Tax (Rate), dated 28.06.2017 GO.MS.No.62 dated 29.06.2017 reads as under:-



Table-5

Schedule-14%

S.No.	Chapter/Heading/Sub-heading/Tariff item	Description of goods
13.	2401	Unmanufactured tobacco; tobacco refuse [other than tobacco leaves]
15.	2403	Other manufactured tobacco and manufactured tobacco substitutes; “homogenised” or “reconstituted” tobacco; tobacco extracts and essences [including biris]

33. As far as the products that are traded by the respective petitioners are concerned, they have adopted different classification at different point of time. For the purpose of simplification and clarity, the classification adopted by the respective petitioners and the classification imposed by the Department for the purpose of payment of Compensation Cess are tabulated below:-

Table-6

S.No.	Classification	W.P.(MD) No.204 of 2021	petitioners other than W.P.(MD) No.204 of 2021	Classification adapted by the Department
1	Classification Prior to GST-under CET Act, 1985	2403 99 10	2403 99 10	2403 99 10
	Description	Chewing tobacco	Chewing tobacco	



2.	Classification from July 2017	Not available	2403 99 90 @ 96% at Sl.No.37 *	2403 99 10 @ 160% at Sl.No.26
	Description	-	All goods, other than Pan Masala containing tobacco 'gutkha', bearing a brand name	2403 99 10 Chewing tobacco without lime
3.	Classification from Jan 2018 to May 2018 under GST	2403 99 10 @160% at Sl.No. 26*		2403 99 10 @ 160% at Sl.No.26
	Description	Chewing tobacco without lime		
4.	Classification from June 2018- Oct 2018	2403 99 20 @72% at Sl.No. 25*		2403 99 10 @ 160% at Sl.No.26
	Description	Preparations containing chewing Tobacco		
5.	Classification	Adopted from Nov 2018- Sought for Advance Ruling	Adopted form July 2017	Determined by Department
	Classification under Heading	2401 20 90	2403 99 90	2403 99 10
	Description	Unmanufactured chewing tobacco without lime	All goods, other than Pan Masala containing tobacco 'gutkha', bearing a brand name	Chewing tobacco without lime
	Rate under the Notification No.1/2017 Compensation Cess(rate) dated 28.06.2017	@71% at Sl.No.5	96% at Sl.No.37	160% at Sl.No. 26

*** Rate under the Notification No.1/2017 Compensation Cess(rate) dated 28.06.2017.**

34. Thus, it is evident that the petitioners in W.P.No.204 of 2021 has adopted Tariff Heading “2403 99 10” from inception but changed the same



to “2403 99 20” from June 2018-Oct 2018 as “Preparations containing Chewing Tobacco”.

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35. Tariff Entry under the Custom Tariff Act,1975 which are relevant for the above rates are reproduced below:-

Tobacco and manufactured tobacco substitutes; products, whether or not containing nicotine, intended for inhalation without combustion; other nicotine containing products intended for the intake of nicotine into the human body

Table-7

Description of goods	Tariff Item
UNMANUFACTURED TOBACCO; TOBACCO REFUSE	2410
---Other	2410 10 90
OTHER MANUFACTURED TOBACCO AND MANUFACTURED TOBACCO SUBSTITUTES; -HOMOGENISED? OR -RECONSTITUTED? TOBACCO; TOBACCO EXTRACTS AND ESSENCES	2403
Tobacco, partly or wholly stemmed or stripped :	2401 20
Other *	2401 20 90
Chewing tobacco	2403 99 10
Tobacco, partly or wholly stemmed or stripped :	
Other#	2403 99 90



*Petitioner in W.P.(MD) No.204 of 2021

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The Petitioners in Writ petitions other than W.P.(MD) No.204 of 2021 have adopted 2403 99 90.

36. These Writ petitioners claim that the products dealt by them are not liable to Compensation Cess in terms of Notification No.1/2017-Compensation Cess (Rate), dated 28.06.2017 at 160% under Chapter Heading 2403 99 10 of Custom Tariff Act, 1975 as determined by the department/Authority for Advance Ruling and Appellate Authority for Advance Ruling.

37. The primordial issue for consideration in these Writ Petitions is regarding the correct classification of the products dealt by the respective petitioners for the payment of Goods and Services Tax Compensation Cess under Notification No.1/2017 Compensation Cess (Rate) 28.06.2017 issued under Section sub-Section (2) of Section 8 of the Goods and Services Tax (compensation to States) Act, 2017.



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38. The petitioners other than the petitioner in W.P.(MD)No.204 of 2021 have an alternate remedy by way of an appeal before the Appellate Authority under Section 107 of the respective GST enactments. Despite the same, they are before this Court.

39. As far as the petitioner in W.P.No.204 of 2021 is concerned, it should be borne in mind that Section 103 of the respective GST enactments makes it clear that once an assessee approaches the “Authority for Advance Ruling” or the “Appellate Authority for Advance Ruling” as the case may be, the decision of the such Authorities are binding on the applicant and the concerned officer or the jurisdictional officer in charge of the office within whose jurisdiction the applicant is assessed to tax.

40. The decision of the Advance Ruling Authority or the Appellate Authority for Advance Ruling as the case may be is a decision *in personam* and the decision/opinion of such Authority is binding on the parties to the aforesaid proceedings.



