

Appellate Authority for Advance Ruling for Goods and Service Tax,

Uttar Pradesh

(Constituted under Section 99 of the Uttar Pradesh Goods and Service Tax Act, 2017)

Order No. 07/AAAR/18 / 14 /2019

Dated: 18/4/ .2019

Before the Bench of:-

Shri Rajeev Tandon, Member

Smt. Amrita Soni, Member

GSTIN Number	09AAACD3039P1ZD
Legal name of the Applicant	M/s Savencia Fromage & dairy Pvt. Ltd.,
Trade Name of the Applicant	M/s Savencia Fromage & dairy Pvt. Ltd.,
Registered address/Address provided while obtaining user ID	A 41, hosiery Complex, Phase 2 Extention, Noida, U.P. 201305
Order of Advance Ruling Against which the appeal is filled	Order No.17 dated 10.12.2018 by the Authority of Advance Ruling, Uttar Pradesh

Received by hand
18/4/19
CHETAN KUMAR

**(Proceedings under Section 101 of the Central Goods and Service Tax Act, 2017
and Uttar Pradesh Goods and Service Tax Act, 2017)**

The present appeal has been filed under Section 100 of the Central Goods and Service Tax Act, 2017 and Uttar Pradesh Goods and Service Tax Act, 2017 (hereinafter referred to as “the CGST Act and UPGST Act”) by M/s. Savencia Fromage & dairy Pvt. Ltd., A 41, hosiery Complex, Phase 2 Extention, Noida, U.P. 201305 (hereinafter referred to as the “Applicant”) against the Advance Ruling Order No.17 dated 10.12.2018 by the Authority for Advance Ruling, Uttar Pradesh.

At the outset, we would like to make it clear that the provisions of both the CGST Act and the UPGST 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 UPGST Act.

Brief Facts of the Case

- 1) M/s Savencia Fromage and Dairy India Private Limited, A 41, Hoseiry Complex, Phase-2 Extension, Noida, Uttar Pradesh, 201305 (here in after called the applicant) is a registered assessee under GST having GSTN : 09AAACD3039P1ZD.
- 2) The Applicant intends to Manufacture ‘Breaded Cheese’.
- 3) The Applicant submitted application for Advance Ruling dated 20.10.2018, with an issue:- Whether the product ‘**Breaded Cheese**’ (‘impugned goods’) is classifiable as ‘cheese’ under Heading 0406, and accordingly, subject to CGST and SGST at the rate of 6 percent each under S. No. 13 of the Schedule-II appended to Notification No. 1/2017- Central Tax (Rate) dated June 28, 2017 (‘Notification No. 1/2017- CT(R)’) and Notification KA.NI.-2-836/XI-9(47)/17-U.P.Act-1- 2017-Order-(06)-2017 dated June 30, 2017 (‘Notification No. 836/17’) respectively.
- 4) On the basis of the facts disclosed in the application, the oral and written submission made at the time of personal hearing, documents produced

during the personal hearing and the views submitted by the jurisdictional Officer, CGST and CX, Noida, the Authority for Advance Ruling vide their Order 17 dated 10.12.2018 passed ruling as follows:-

“ ‘Cheese Balls’ under reference are classified under Schedule III of GST Laws, vide heading 2106 as ‘Food preparations not elsewhere specified or included’ and taxable @ 18% GST (9%CGST + 9%SGST)”.

5) a) Being aggrieved with the Order no. 17 dated 10.12.2018, M/s Savencia Fromage & dairy Pvt. Ltd., A 41, hosiery Complex, Phase 2 Extention, Noida, U.P. 201305 filed appeal application on 25.01.2019 to

- a. Set aside / modify the impugned advance ruling passed by the Authority for Advance Ruling;
- b. Allow the impugned goods to be classified under Heading 0406 and exigible to central tax and state tax at the rate of 6 percent each;
- c. Grant a personal hearing; and
- d. Pass any such further or other order(s) as may be deemed fit and proper in the facts and circumstances of the case.

b) And they submitted the grounds of appeal as Annexure- ‘B’ wherein the grounds for appeal broadly were as under:-

- i. Relevant entries under consideration.
- ii. Scope of heading 0406.
- iii. Impugned goods merit classification under Heading 0406.
- iv. The impugned goods are not classifiable under Heading 2106.
- v. The impugned goods satisfy the description ‘cheese’.
- vi. The common parlance test is inapplicable.
- vii. The Appellant did not submit test report declaring ingredients and recipe.
- viii. Authority ignored the US customs Rulings.
- ix. FSSAI classification is not relevant in the present case.

