

## COMPENDIUM

- Amid the ongoing debate over goods and services tax (GST) rate on hand sanitizers, the Goa bench of the GST Authority of Advance Ruling (AAR) has held that the alcohol-based hygiene product will attract 18 percent GST. It added that its classification as an essential commodity cannot be a criterion for exemption from GST.
- Recently, Referring to the CEIB's report, the Directorate General of GST Intelligence (DGGI) clarified through an internal document directing Principal Commissioners investigating GST evasion. Wherein it opined that 18% of GST is applicable to the Hand Sanitizer and not 12%.
- Further, the CBIC vide Press Release dated 15.07.2020, clarified that the rate is 18% only and a lower rate would lead to an inverted duty structure and put domestic manufacturers at a disadvantage. As lower rates help import by making them cheaper.

### Synopsis of Goa AAR

#### Issue Involved

"Springfields (India) Distilleries" (The Applicant) is a registered partnership firm manufacturing Hand Sanitizers vide License issued by Directorate of Food and Drug Administration applied for AAR on the below mentioned questions:-

- ***Is Hand Sanitizer is covered under following HSN Code & rate 30049087 – Antihypertensive drugs: Antibacterial formulations not elsewhere specified or included HS Code and Indian Harmonized System Code. The rate of GST is 12%?***
- ***The Ministry of Consumer Affairs, Food, and Public Distribution, in a notification CG-DL-E13032020-218645, has classified Hand Sanitizers under the Essential Commodities Act, 1955 as an essential commodity and thus exempt from GST.***

#### Ruling:

##### For First Question

Hand sanitizers manufactured by the applicant are of the category of alcohol-based sanitizers and are classifiable under heading 3808 of the Harmonized System of Nomenclature (HSN) to which the rate of GST applicable is 18 percent.

##### For the Second Question,

There is a separate notification under GST law for exempted goods and services. "Merely classifying any goods as an essential commodity will not be the criteria for exempting such goods from GST.

##### Rationale behind Classification

The ruling comes at a time when the GST administration is investigating GST evasion by manufacturers of alcohol-based sanitizers. They are paying 12 percent GST by wrongly classifying the item under a different heading of 'medicament', it was felt. GST officials have said several manufacturers and suppliers, including sugar mills and distilleries, which are classifying alcohol-based hand sanitizers under the tariff heading 3004 with 12 percent tax against 3808 of HSN, which attracts 18 percent GST.

## Jurisprudence

The Hand Sanitizers may be:-

- Disinfectant
- Medicine

One of the essential tests of the classification of the product would be based on the ingredients and its end-use.

Generally, Sanitizers reduce bacteria on a surface by at least 99.9% disinfectants kill a wider range of microorganisms than sanitizers and cleaners simply remove dirt soils and impurities from surfaces.

### Chapter 30

Hon'ble Supreme Court in the case of **Dabur India Vs. C.C.E. 2005 (182) ELT 290 (SC) and Puma Ayurvedic Herbal Pvt. Ltd. Vs. CCE, Nagpur- 2006 (196) ELT 3 (SC)** held that if ingredients of the products are available in the Ayurveda texts, then it will be the essential factor for classification of the product as "medicament" under Chapter Heading 30.

- *Medicaments consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses "incl. those in the form of transdermal administration" or in forms or packing for retail sale (excluding goods of heading 3002, 3005 or 3006)*

Chapter 30 of the Customs Tariff Act covers the classification of pharm products. Two of the most essential characters of medicine are its 'Therapeutic use and prophylactic use. The word 'prophylactic' derives from the Greek word 'prophylactics' which means "to take precautions against" or "to keep guard before". Dorland's Medical Dictionary 1364 (28th ed. 1994) defines "prophylactic" as "an agent that tends to ward off disease". Merriam-Webster's Medical Desk Dictionary 579 (1993) defines it as "guarding against or preventing the spread or occurrence of disease or infection"; Mosby's Dictionary 1284 (4th ed. 1994) defines it as a biologic, chemical, or mechanical agent that prevents the spread of disease.

As per **Ciens Laboratories 2013 (295) E.L.T. 3(S.C.)** wherein the SC Held that, if a product's primary function is "care" and not "cure", it is not a medicament.