Act, 1944 save that appeal is not before the High Court under the Customs

Act, 1962. These provisions are reproduced below :-

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Table-3

Section 28(j) of the Customs Act, 1962	Section 23 E of Central Excise Act, 1944	Section 103 of the respective GST enactments
28J. Applicability of advance ruling. (1) The advance ruling pronounced by the Authority under section 28-I shall be binding only- (a) on the applicant who had sought it; (b) in respect of any matter referred to in sub-section (2) of section 28-H; (c) on the Commissioner of Customs, and the customs authorities subordinate to him, in respect of the applicant. (2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.	Section 23E. Applicability of advance ruling. (1) The advance ruling pronounced by the Authority under Section 23D shall be binding only — (a) on the applicant who had sought it; (b) in respect of any matter referred to in sub-section (2) of Section 23C; (c) on the 1 Principal Commissioner of Central Excise or Commissioner of Central Excise, and the Central Excise Authorities subordinate to him, in request of the applicant. (2) The advance ruling referred to in sub-section (1) shall be binding as aforesaid unless there is a change in law or facts on the basis of which the advance ruling has been pronounced.	Section 103 - Applicability of advance ruling. (1) The advance ruling pronounced by the Authority or the Appellate Authority under this Chapter shall be binding only- (a) on the applicant who had sought it in respect of any matter referred to in sub-section (2) of section 97 for advance ruling; (b) on the concerned officer or the jurisdictional officer in respect of the applicant. (2) The advance ruling referred to in sub-section (1) shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed.



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45. Thus, these enactments themselves recognizes an appellate mechanism against the orders of the Authority for Advance Ruling before the Appellate Authority for Advance Ruling.

46. If the ruling or the decision of the Authority for Advance Ruling is confirmed or modified by an Appellate Authority for Advance Ruling or any Appellate Authority specified under therein. The decision is binding not only on the Applicant but also on the Jurisdictional Officer under whom such Applicant is assessed to tax.

47. There is no further remedy provided under the statute to an applicant to challenge the ruling of the Appellate Authority for Advance Ruling. Once the Appellate Authority for Advance Ruling affirms the ruling of the Authority for Advance Ruling, the issue can be said to have attained finality between an Applicant and the Jurisdictional Officer. The applicant as also the Jurisdictional Officer are bound by such rulings.



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48. In case, the Authority fails to accept the same, an aggrieved applicant could question the same only before the Appellate Authority. Once the Appellate Authority decides the case, there is no further scope for any appeal or judicial review.

49. In fact, it is not for the Applicant to take a particular view and that the Authority for Advance Ruling or the Appellate Authority for Advance Ruling have to accept the same as is/was suggested by the Applicant before such Authority. This is the statutory mechanism prescribed under the Act and cannot be ignored.

50. Therefore, writ petition cannot be ordinarily entertained to challenge an order of the Appellate Authority for Advance Ruling as a matter of right, unless the decision/ruling suffers from any vices which are amenable to challenge under Article 226 of the Constitution.

51. Only under limited circumstances, judicial review of such orders can be made by the Courts which are recognized under Article 226 of Constitution.



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52. In **Tata Cellular v. Union of India**, (1994) 6 SCC 651, the Hon'ble Supreme Court pointed out that there are certain inherent limitations to the power of judicial review of the said administrative actions and decisions so as to ensure that judicial scrutiny does not get converted into judicial restraint. The court held that the administrative decisions of the public authorities can be controlled by judicial review only if the decision-making public authority:-

- (i) has exceeded its powers;
- (ii) has abused its powers;
- (iii) has committed breach of the principles of natural justice; and
- (iv) is guilty of illegality, irrationality (Wednesbury unreasonableness), mala fides or procedural impropriety.

53. Further, under Article 226 of the Constitution, this Court is not sitting as an appellate Court in its revisional Jurisdiction. It is not really concerned with the decision impugned before it. Rather, the Court is merely concerned only with the decision making process.

54. As such there is no error or infirmity that is notice in the impugned order of the Appellate Authority in the decision making



process. Thus, W.P.No(MD).204 of 2021 is liable to be dismissed on this ground alone.

55. Even otherwise, the petitioner in W.P.No(MD).204 of 2021 has no case on merits and as such W.P.No(MD).204 of 2021 is liable to be dismissed. I shall explain further.

56. It is noticed that the Appellate Authority for Advance Ruling of Uttar Pradesh vide order dated **09.08.2023** in **Appeal Order No. 8/AAAR/09/08/2023**, in the case of **M/s Pandey Traders**, while dealing with a somewhat similar product has given a Ruling.

57. There, the said Pandey Traders was engaged in the marketing of unbranded tobacco from un-manufactured raw tobacco dust which is a result of Screening of raw tobacco through which tobacco leafs, its stem, and other tender parts are separated through the process of drying, winnowing, crushing and separating through sieving, and the better parts are used for chewing tobacco and remaining part in raw form, i.e. stems, hard veins and leaves of tobacco plant were then crushed in to dust form



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and sold as such for human consumption. Raw tobacco dust were mixed with scent and/treated with a touch of perfume.

58. It was the case of the appellant therein that the process did not undergo any irreversible change and the product still remained as an un-manufactured raw tobacco and therefore merits classification under Chapter Heading 2401 of the Customs Tariff Act, 1975 as made applicable for classification under the GST.

59. The Authority for Advance Ruling there concluded that the product was a “manufactured tobacco” under Heading 2403 of the **Customs Tariff Act, 1975**. The Appellate Authority for Advance Ruling, however reversed the decision of the Authority for Advance Ruling and accepted the contention of the Applicant namely Pandey Traders that un-manufactured tobacco dust which was a result of screening of raw tobacco, through which tender and better parts were separated and used for being sold as chewing tobacco and remaining parts in raw form and the dust which was sold for human consumption which did not result in any irreversible change and therefore, what was supplied by the said appellant was nothing but an “un-



manufactured tobacco dust” and could not be equated with “manufactured tobacco” of chapter Heading 2403 of the Custom Tariff Act, 1975

60. The product under consideration in these cases fall under Chapter 24 of the Custom Tariff Act, 1975. The classification under the Custom Tariff Act, 1975 is adopted for the purpose of classification and determination of Rates under the respective GST enactments and Goods and Services (Compensation to States) Act, 2017.