6) Applicant was granted personal hearing on 27.03.2019;

Personal Hearing

a) Mr. Puneet Bansal, Advocate and Miss Sneha Ghosh, Advocate from M/s Nitya Associates represented M/s Savencia Fromage and Dairy pvt. Ltd., Noida on behalf of the applicant for personal hearing.

b) During the Personal Hearing, they submitted that the product was under classification Head 04069000 as Other Cheese. In support of this, they rely on explanatory notes below Heading 0406 which specifically states the following:-

The presence of meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect classification provided that the goods retain character of cheese.

Cheese which have been coated with batter or bread crumbs remain classified in this heading whether or not they have been pre-cooked, provided that the goods retain the character of cheese.

c) They further took resort to U.S. Customs Ruling HQ 963175 dated 10.10.1999 in support of the case and also drew attention to other rulings incorporated in the submission of oral arguments.

d) They also brought reference to general rules of interpretation rule 3(b) in support of their proposition suggesting that the product would not get classified under 2106 90 99 being a residual entry and that essential characteristics both understood in common parlance as well from the English grammatical context would and in terms of volume 55%, their product is classified under Heading 0406.

e) On 29.03.2019 through email, they submitted copies of the following Case Laws, in support of their contention:-

- i) Maheshwari Stone Supplying Company
- ii) M/S. Asian Paints Ltd.
- iii) Dyna Automation Pvt. Ltd.
- iv) Hafele India Pvt. Ltd.
- v) Collector of Central Excise, Shillong Vs Wood Craft Products Ltd.
- vi) O.K. Play (India) Ltd. Vs Commissioner of C. EX., Delhi-III, Gurgaon.

Discussion and Findings

- 7) Having gone through the decision of the Authority for Advance Ruling of Uttar Pradesh and submissions made by the appellants in written form as well as those made during the course of personal hearing, we find that the issue before us to decide are:
- (i) Whether the product of the appellant is classified under HSN 0406 as claimed by them or the HSN 2106 as decided by the Authority for Advance Ruling of Uttar Pradesh; and
 - (ii) Whether the product is subject to CGST and SGST at the rate of 6 percent each under S.No. 13 of the Schedule-II appended to Notification No. 1/2017- Central Tax (Rate) dated June 28, 2017 ('Notification No. 1/2017-CT(R)') and Notification KA.NI.-2-836/XI-9(47)/17-U.P.Act-1- 2017- Order-(06)-2017 dated June 30, 2017 ('Notification No. 836/17') respectively.
- 8) Classification of the product in question i.e. Breaded Cheese:-
1. Learned Counsel representing the appellant raised points for our consideration. According to them, the product was under classification head 04069000 as 'other cheese'. They further took resort to Customs Rulings HQ 963175 dated 10.10.1999 in support of the case and also drew attention to other rulings incorporated in the submission of oral arguments. They also brought reference to general rules of interpretation rule 3(b) in support of their proposition suggesting that the product would not get classified under 2106 90 99 being a residual entry and that essential characteristics both understood in common parlance as well from English grammatical context would and in terms of volume 55%, their product is classified under Heading 0406.
 2. To decide the issue, first it is necessary to go through the ingredients and process employed for making of the impugned goods:-
 - a) Brief description of impugned goods :- The major ingredients employed for preparing impugned goods are as under:-

i) Cheese, ii) Milk Solids, iii) Bread crumbs, iv) Batter for coating, v) Vegetable Oil (for frying) and vi) permitted quantity of preservatives, emulsifiers, stabilisers and acidity regulators.

b) The process employed for making impugned goods is elaborated as under:-

Step 1:- Raw processed cheese is cut into small pieces and is then mixed with spices and seasonings.

Step 2:- The smaller pieces of cheese so formed are coated with batter and covered with bread crumbs

Step 3:- The battered and breaded cheese balls are then partially fried in vegetable oil

Step 4:- The partially fried breaded cheese pieces are then frozen and packed.

9) From the pictures of products and packaging provided by the Appellant it can be observed that the processed cheese being main ingredient contains 55% of total volume. Composition of the product is not in dispute. So, the only question is whether the above product is to be classified under Chapter Heading 0406 or under Chapter Heading 2106.

10) Classification of goods for the purposes of GST is based on the entries in the First Schedule to the Custom Tariff Act 1975. In terms of explanation (iii) and (iv) to Notification No. 1/2017 - Central Tax (Rate) dated 28-06-2017, tariff heading, 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 and the rules for the interpretation of the First Schedule to the Customs Tariff Act, 1975, including the Section and Chapter Notes and the General Explanatory Notes of the First Schedule shall be applied for the interpretation and classification of goods.

11) Further, the Customs Tariff is based on the Harmonious System of Nomenclature (HSN) which is a dependable guide for interpreting the customs tariff as held by the Hon'ble Supreme court in the case of *L.M.L.*

cheese and curd.