As per the case, **Sarvotham Care Ltd 2015 (322) E.L.T. 575 (S.C.)** The Supreme Court agreed to the suggestion that shampoo should be used once a week and on other days, normal shampoos may be used, showed it was to be used as a medicine, unlike other normal Shampoos. It was more so as it was not used for cleaning hair. Hence, the shampoo was classifiable as medicine under sub-heading 3003.10 of Central Excise Tariff and not under sub-heading 3305.99 ibid as 'preparation for use on hair'.

Sometimes reliance is also placed on the Indian Pharmacopoeia, the United States Pharmacopoeia and the International Pharmacopoeia as well for deciding the functionality of a particular product

Prior to COVID – 19, Hand Sanitizer was a product of the opulent. The general hand sanitizers were used as a product to clean the hands and was merely used as an option. Now, if such sanitizer contains a significant amount of Alcohol then it won't be classified under this head.

## Chapter 38

- HSN 3808 Insecticides, rodenticides, fungicides, herbicides, anti-spouting products and
- Plant growth regulators, disinfectants and similar products put up in forms or packings for retail sale or as preparations or articles (for example, sulfur treated bands wicks and candles, and flypapers).

### Dictionary Meaning

'Disinfectant' is defined in **Webster Comprehensive Dictionary** 'as a substance used to disinfect or to destroy the germs of infectious and contagious diseases'. In the **Concise Oxford Dictionary of Current English**, 'disinfectant' is defined as 'a commercially produced chemical liquid that destroys germs',

Disinfectants may be of two types; one to disinfect and others to destroy the germs. The former, i.e., those products which are used as a disinfectant, for instance, lavender, etc. may not be covered in the expression 'pesticide'. But those products which are used for killing insects by use of substances such as high boiling tar acid have the same characteristic as 'pesticide'.

The Hon'ble Supreme Court in the case of **NIRMALA DYECHEM VERSUS COMMISSIONER OF C. EX., DAMAN 2007 (207) E.L.T. 161 (S.C)** observed that the expression "cide" means to kill and hence the things mentioned in heading 38.08 are all things meant for killing (germs, animals, etc.) and they do not relate to products which are basically meant for cleaning (highlight added). Hon'ble Supreme Court also noted that the submission made by the learned Counsel that some cleaning materials may have some antiseptic or disinfectant quality but that would not by itself bring the product under Chapter 38.08. These submissions as summarized by the Hon'ble Supreme Court would clearly show that the submissions of the department before the Apex Court were that basic function of the product is to be seen and basic function of this product is cleaning and the fact that the products also kill the germs, is not relevant. Hon'ble Supreme Court observed that the matter required an in-depth consideration to see what was the main function and what was the subsidiary function. In the opinion of the Supreme Court, the submissions that once the Commissioner came to the conclusion that the product had a capacity to kill 100% germs, it should have been classified under Chapter CETH 3808.90, is not correct.

Further **World Customs Organization (WCO)** has inferred that alcohol-based hand sanitizers are correctly classifiable under heading 3808 of HSN.

### Why it should fall in Chapter 38?

Now as per The Drugs and Cosmetics Act, 1940 read with the Drugs and Cosmetic Rules 1945 mandates that every drug, manufactured, stocked, or sold, exhibited in India must be done so under a license unless the said drug is exempted. The object of The Drugs and Cosmetics Act, 1940 was to regulate the import, manufacture, distribution, and sale of drugs and cosmetics. 'Drug' is defined under Section 3(b) and the said section has 4 sub-clauses and sub-clause (1) talks of 'medicines', while sub-clause (ii) and (iii) talks of 'substances' and sub-clause (iv) talks of 'devices'. Therefore the conclusion one could arrive at is that a 'Drug' would not only constitute just medicines but also substances and devices.

As contemplated in Section 3(b). Supreme Court in **Chimanlal Jagjivan Das Sheth v. the State of Maharashtra, (1963)** concluded that a 'substance' as stated under

Section 3(b) of the Drugs and Cosmetics Act is beyond those that can be classified as "Medicine" and a substance can even be a 'thing' that can be used for any treatment. Hence borrowing this understanding, a Hand sanitizer would conclusively fall within the meaning of a Drug, as a substance. The next question is of who all should obtain a license under the act for the purposes of dealing with the drug. Distribution, sell or stock or exhibit of the offer, for sale of any drug'.