61. As far as the petitioner in W.P.(MD) No.204 of 2021 is concerned, there are no records to establish that the the product in the hands of the petitioners falls under **Heading 2401 20 90**. The decision of the Advance Ruling Authority and the Appellate Authority are merely based on the records that were filed before the Advance Ruling Authority and the response of the department.

62. On the other hand, as far as the petitioners other than the petitioner in W.P.(MD) No.204 of 2021 are concerned, there are test reports, which have been relied upon by the Adjudicating Authority, as the Original Authority.



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63. The petitioners in writ petitions other than the petitioner in W.P. (MD) No.204 of 2021 were the Central Excise Assesseees under the provisions of the Central Excise Act, 1944. The classification adapted by these writ petitioners when they were under the purview of the Central Excise Act, 1944 and Central Excise Tariff Act, 1985 had adopted the classification under Tariff Heading 2403 99 10.

64. This is evident from the reading of the Counter in W.P.No.204 of 2021, the respondent also stated as follows in Para No.2:-

2.It is submitted that earlier tobacco manufacturers of this Range were engaged in the manufacture of chewing tobacco and they had declared and classified their product as branded chewing Tobacco" under chapter heading 24039910 and paid central excise duty and NCCD till May 2017. M/s R. Arumugham GSTIn33AABPA9979p3Z2, hereinafter referred to as the tax payer) who obtained registration on 26.12.2017, earlier paid compensation cess @ 160%. The assessee vide his letter dated 20.5.2018 has stated that due to stiff completion and financial crunch they had stopped production and business w.e.f 20-5-2018 and further informed that they would surrender the registration certificate after payment of taxes and returns for the month of May 2018. However, in contrast to what was mentioned they continued to file the returns and not surrendered the Registration Certificate. Further as seen from enclosure to HQrs letter C.No.IV/16/333/2018-GST Policy dated 19-06-2019 (Copy enclosed) regarding comments on the Advance Ruling Application filed by the assessee, the tax payer vide letter dated Nil received on 12.11.2018



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stated that they had supplied branded chewing tobacco classifying it under Chapter sub- heading 24039910 paying GST Compensation Cess @ 160% in terms of Notification No.1/2017-Compensation Cess (Rate) New Delhi dated 28.06.2017; from Jan 2018 to May, 2018 Cess has been paid at the rate of 160%. From June 2018 to September 2018 Cess has been paid at the rate of 72% and classified under Chapter Heading 24039920 as per their letter. Further, the tax payer vide letter dated 14.03.2019 has reiterated the classification as 24039920 (for June 2018 to Oct 18) and have paid Cess @ 72%; further the tax payer has stated that NCCD has been paid in terms of Section 4A of Central Excise Act @10% on 45% of MRP; further it has been stated that from Nov 2018 onwards, they had changed the product manufactured from 24039920 to 24012090, stated that they were not required to pay NCCD under Central Excise Act, and hence ER1 returns are not filed; that however, GST returns are continue to be filed; from the above, it clear that the assessee had intend to evade payment of duty.

65. Para 5 of the Counter filed in W.P.No.10565 of 2020, which is applicable to other writ petitioners also (other than the W.P.No.204 of 2021) also indicate that these petitioner had also adopted the classification under Tariff Heading 2403 99 10 when they were governed by the provision of the Central Excise Act, 1944 and the Central Excise Tariff Act, 1985.

66. Para 5 of the Counter filed in W.P.No.10565 of 2020 reads as under:-



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5. I submit that M/s. Tajmahal Tobacco Company P. Ltd were engaged in the manufacture of chewing tobacco and they had declared and classified their product as "branded chewing Tobacco" under chapter heading 24039910 and paid Central Excise duty and NCCD till May 2017. Further, from the month of June 2017, M/s.Tajmahal Tobacco Company P. Ltd., had changed the classification under chapter 24039990 and declared their product as Other tobacco products and subsequently they maintained their classification under chapter 24039990 in the GST regime also.

67. Section 26 of the Food Safety and Standards Act, 2006 (Central Act 34 of 2006) provides that tobacco and nicotine shall not be used as ingredients in any food products, as they are injurious to health. Therefore, reference to the provisions of Food Safety and Standards Act, 2006 is irrelevant.

68. The Government of Tamil Nadu which banned such products under regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 is not relevant for the purpose of determination of classification. The ban was in force from 2013 and the ban has been extended every year for a period of one year periodically.



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69. This was in the exercise of powers conferred under Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 framed by the Food Safety and Standards Authority of India in the exercise of the powers conferred by Clause (1) of sub-section (2) of Section 92.

70. Earlier, the Hon'ble Division Bench of this Court in ***J.Anbazhagan Vs. Union of India (2018) (3) CTC 449***, held as under:-

“ 71. Food is defined in [Section 3\(j\)](#) of the Food Safety Act to mean any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes genetically modified or engineered food, but does not include animal feed, live animals, unless they are prepared or processed for placing in the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.

72. The definition of food which includes any substance whether processed, partially processed or unprocessed, which is intended for human consumption, and even includes chewing gum, is clearly wide enough to include gutkha and other forms of chewable tobacco intended for human consumption.

73. [The Food Safety Act](#) is a statute enacted after COTA. The definition of Food in [Section 3\(j\)](#) of the Food Safety Act is different from the definition of food in the [Prevention of Food Adulteration Act, 1954](#), which was as follows:

[Section 2. Definitions:](#) - In this Act unless the context otherwise requires,-



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....
(v) *Food means any article used as food or drink for human consumption other than drugs and water and includes,*

(a) Any article, which ordinarily enters into, or is used in the composition or preparation of, human food,

(b) Any flavouring matter or condiments, and

(c) Any other article which the Central Government may, having regard to its use, nature, substance or quality declare, by notification in the official Gazette, as food for the purposes of this Act.”