- ii) 0406 20 00 - Grated or powdered cheese, of all kinds
- iii) 0406 30 00- processed cheese not grated or powdered
- iv) 0406 40 00- blue veined cheese and other cheese containing veins produced by penicillium roqueforti
- v) 0406 90 00- other cheese.

15) The description of Heading 0406 starts with the phrase “*this heading covers all kinds of cheese*” and proceeds to enlist a wide variety and forms of cheese. As per the Explanatory Notes on Heading 0406, this Heading includes ‘processed cheese’ which is manufactured by comminuting, mixing, melting and emulsifying, with heat, emulsifying or acidifying agents, one or more varieties of cheese. Such ‘processed cheese’ may also contain cream or other dairy products, salts, spices, flavoring, coloring and water. This indicates that cheese having undergone processes and addition of several other ingredients, are also classified under Heading 0406.

16) The Explanatory Notes clarify that presence of meat, fish, crustaceans, herbs, spices, vegetables, fruits, nuts, vitamins, skimmed milk does not affect the classification of provided that the product retains characteristics of cheese. Relevant extract of the same is reproduced as under:

“The presence of meat, fish, crustaceans, herbs, spices, vegetables, fruit, nuts, vitamins, skimmed milk powder, etc., does not affect the classification provided that the goods retain the character of cheese”

Ltd Vs. Commissioner of customs [2010 (258) ELT 321 (S.C.).

- 12) In view of this settled legal position, we have to examine the relevant items of goods mentioned in the Tariff sub-headings of both the chapter 4 and chapter 21 of the Customs Tariff Act.
- 13) a) Chapter 4 of the Customs Tariff Act deals with dairy produce; birds, eggs; natural honey; edible products of animal origin, not elsewhere specified or included. Products obtained by the concentration of whey and with the addition of milk or milkfat are to be classified as cheese in heading 0406 provided that they have the three following characteristics:-
- i) A milkfat content, by weight of the dry matter, of 5% or more;
 - ii) A dry matter content, by weight, of at least 70% but not exceeding 85%; and
 - iii) They are moulded or capable of being moulded.
- b) The chapter does not cover:-
- i) A products obtained from whey, containing by weight more than 95% lactose, expressed as anhydrous lactose calculated on the dry matter (Heading 1702);
 - ii) Products obtained from milk by replacing one or more of its natural constituents (e.g. butyric fats) by another substance (e.g. oleic fats) (Heading 1901 or 2106); or
 - iii) Albumins (includes concentrates of two or more whey proteins, containing by weight more than 80% whey proteins, calculated on the dry matter)(Heading 3502) or globulin (3504)
- 14) Description of goods under heading 0406 is as 'cheese and curds' and descriptions under sub headings are as follows:-
- i) 0406 10 00- fresh (unripened or uncured) cheese, including whey

- 17) The Explanatory Notes provide that cheeses which have been coated with batter or bread crumbs remain classified under this Heading whether or not they have been pre-cooked, provided that the goods retain the character of cheese. Relevant extract of the same is reproduced as under:

“Cheeses which have been coated with batter or bread crumbs remain classified in this heading whether or not they have been pre-cooked, provided that the goods retain the character of cheese.”

- 18) Chapter 21 of the Customs Tariff Act deals with the ‘miscellaneous edible preparations’. Supplementary Notes of the Chapter 21 at point No. 5 provides:-

“Heading 2106 (except tariff 2106 90 20 and 2106 90 30), inter alia, includes:-

- i) Protein concentrates and textured protein substances;
- ii) Preparations for use, either directly or after processing (such as cooking, dissolving or boiling in water, milk or other liquids), for human consumption;
- iii) Preparations consisting wholly or partly of foodstuffs, used in the making of beverages or food preparations for human consumption;
- iv) Powders for table creams, jellies, ice creams and similar preparations, whether or not ingredients;
- v) Flavouring powders for making beverages, whether or not sweetened;
- vi) Preparations consisting of tea or coffee and milk powder, sugar and any other added ingredients;

- vii) Preparations (e.g., tablets) consisting of saccharin and foodstuff, such as lactose, used for sweetening purpose;
- viii) Pre-cooked rice, cooked either fully or partially and their dehydrates; and
- ix) Preparations for lemonades or other beverages, consisting, e.g., of flavoured or coloured syrups, syrup flavoured with an added concentrated extract, syrup flavoured with fruit juices and concentrated fruit juice with added ingredients.”