This Section has also to be read with **Part VI - Rules 59 of the Drugs and Cosmetics Rules 1945. A to 66A and Part VII - Rules 71 to 84B** perusal of these rules would make it clear that not only the manufacturer but also to stock, exhibit or offer sale or distribute have to obtain the appropriate license under different forms as prescribed.

As per **Part XI of the Drugs and Cosmetics Rules 1945 – Rule 123 – Exemptions**. It would be useful to extract the same, which is as follows,

*"123. The drugs specified in Schedule K shall be exempted from provisions of Chapter IV of the Act and the Rules made thereunder to the extent and subject to the conditions specified in that schedule."*

### **Exemption to Schedule 'K'**

This would mean that all drugs specified in Schedule `K' shall be exempted from the provisions of Chapter IV of the Act and the Rules made thereunder, to the extent and subject to the conditions specified in that schedule. Schedule K lists out 35 items that are exempted from Chapter IV of the Drugs and Cosmetics Act 1940.

### **License is Mandatory**

Section 18(c) of the Drugs and Cosmetics Act 1940 makes it very clear that license should be applied for 'Manufacture for sale, For the purposes of this Article, item 12 would be of great relevance and the same is extracted as follows:

*"12. Substances intended to be used for the destruction of Vermin or insects which cause disease in human beings or animals, viz. Insecticides and Disinfectants."*

A closer look would reveal that the above description (item 12) is similar to the wordings of Section 3(b) (ii)(*Extracted Supra*) of the Drugs and Cosmetics Act 1940.

Therefore the intention of the legislature seems to be that those substances as defined under 3(b)(ii), which specifically fall within item 12 of Schedule K are exempted from the provisions of the Act to the extent as provided for. Item 12 very clearly exempts the following:

*Those "Substances" intended to be used for "destruction of Vermin" or insects which cause disease in "human being" or animals, viz. Insecticides and Disinfectants. Therefore there is an exemption under the Act for "Disinfectants".<sup>1</sup>*

### **Hand Sanitizer is Disinfectant?**

Now the moot question is whether a Hand Sanitizer would fall within the definition of a "Disinfectant". It is here that the Food & Drugs Administration in Maharashtra comes out with an answer that a Hand Sanitizer is not a Disinfectant and hence even the smallest shop should obtain a license to sell the Hand Sanitizers as according to them Hand Sanitizer is not an Exempted item within item 12 -Schedule

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<sup>1</sup> <https://www.mondaq.com/>

K of the Act. There is no fixed test for the classification of a taxable commodity. **This is probably the reason why the 'common parlance test' or the 'commercial usage test' is the most common (A. Nagaraju Bors. v. State of A.P., 1994 Supp (3) SCC 122].**

Whether a particular article will fall within a particular Tariff heading or not has to be decided on the basis of the tangible material or evidence to determine how such an article is understood in 'common parlance' or in 'commercial world' or in 'trade circle' or in its popular sense meaning. It is they who are concerned with it and it is the sense in which they understand it that constitutes the definitive index of the legislative intent when the statute was enacted [see **D.C.M. v. the State of Rajasthan, (1980) 4 SCC 71].**

One of the essential factors for determining whether a product falls within Chapter 30 or not is whether the product is understood as a pharmaceutical product in common parlance [**CCE v. Shree Baidyanath Ayurved, (2009) 12 SCC 413; Commissioner of Central Excise, Delhi v. Ishaan Research Lab (P) Ltd. (2008) 13 SCC 349].**

Further, the quantity of medicament used in a particular product will also not be a relevant factor for, normally, the extent of use of medicinal ingredients is very low because a larger use may be harmful to the human body. [**Puma Ayurvedic Herbal (P) Ltd. v. CEE, Nagpur (2006) 3 SCC 266; State of Goa v. Colfoax Laboratories (2004) 9 SCC 83; B.P.L Pharmaceuticals v. CCE, 1995 Supp (3) SCC 1].**

However, there cannot be a static parameter for the correct classification of a commodity. In the case of **Indian Aluminium Cables Ltd. v. Union of India, (1985) 3 SCC 284**, has ruled out this principle in the following words:

*To sum up the true position, the process of manufacture of a product and the end-use to which it is put, cannot necessarily be determinative of the classification of that product under a fiscal schedule like the Central Excise Tariff. What is more important is whether the broad description of the article fits in with the expression used in the Tariff..."*