74. *Under the Food Safety Act*, food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption. It includes primary food to the extent defined in clause (zk), that is an article of food being a produce of agriculture or horticulture or animal husbandry and dairying or aquaculture in its natural form resulting from the growing, raising, cultivation, picking, harvesting, collection or catching in the hands of a person other than a farmer or fisherman. It also includes genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any *J.Anbazzhagan vs 3 The Joint Director Indian Kanoon -*

<http://indiankanoon.org/doc/95196559/> 24 substance, including water, used into the food during its manufacture, preparation or treatment. What is excluded is animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.

75. Significantly, in *Godawat Pan Masala Products I.P. Ltd. and another v. Union of India and others*, reported in (2004) 7 SCC 68, the



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Supreme Court observed:

.. Thus, the Act 34 of 2003 being a special Act, and of later origin, overrides the provisions of [Section 7\(iv\)](#) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit the sale or manufacture of tobacco products which are listed in the [Schedule to the Act](#) 34 of 2003.

76. [The Prevention of Food Adulteration Act, 1954](#) has been repealed and replaced by the [Food Safety Act](#). The definition of food in [Section 3\(j\)](#) of the Food Safety Act is different from and far more expansive than the definition of food in [Section 2\(v\)](#) of the Prevention of Food Adulteration Act. [Further, the Food Safety Act](#) as been enacted after the COTA.

77. The judgment of the Supreme Court in [Godawat Pan Masala Products I.P. Ltd.](#), supra, rendered in the context of the [Prevention of Food Adulteration Act, 1954](#) will not have application in the facts and circumstances of the instant case.

78. It appears that in [Jayavilas Tobacco Traders LLP v. The Designated Officer](#), The Food Safety and Drugs Control Department, (W.P.No.21 of 2017, dated 9.6.2017), Duraiswamy,J. referred to and followed the judgment of the Supreme Court in [Godawat Pan Masala Products I.P. Ltd.](#), supra. It is on that ground that the notifications impugned were held to be void.

79. With the greatest of respect, we are unable to agree with the Single Bench decision of Duraiswamy, J. in [Jayavilas Tobacco Traders LLP](#), supra, and and the decision of the Madurai Bench in Crl.O.P.(MD) No.5505 of 2015 [Manufacturer, M/s.Tejram Dharam Paul, Maurmandi, Bhatinda District, Punjab and another v. The Food Safety Inspector, Ambasamudram] dated 27.04.2015.



80. In [Dhariwal Industries Limited and another v. State of Maharashtra and others](#), reported in (2013) 1 Mah LJ 461, a Single Bench of the Bombay High Court held:

"19. While the definition in the 1954 Act excluded drugs and water, the definition in the [Food Safety Act, 2006](#) excludes animal feed, live animals, plants prior to harvesting, drugs and medicinal products, cosmetic, narcotic and psychotropic substance. Obviously, gutka and pan masala do not fall in any of these excluded categories. The expression "any substance which is intended for human consumption" in [FSS Act, 2006](#) is also wider than the expression "any article used as food or drink for human consumption" in [PFA Act, 1954](#). It is also pertinent to note that the definition of food in the Act of 2006 specifically includes "chewing-gum" and any substance used into the food during its manufacture, preparation or treatment. Hence, even if gutka or pan masala were not to be ingested inside the digestive system, any substance which goes into the mouth for human consumption is sufficient to be covered by definition of food just as chewing-gum may be kept in the mouth for J.Anbzhagan vs 3 The Joint Director Indian Kanoon -<http://indiankanoon.org/doc/95196559/> 25 some time and thereafter thrown out. Similarly gutka containing tobacco may be chewed for some time and then thrown out. Even if it does not enter into the digestive system, it would be covered by the definition of "food" which is in the widest possible terms. The definition of "food" under [section 2\(v\)](#) of the PFA Act was narrower than the definition of food under [Food Safety Act](#), still the Supreme Court in Ghodawat case held that pan masala and gutka were "food" within the meaning of [PFA Act](#). The very fact that the petitioners themselves had obtained licences under the [PFA Act](#) and have also obtained licences under the [Food Safety Act, 2006](#).



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is sufficient to estop them from raising the contention that gutka and pan masala do not fall within the definition of "food" under the [Food Safety Act, 2006](#)."

81. We agree with the view of the learned Single Bench of the Bombay High Court that gutkha and pan masala are food within the meaning of the [Food Safety Act](#). Gutkha also being a tobacco product might be governed by the provisions of the COTA. COTA deals with regulation of cigarettes or other tobacco products. [The Food Safety Act](#) is not in conflict with the provisions of COTA in any manner. COTA does not deal with adulteration, though it may remotely touch upon misbranding.

82. It is well settled that the endeavour of the Court should be to harmonize two Acts seemingly in conflict. Of course, in this case there does not appear to be any conflict between COTA and the Food Safety Act. COTA is in addition to and not in derogation of other laws relating to food <http://www.judis.nic.in> products. There is no non obstante clause in COTA which excludes the operation of other Acts.

83. Considering the harmful effects of consumption of chewable tobacco, such as gutkha, which leads to fatal ailments such as cancer, this court cannot shut its eyes to the malaise of illegal manufacture and sale of gutkha within the jurisdiction of this High Court, i.e., the State of Tamil Nadu and the Union Territory of Puducherry.