Further, the description under the Heading 2106 is as under:-

‘food preparations not elsewhere specified or included’ and description under sub headings are as follows:-

- i) 2106- Food preparations not elsewhere specified or included
- ii) 2106 10 00- Protein concentrates and textured protein
- iii) 2106 90- Other: --- Soft drink concentrates
- iv) 2106 90 11 ---- Sharbat
- v) 2106 90 19 ---- Other
- vi) 2106 90 20 --- Pan masala
- vii) 2106 90 30--- Betel nut product known as “Supari”
- viii) 2106 90 40 --- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup
- ix) 2106 90 50 --- Compound preparations for making non-alcoholic beverages
- x) 2106 90 60 --- Food flavouring material

- xi) 2106 90 70 --- Churna for pan
- xii) 2106 90 80 --- Custard powder --- Other:
- xiii) 2106 90 91 ---- Diabetic foods
- xiv) 2106 90 92 ---- Sterilized or pasteurized millstone
- xv) 2106 90 99 ---- Other

19) The description to Heading 2106 is '*Food preparations not elsewhere specified or included*'. The title makes it plain and clear that the items covered there under are foods preparations which are not covered under any other Heading. HSN Explanatory Notes as well as Chapter Notes under Customs Tariff Act to Chapter 21 talk primarily about products which are 'preparations not elsewhere specified or included'. Supplementary Chapter Note 6 to Chapter 21 specifically provides for inclusion of sweet meats, commonly known as mishthans or mithai, namkeens, mixtures, bhujia, chabena under tariff item 2106 90 99, regardless of the ingredients.

Therefore, to determine whether a product is classifiable under Heading 2106 is to check if it is not classifiable under any other Heading under the First Schedule of the Customs Tariff Act and it is specifically covered by Supplementary Chapter Note 6 above.

i) After going through the ingredients and process employed for making the impugned goods it is clear that cheese forms most important constituent (55% of total volume) of the product and the impugned goods cannot be formed without cheese. The batter and bread coating are not essential and can be easily substituted. It is only cheese that differentiates the impugned goods from any other breaded product. As Heading 0406 includes 'processed cheese', which may also contain cream or other dairy products, salts, spices, flavouring, colouring and water.

ii) In addition to the above, it is undisputed that impugned goods are neither sweetmeat nor are they in the nature of namkeens, bhujia etc. The impugned goods thus are not covered by Supplementary Chapter Note 6 referred above.

Thus, in reference to the impugned goods, both the criteria specified for classification under Heading 2106 are not fulfilled.

20) On the other side, Heading 0406 includes not only cheese but a mixture or combination of cheese and some other product, including bread and herbs. The term 'cheese' under Heading 0406 is of wide import covering within its sweep not only all kinds of cheese but certain articles of cheese too. The process of mixing other ingredients such as meat, fish etc., breading and cooking may result in the creation of an article of cheese but the same remains classifiable under Heading 0406 if it retains the characteristics of cheese. The HSN and Explanatory Notes which form essential guidance for interpretation of any Heading make it abundantly clear that cheese which contain various additions that are battered or breaded and pre-cooked are included as 'Cheese' under Heading 0406. Ingredients and characteristics of the product with which we are concerned do not contain any material or feature, which will take the said product out of goods falling under Heading 0406.

21) As the Apex Court held in the case of M/s Bharat Forge & Press Industries Private Limited v. CCE, 1990 (45) ELT 525 (SC);

Classification of goods under residuary Entry - Criteria. -

Under a residuary entry only such goods are covered which cannot be brought under the various specific entries in the tariff. In other words unless the Department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary item. [Para 3]

As noted above, Heading 2106 is the residuary entry whereby Heading 0406 covering 'Cheese' forms the specific entry. Hence, where goods are equally


classifiable under Heading 0406 and Heading 2106, then the former, *i.e.* Heading 0406 shall prevail.

In view of the extensive deliberations as held hereinabove, we find that the impugned goods merit to be classified under the Heading 0406 of the Customs Tariff Act and we pass an order as follows:

Ruling

In view of the foregoing discussion and findings we hereby modify the Ruling no.17 dated 10.12.2018 of the Authority on Advance Ruling to the extent that-

Goods under reference are classifiable under S. No. 13 of Schedule II of Notification 1/2017 of Central tax (Rate), vide Heading 0406 and taxable @ 12% GST (6% CGST + 6% SGST).


(Shri Rajeev Tandon)
Member for AAAR
CGST


(Smt. Amrita Soni)
Member for AAAR
SGST

To,
M/s Savencia Fromage & dairy Pvt. Ltd.,
A 41, hosiery Complex, Phase 2 Extention,
Noida, U.P. 201305

APPELLATE AUTHORITY FOR ADVANCE RULING –UTTAR PRADESH

Order No. 07

Date: 18/4/19

Copy to –

1. The Chief Commissioner, CGST & Central Excise, Lucknow Zone, Member, Appellate Authority for Advance Ruling.
2. The Commissioner, Commercial Tax, Uttar Pradesh, Member, Appellate Authority for Advance Ruling.
3. The Commissioner, CGST & Central Excise, Noida.
4. Through the Additional Commissioner, Grade – I, Commercial Tax, Noida to jurisdictional tax assessing officers.