Moreover, the functional utility and predominant or primary use of the commodity which is being classified must be taken into account, apart from the understanding in common parlance [**O.K. Play (India) Ltd. v. CCE, (2005) 2 SCC 460; Alpine Industries v. CEE, New Delhi (1995) Supp. (3) SCC 1; Sujanal Chemo Industries v. CEE & Customs (2005) 4 SCC 189; ICPA Health Products (P) Ltd v. CEE (2004) 4 SCC 481; Puma Ayurvedic Herbal (Supra); Ishaan Research Lab (P) Ltd.(Supra); CCE v. Uni Products India Ltd., (2009) 9 SCC 295].**

A commodity cannot be classified in a residuary entry, in the presence of a specific entry, even if such specific entry requires the product to be understood in the technical sense [**Akbar Badruddin v. Collector of Customs, (1990) 2 SCC 203; Commissioner of Customs v. G.C. Jain.,(2011) 12 SCC 713].**

A residuary entry can be taken refuge of only in the absence of a specific entry; that is to say, the latter will always prevail over the former [**CCE v. Jayant Oil Mills, (1989) 3 SCC 343; HPL Chemicals v. CCE, (2006) 5 SCC 208;**

**Western India Plywoods v. Collector of Customs, (2005) 12 SCC 731; CCE v. Carrier Aircon, (2006) 5 SCC 596].** In **CCE v. Carrier Aircon, (2006) 5 SCC 596**, this Court held:

*"14... There are a number of factors that have to be taken into consideration for determining the classification of a product. For the purposes of classification, the relevant factors inter alia are statutory fiscal entry, the basic character, function, and use of the goods. When a commodity falls within a tariff entry by virtue of the*

purpose for which it is put to (sic. produced), the end use to which the product is put to, cannot determine the classification of that product."

## **"Disinfectants"**

The word Disinfectant has not been defined anywhere in the Act or the Rules. However, the **Hon'ble SC in Bombay Chemical (P) Ltd. v. CCE, (1995)** had an opportunity to consider the meaning of the word "disinfectant" from the context of Central Excise Rules and concludes that a Disinfectant is a Substance used to disinfect or to destroy germs of infectious and contagious diseases and is commercially produced chemical liquid that destroys germs. Therefore giving an ordinary, natural, and popular construction and applying the above ratio, a Hand Sanitizer would fall within the meaning of Disinfectant and as a Substance.

Therefore from the above, it is clear that a "Disinfectant" is a substance (liquid) used to disinfect or to destroy germs of infectious and contagious diseases. Extending the same interpretation as stated above, Hand Sanitizer would fall within the meaning of Disinfectant and as a Substance within the meaning of 3(b)(ii) and the same meaning has to be given to the word "Disinfectant" found in item 12 of Schedule K, by which a substance which destructs vermin which causes disease in human viz. would be a Disinfectant.

Further reference can also be had to a Judgment of the **Kerala High Court Reckitt Benckiser (India) Ltd. v. the State of Kerala, (2011)**. In the said case, the question that arose was whether 'Dettol' is a Disinfectant within the meaning of Item `12 of Schedule K of the Drugs and Cosmetics Rules 1945 (similar to our facts and circumstances). The Kerala High Court after taking into account other precedents and authorities, ultimately holds that Dettol is indeed a Disinfectant within the meaning of Item 12 - Schedule K. The Kerala High Court in a very captivating fashion would have said that the function of a 'Disinfectant' which is is the destruction of micro orga-nisms particularly on inanimate objects, but that does not mean that a Disinfectant could be used only on inanimate objects and the moment it could be used on animate objects also, it ceases to be a 'Disinfectant' and became an 'Antiseptic'. Its use on animate objects is only external with the same purpose - destruction or making inert microorganisms". What can be deduced from the above is that Alcohol-based Hand Sanitizer is used to disinfect externally and hence would fall within the meaning and ambit of 'Disinfectant' as given in Item 12 – Schedule K.

## **Why it should fall under Chapter 30**

if the product is "medicament" which would fall under chapter sub-heading 3003.