84. There can be no doubt that a high level, fair and impartial enquiry should be conducted to effectively stop illegal manufacture, distribution and sale of gutkha and other forms of chewable tobacco in contravention of the provisions of the 2011 Regulations and the various notifications, referred to above, and also to identify and take action against those carrying on, aiding, abetting or otherwise in connivance



with the illegal manufacture, distribution and sale of gutkha and other forms of chewable tobacco.” Though the Hon'ble First Bench employed a polite expression that it was unable to agree with the Single Bench decision, in effect, it means that all the earlier Single Bench decisions on the subject stood over ruled and no longer constitute good law. The order dated 23.04.2018 made in W.P.(MD)No.5924 of 2018 rests on these two decisions. Therefore, in view of the later judgment rendered by the Hon'ble First Bench on 26.04.2018, the foundational proposition, on which, the writ petition is anchored stands totally shaken and undermined.”

71. The Hon'ble Supreme Court in ***E.Siva Kumar Vs. Union of India*** reported in (2018) 7 SCC 365, had declined to interfere with the decision of the Hon'ble Division Bench in the above case. In the context dealing with the same, the learned single Judge of this Court in ***W.P.(MD) No.778 of 2019 (Jeetmal Ramesh Kumar Vs. The Commissioner and others) dated 14.02.2019*** has observed as under:

“8. It is relevant to note here that the order of the Hon'ble First Bench rendered in [Anbalagan's](#) case was challenged before the Hon'ble Supreme Court. A Three Judges of the Hon'ble Supreme Court in the decision reported in (2018) 7 SCC 365 ([E.Siva Kumar Vs. Union of India](#)), declined to interfere. Of-course, the order passed by the Hon'ble Supreme Court dismissing the SLP was more on the correctness of the order entrusting the investigation of the crime in question to C.B.I. But then, the petitioner before the Hon'ble Supreme Court namely, E.Siva Kumar who



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was named as an accused in the F.I.R, was on deputation as Food Safety Officer in the Food Safety and Drug Administration Department, Ministry of Health. The very first paragraph refers to the “illegal manufacture and sale of Gutkha and Pan Masala containing tobacco and Nicotine”. The dismissal of the SLP was not by a non speaking order. It refers to the facts of the case and is a speaking order. Therefore this Court can proceed on the premise that the decision of the Hon'ble First Bench in [Anbalagan](#) case has been approved by the Hon'ble Supreme Court in [E.Sivakumar](#) case. In fact, the editorial note made in the web edition of SCC online also says so. Still there may be some controversy as to whether, the Hon'ble Supreme Court has given its seal of approval to the finding of the Hon'ble First Bench with regard to tobacco being a food product falling under [Food Safety and Standards Act, 2006](#). But then, there cannot be any dispute about the fact that as on date, as far as the State of Tamil Nadu is concerned, the position is that chewing tobacco/pan masala containing tobacco/nicotine are food substances falling within the purview of the [Food Safety and Standards Act, 2006](#).”

72. Ultimately, this Court had further further observed as under:

“11. I may incidentally add that the [Food Safety and Standards Act, 2006](#) contains a overriding provision. [Section 89](#) of the said Act reads as follows:-

“Overriding effect of this Act over all other food related laws:- The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.”

.....



15. It is interesting to note that chewing gum is also defined as a food. One does not swallow a chewing gum. Therefore, there is no merit in the petitioner's contention that tobacco is only chewed and not digested and therefore, cannot be considered as food.

16. As rightly contended by the respondents, tobacco is kept in the mouth and chewed and it gets mixed with saliva and goes into the body. Therefore, a conjoint reading of [Section 3\(j\)](#) of the Food Safety and Standards Act, 2006, regulation 2.3.4 of FSSAI, 2011 and Notification No. 1418/2013/S8/FSSAI, dated 23.05.2018 in the light of the decision of the Hon'ble First Bench in [Anbalagan](#) Case leads one to the irresistible inference that chewing /chewable tobacco is a banned substance and that, it falls under the purview of the [Food Safety and Standards Act, 2006](#). Therefore, I find no merit in the contention of the writ petitioner that the impugned report of the analyst is without jurisdiction. The writ petition stands dismissed. However, it is made clear that the dismissal of this writ petition will not come in the way of the petitioner establishing his innocence that he has nothing to do with the contraband in question. All the other defences of the writ petitioner are left open. The writ petition is dismissed. No costs. Consequently, connected miscellaneous petitions are closed."

73. The decision in ***Jeetmal Ramesh Kumar's case (referred supra)***, content of which has been extracted above, has not clearly discussed the specific product, with which it was concerned with. Therefore, the decision cannot be universally applied.



74. In **W.P.(MD)Nos.18115 of 2021 and batch (M/S.E.S.Mydeen and Co Vs. The Designated Officer (Thanjavur District) dated 18.07.2022**, the challenge was to a “sale stop order” and a Seizure Memo dated 23.09.2021. There, the Court took note of the decision of the Hon'ble Division Bench of this Court in ***Pachiappa Chettiar Vs. State of Madras*** reported in **(1963) 2 MLJ 71**.

75. While referring to Regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011, the Court took a lenient view by referring to Article 47 of the Constitution of India and allowed the writ petitions with the following observations:

“11. The above contention of the State would have impressed me if the State has enforced Article 47 in its totality. Unfortunately, that is not the case. The State has monopolized the privilege of selling liquor. The government of Tamil Nadu is raising huge revenue through liquor sale. Tamil Nadu State Marketing Corporation (TASMAC), a wholly government owned company, has thousands of retail outlets throughout the State. The argument of the State anchored on Article 47 is like devil quoting the scripture or pot calling the kettle black. I am not rejecting this contention on the ground of whataboutery. Nicotine is inherent in tobacco and its content in the tobacco leaf has not gone up on account of spraying of jaggery water. Regulation 2.3.4 only mandates that tobacco and nicotine shall not be used as ingredients in any food products. Since the petitioners are dealing only with unmanufactured tobacco, they have not



breached any of the statutory provisions.

12. In this view of the matter, the impugned orders and notices are quashed. The writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.”

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76. There, the Court came to a conclusion that the chewing tobacco dealt by the petitioners therein satisfied the definition of food within the meaning of Section 3(1)(j) of the Food Safety and Standards Act, 2006.

77. The Court further observed that chewing gum was also included as Food and therefore, the product in hand, namely the “Chewing Tobacco”, were food within the meaning of 3(1)(j) of the Act.

78. The Court has concluded that if the petitioner used tobacco or nicotine as an ingredient in any food product, Regulation 2.3.4 of the Regulations will get triggered. However, the restrictions in Regulation 2.3.4 of the aforesaid Regulation will not apply to the tobacco leaf as the tobacco leaf itself is food product.



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79. In para 9, the Court has observed as under:

“9.I went through the test reports of the respondents. A mere look at the same would reveal that on account of the sprinkling of jaggery water, there has been no change in the Nicotine content. Jaggery water is sprayed only to ensure that the leaf does not turn brittle. In other words, the Nicotine content in the tobacco remains the same before and after the liquoring process. Nicotine is inherent in the product itself. It is not as if the petitioners have added Nicotine as an ingredient in the food product. The State has not prohibited the cultivation of tobacco as it has done in the case of Ganja. There is even Central Tobacco Research Institute located in Vendasandur, Dindigul which trains the tobacco farmers regarding tobacco cultivation. Applying the ratio laid down by the Hon'ble Division Bench in Pachiappa Chettiar case, I hold that the petitioners are dealing only with unmanufactured tobacco and that they have not been mixing the same in any food product.”

80. The Hon'ble Supreme Court in ***State of Madras Vs. Bell Mark Tobacco Co.*** reported in ***1966-VILL-08-SC:(1967) 19 STC 129 (SC)***, while dealing with the levy of sales tax under the provisions of Madras General Sales Tax Act, 1939 concluded that the chewing tobacco was the manufactured product following the decision in ***State of Madras Vs. Swasthik Tobacco Factory*** reported in ***(1966) 17 STC 316***. There, the Court has held that the expression "in respect of the goods" in rule 5 (1) (i) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939,



means "on the goods", and therefore only the excise duty paid on the goods sold by the dealer is deductible.

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81. In *Swasthik Tobacco Factory's case [1966] 17 S.T.C. 316.*, the dealer purchased raw tobacco and converted it by a manufacturing process into chewing tobacco and sold it in small packets. His claim in computing the taxable turnover for rebate in respect of excise duty paid on raw tobacco used in manufacturing "chewing tobacco" was disallowed. This decision is *prima facie* determinative of the only question which is raised in these appeals by the State.

82. The Court ultimately concluded as follows:

"Chewing tobacco" is, for reasons already set out, manufactured from raw tobacco. It is common ground that the respondents were charged to tax in respect of the first sale effected by them in the State of Madras and they are not exempt from taxation under section 3, sub-section (3). But it was urged that the expression "tax" in the proviso includes "excise duty". The Madras General Sales Tax Act deals with the levy sales tax and section 5 provides for the rates of sales tax and the point at which tax is to be levied. The proviso could obviously not refer to tax other than the sales tax with which the whole Act, and especially the provisions of section 5, deals. It is intended to provide by the proviso that in the computation of taxable turnover of a dealer in respect of any goods included in clause



(vii) *the dealer is entitled to the rebate to the extent of sales tax paid by him on the raw tobacco used in the manufacture of those goods. The contentions raised by counsel must be rejected, and following the judgment of this Court in Swasthik Tobacco Factory's case [1966] 17 S.T.C. 316., the appeals filed by the State must be allowed. There will be no order as to costs in these appeals."*

83. Further, the Court has observed as under:

"...Stalks of tobacco are broken and removed, and sand and dust are removed. After payment of excise duty the bundles of tobacco are brought to the premises of the factory, where chewing tobacco is prepared. "Jaggery juice" is sprinkled on tobacco, and it is then cut into thin strips by shearing machines. The resulting tobacco is called "nice" tobacco. This "nice" tobacco is allowed to dry for some days. Then "flavouring essences" are sprinkled on it and it is then packed in special wrappers. The packets are known as "chewing tobacco" packets. A large number of workmen are employed to carry out these several processes."

84. There, the petitioners were facing imminent prosecution under the provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production Supply and Distribution) Act, 2003 (34 of 2003). The said Act was enacted in the year 2003.



85. The statement of objects and reasons reads as under:

“Statement of Objects and Reasons:-Tobacco is universally regarded as one of the major public health hazards and is responsible directly of indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco related diseases and the loss of productivity caused therein cost the country almost Rs.13,500 crores annually, which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry. The need for a comprehensive legislation to prohibit advertising and regulation of production, supply and distribution of cigarettes and tobacco products was recommended by the Parliamentary Committee on Subordinate Legislation (Tenth Lok Sabha) and a number of points suggested by the Committee on Subordinate Legislation have been incorporated in the Bill.”

86. The definition of Food in the Food Safety and Standards Act, 2006 reads as under:

“(j) Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances”



87. The definition of ingredient reads as under:

“ingredient? means any substance, including a food additive used in the manufacture or preparation of food and present in the final product, possibly in a modified form;”

88. 2.3. of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011 reads as under:

“2.3. Prohibition and Restriction on sale of certain products

2.3.1: Prohibition on sale of food articles coated with mineral oil: No person shall sell or offer or expose for sale or have in his premises for the purpose of sale under any description, food articles which have been coated with mineral oil, except where the addition of mineral oil is permitted in accordance with the standards laid down in these Regulations and Food Safety and Standards (Food Products Standards and Food Additives) regulations, 2011.