## **According to Britannica.com<sup>2</sup>**

*Hand sanitizer also called hand antiseptic, hand rub, or hand rub, agent applied to the hands for the purpose of removing common pathogens (disease-causing orga-nisms) Hand sanitizers typically come in foam, gel, or liquid form. Their use is recommended when soap and water are not available for hand washing or when repeated hand washing compromises the natural skin barrier (e.g., causing scaling or fissures to develop in the skin. Although the effectiveness of hand sanitizer is variable, it is employed as a simple means of infection control in a wide variety of settings, from day-care centers and schools to hospitals and health care clinics and from supermarkets to cruise ships.*

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<sup>2</sup> The Encyclopedia Britannica is a general knowledge English language online encyclopedia.

It is a simple means of infection control. In fact, if one looks at the ingredients provided for in the label, one can find Ethanol and Hydrogen Peroxide as the mainstay ingredients.

**According to, Kathleen A. Baxter's report**<sup>3</sup> "Analysis of Alcohol-Based Hand Sanitizer Delivery Systems: Efficiency of Foam, Gel, and Wipes against Influenza (H1N1) Virus on Hands,"

Alcohol-based sanitizers are very effective at quickly destroying a variety of pathogens and that too without the need for water, plumbing, and drying facilities. According to the World Health Organization (WHO), alcohols have excellent activity against gram-positive bacteria, gram-negative bacteria, enveloped viruses, non-enveloped viruses, mycobacteria, and even fungi. Numerous studies have also documented the in-vivo antimicrobial activity of alcohols and the effectiveness in removing clinical strains of *Acinetobacter baumannii*, methicillin-resistant *Staphylococcus aureus*, *Escherichia coli*, *Enterococcus faecalis*, *Pseudomonas aeruginosa*, and *Candida albicans* from profoundly contaminated hands of human volunteers.

A study published in the **Journal of Infectious Diseases** evaluated the viricidal activity of alcohol-based hand sanitizers (ABHS) against re-emerging viral pathogens, such as Ebola virus, Zika virus, severe acute respiratory syndrome coronavirus (SARS-CoV), and Middle East respiratory syndrome coronavirus (MERS-CoV). It determined that these pathogens, as well as other enveloped viruses, could also be efficiently inactivated alcohol. This further supports the use of ABHS in healthcare settings and viral outbreaks. More recently, alcohol-based sanitizers are also considered effective in preventing the hand-to-mucous membrane transmission of SARS-CoV-2, the pathogen responsible for the COVID-19 pandemic across the world. Alcohol-based sanitizers are thus considered useful in both hospital and community settings.<sup>4</sup>

Keeping in mind its excellent coverage against nearly all pathogens and lack of resistance development, alcohol-based hand sanitizers can be used in a variety of settings not limited to clinics, hospitals, acute care facilities, emergency medical centers, mobile healthcare units, nursing homes, and the community in general.

Hand sanitizers are regulated as over-the-counter (non-prescription) drugs by the U.S. Food and Drug Administration. If you use alcohol-based hand sanitizers, read and follow the Drug Facts label, particularly the warnings section.<sup>5</sup>

The test of trade parlance and the period of use can be the ground to classify the said product under HSN 3003, but this is not the final view. This classification battle will probably reach the Apex Court.

## Final Remarks

*The conclusion is that classification is determined by various factors such as tariff description, market parlance, basic nature of the goods, and end-use. It is settled law that market parlance determines the classification if there is no specific tariff description. Even in the tariff description, while determining whether the goods will fall under a particular head, the most import factor is the basic nature or character of the goods, that is to say, what the goods are. If the tariff description itself depends upon the end-use factor, then the end-user will be relevant. Again, while*

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<sup>3</sup> <https://www.ajicjournal.org/article/S0196-6553%2811%2901270-3/abstract>

<sup>4</sup> <https://www.ncbi.nlm.nih.gov/books/NBK513254/>

<sup>5</sup> <https://www.fda.gov/consumers/consumer-updates/safely-using-hand-sanitizer>

determining what the end-use of the goods is, the predominant use will have to be taken into consideration and not casual use.

**\*Important documents for technical analysis**

- Guide to Local Production: WHO recommended Hand rub Formulations.  
[https://www.who.int/gpsc/5may/Guide\\_to\\_Local\\_Production.pdf](https://www.who.int/gpsc/5may/Guide_to_Local_Production.pdf)
- WHO Guidelines on Hand Hygiene in Health Care: a Summary  
[https://www.who.int/gpsc/5may/tools/who\\_guidelines-handhygiene\\_summary.pdf](https://www.who.int/gpsc/5may/tools/who_guidelines-handhygiene_summary.pdf)