2.3.2: Restriction on sale of Carbia Callosa and Honey dew.:Carbia Callosa and Honey dew shall be sold only in sealed containers bearing Agmark seal.

2.3.3: Food resembling but not pure honey not be marketed as honey: No person shall use the word ‘honey’ or any word, mark, illustration or device that suggests honey on the label or any package of, or in any advertisement for, any food that resembles honey but is not pure honey.

2.3.4: Product not to contain any substance which may be injurious to health: Tobacco and nicotine shall not be used as



ingredients in any food products.

2.3.5: Prohibition of use of carbide gas in ripening of fruits:

No person shall sell or offer or expose for sale or have in his premises for the purpose of sale under any description, fruits which have been artificially ripened by use of acetylene gas, commonly known as carbide gas.”

89. Although, elaborate submission have been made in the context of the banning of tobacco products under the provisions of the aforesaid regulations and Food Safety and Standards Act, 2006, this Court is of the view that they are of no significance and of any relevance as far as the present dispute is concerned as there is no dispute that the petitioner in W.P(MD)No.204 of 2021 had classified the same product under Tariff Heading “**2403 99 10**”, at the inception of GST enactment with effect from **01.07.2017**. Similarly others were adopting same classification prior to 01/07/2017.

90. A reading of the Counter filed by the respondent in W.P(MD).No.204 of 2021 also indicates that the petitioner had also earlier paid cess at 160 % in terms of the **Serial No.26 of Notification No.1/2017 – Compensation Cess (Rate)**, dated **28.06.2017**. It appears that, the



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petitioner vide his letter dated **20.05.2018** has stated that due to stiff completion and financial crunch they had stopped the business w.e.f. 20.05.2018 and opted to surrender the registration GST Certificate and had stated that that after payment of the tax and returns for the month of May 2018, the petitioner would surrender the registration Certificate.

91. However, the petitioner continued to file returns and did not surrender the GST registration. It appears that on **12.11.2018**, the petitioner has stated that, the petitioner has also supplied chewing tobacco by classifying the product under heading 2403 99 10 by paying GST compensation cess at 160 % in terms of **Serial No.26 of Notification No. 1/2017 – Compensation Cess (Rate)**, dated **28.06.2017** even during the period of **Jan 2018 to May 2018** and that from **1st June 2018 to September 2018**, paid cess at 72 % by classifying the same product under Tariff Heading **24 03 99 20**.

92. It further appears that vide letter dated 14.03.2019, the said petitioner in W.P(MD)No.204 of 2021 further stated that from **Nov 2018** onwards they have changed the product manufactured from Tariff Heading



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24 03 99 20 to Tariff Heading **2401 20 90**, and thereafter attempted to obtain a ruling from the Appellate Authority for Advance Ruling under the provisions of the GST Act for classifying the same product under the Tariff Heading **2401 20**.

93. It is the elementary principle that insofar as the classification of products are concerned an assessee cannot change the classification merely to take advantage or benefit of any rate/concession. Classification can also not be altered because the product will attract higher rate of duty/tax. In this case, admittedly, the respective petitioners have classified their products under Heading 2403 99 10 of the Central Excise Tariff Act, 1985 which is similar to Customs Tariff Act, 1975 which are based on HSN Classification.

94. Heading 2403 of the **Customs Tarrif Act, 1975** which is relevant for the purpose of classification and adoption of rate, for the provisions of respective GST enactments and the **Central Excise Act, 1944**, which was applicable immediately prior to 01.07.2017 are divided in to two basic categories namely:-



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Table-8

2403	
Other manufactured tobacco and manufactured tobacco substitutes; “homogenised” or “reconstituted” tobacco; tobacco extracts and essences	
A	B
Smoking tobacco, whether or not containing tobacco substitutes in any proportion.	Other
2403 11 ---Water Pipe tobacco specified in Sub-Heading Note to this Chapter:	2403 91 00 ---”Homogenised or “reconstituted” tobacco
2403 19 ---Others	2403 99 --- Other
	2403 99 10---Chewing Tobacco
	2403 99 20---Preparations containing chewing tobacco
	2403 99 30---Jarda scented tobacco
	2403 99 40---Snuff
	2403 99 50---Preparations containing snuff
	2403 99 60---Tobacco extracts and essence
	2403 99 70---Cut-tobacco
	2403 90---Other

95. As far as the petitioner in W.P.(MD)No.204 of 2021 is concerned, the petitioner had adopted the classification under Tariff Heading 2403 99 20 as “preparation containing between chewing tobacco” from **June 2018- Oct 2018** and later opted to classification of the same product under Tariff Heading 2401 20 90 by describing the manufacturing process given by the petitioner to Authority for Advance Ruling.



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96. As mentioned above, Tariff Heading 2403 99 20 pertains to “Preparations Containing Chewing Tobacco”. Such preparations are clearly banned in terms of the Government orders issued by Government of Tamil Nadu under regulation 2.3.4 of the Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011. The classification adopted by the said petitioner under 2403 99 20 would not have permitted the petitioner to manufacture and sell the products.

97. There is no difference between the Tariff classification under the **Central Excise Tariff Act, 1985** under Tariff Heading **2403 99 10** and under **Customs Tarrif Act, 1975**. Under the respective **Customs Tarrif Act, 1975**, goods falling under the main Tariff Heading 2403 is “Other Manufactured Tobacco And Manufactured Tobacco Substitutes; “Homogenised” or “Reconstituted” Tobacco, Tobacco Extracts Essences”.

98. As far as the writ petitioner in WP.(MD).No.204 of 2021 is concerned, the petitioner was indeed not only paying GST applicable under Tariff heading 2403 99 10 but also paying GST compensation cess under **Notification No.1/2017 – Central Tax (Rate)** dated **28.06.2017** under



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heading **2403 99 10**, from inception of GST and later stated that the petitioner wanted to close down the business due to stiff market conditions. Thereafter, the petitioner in WP.(MD).No.204 of 2021 has altered the classification from **2403 99 10** to **2403 99 20** for the period between June 2018 to September 2018 and now seeks classification under 2401 20 90.

99. The Supreme Court in **The Commissioner of Central Excise Vs. Shree Baidyanath Ayurved Bhawan Limited** [2009 237 (ELT) 225] observed as under:-

“30. Merely because there is some difference in the tariff entries, the product will not change its character. Something more is required for changing the classification especially when the product remains the same. (BPL Pharmaceuticals Ltd.)

31. There cannot be justification enough for changing the classification without a change in the nature or a change in the use of the product. The exception being where Tariff Act itself provides for a statutory definition, obviously, the product has to be classified as per the definition.

45. Before we part with the case, we may address to the plea of res judicata raised by the learned Senior Counsel for the Department. Mr. K. Radhakrishnan pressed into service few legal maxims in this regard. It is true that maxim Nemo debet bis vexari pro una et eadem causa is founded on principle of private justice as it states that no man ought to be twice put to trouble if it appear to the



court that it is for one and the same cause. The maxim Interest republicae sit finis litium concerns the State that law suits be not protracted. This maxim is based on public policy. In our opinion, these maxims cannot be applied as a rule of thumb in the taxation matters. In the matters of classification of goods, the principles that have been followed by the courts - which we endorse - are that there may not be justification for changing the classification without a change in the nature or a change in the use of the product; something more is required for changing the classification especially when the product remains the same. Earlier decision on an issue inter parties is a cogent factor in the determination of the same issue. The applicability of maxim Res judicata pro veritate occipitur in the matters of classification of goods has to be seen in that perspective. The interpretation given by this Court in Baidyanath with regard to this product has been considered and applied by us after amendment because Chapter Sub-heading 3003.31 does not contain definition of Ayurvedic Medicine and the product DML in nature, character and uses remains the same as it was prior to amendment.”

100. In **J.K. Synthetics Ltd. V. Union of India 1981(8) E.L.T.328 (Del.)**, it has been held that a change in classification can be justified only under the following circumstances:-

- a. If facts are different
- b. If fresh facts are brought on record
- c. The process of manufacture has changed



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- d. If the relevant Tarrif entries have undergone a modification and
- e. If subsequent to the earlier decision, there has been a pronouncement of a High Court/ Supreme Court which necessitates reconsideration of the issue.

101. As far as the other petitioners who have challenged various Orders-in-Originals, as detailed in Table-1 of this order are concerned, they have also been in existence even before the GST was rolled out w.e.f 01.07.2017. They were Central Excise Assesseees under the **Central Excise Act, 1994** read with **Central Excise Tariff Act, 1985**. They had also classified the product under **2403 99 10** under the **Central Excise Tariff Act, 1985**.

102. Similarly, other than the petitioner in W.P.(MD).No.204 of 2021, who have challenged various Orders-in-Original as in Table-1, to this order have adopted the classification under Tariff Heading 2403 99 10 during the period prior to roll out of GST dated **01.07.2017**. They have however, classified the products under Tariff Heading 2403 99 90 with a view to get away with the Government order referred *supra*. The facts remains that these products manufactured by both the petitioners would attract compensation cess by implementation of the GST enactments with



effect from **01.07.2017** under the provisions of the **Goods and Services Tax (Compensation to States) Act, 2017**.

103. The change of classification with a view to take advantage to evade payment of tax is not permissible.

104. Thus, in the absence of these facts, reopening or revision would be bad in law. There is none of the circumstances cited by the respective petitioners to warrant a change in the classification for the purpose of paying lesser compensation cess under Chapter 24 -Tobacco and Manufactured Tobacco substitutes.

105. Therefore, the adoption of classification, contrary to the products by the respective petitioners with a view to pay lesser compensation cess under **Notification No.1/2017 – Central Tax (Rate)**, dated **28.06.2017** cannot be justified. Therefore, there is no merit in challenge to either the impugned Orders-in-Original as detailed in Table-1 of this order or to the impugned order dated **29.09.2020** of the Appellate Authority for Advance Ruling which affirms or upholds the order of



Authority for Advance Ruling dated **20.04.2020**. These writ petitions are dismissed.

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106. It is however left open for the respective petitioners to alter their process to pay lesser compensation cess for the future period. No costs.

107. It is however open for the petitioners other than the petitioner in W.P.No.204 of 2021 to file a statutory appeal before the Appellate Commissioner under Section 107 of the respective GST enactments, within a period of 30 days from the date of receipt of a copy of this order. Consequently, connected miscellaneous petitions are closed.

24.10.2024

jen/smn-2/mm/mrr
Index : Yes/No
Neutral Citation: Yes/No
Speaking Order (or) Non-Speaking Order

To

1. Assistant Commissioner,
Office of the Assistant Commissioner of GST &
Central Excise,
Pon Nagar, Medical College Road,
Thanjavur – 613 007.

59/64



2. Assistant Commissioner,
Office of the Assistant Commissioner of GST &
Central Excise,
Williams Road, Cantonment,
Tiruchirappali – 620 001.



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C.SARAVANAN, J.

jen/smn-2/mm/mrr

**W.P.(MD) Nos.12689, 10565,
12626, 12724, 12813, 12835, 13023,
15533 of 2020, 5414 & 204 of 2021**

24.10.2024