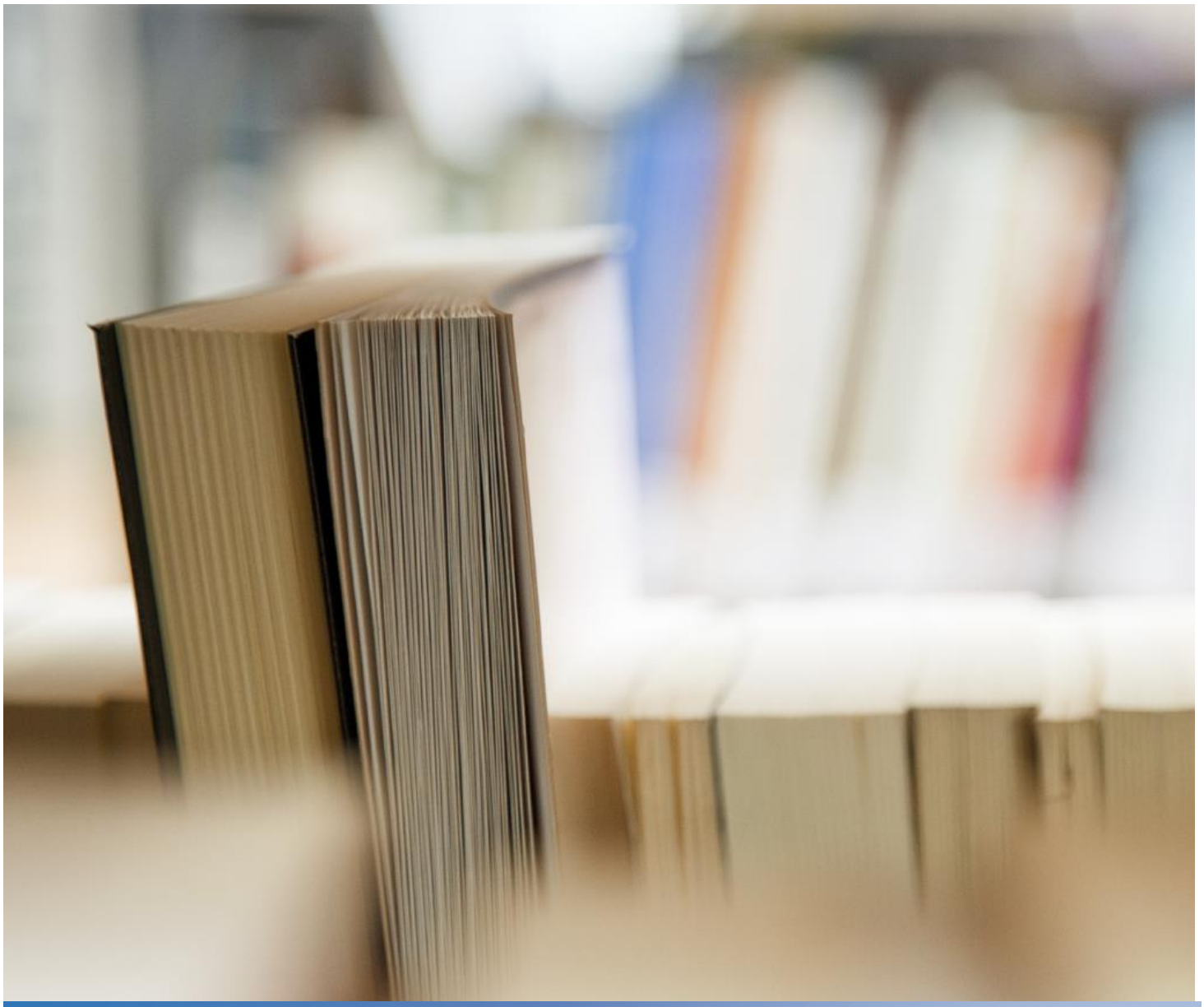

Impact of GST on Brand Name in Food Processing

S KHAITAN & ASSOCIATES

SHUBHAM KHAITAN

IMPACT OF GST ON BRAND NAME IN FOOD PROCESSING INDUSTRY

Introduction

One of the biggest areas of litigation plaguing the food processing industry has been the classification of goods into exempt and taxable supplies. For goods such as wheat, cereal flours, cereal groats, flour, pellets of potatoes, rice, flour of leguminous vegetables, rye, oats, maize, buckwheat, cheese, natural honey etc., the classification of goods depends on whether there is a registered brand name or a brand name with enforceable right or actionable claim associated with the product being sold. Without a brand name with enforceable right, the GST is exempt in most cases whereas it is taxable in cases where the products possess the same.

A. Rate notifications issued by the Government

1. Entry as per Rate notification on goods

For instance, as per the rate notification no. 1/2017-Central Tax (rate) dated 28th June 2017 as updated from time to time, the rate of GST has been provided as 5% for wheat under the following entry:

"Entry No. 46 – HSN Code 1001

Wheat and meslin put up in unit container and,-

(a) bearing a registered brand name; or

(b) bearing a brand name on which an actionable claim or enforceable right in a court of law is available [other than those where any actionable claim or any enforceable right in respect of such brand name has been voluntarily foregone, subject to the conditions as in the ANNEXURE"

2. Entry as per Exemption notification on goods

All other products of wheat are to be considered as exempted except if the above conditions are satisfied in which case the rate of 5% will be applicable.

3. Meaning of Unit container

Explanation (i) to the aforesaid both Notification no. 1/2017-CT (rate) and 2/2017-CT (rate) provides the following:

The phrase "unit container" means a package, whether large or small (for example, tin, can, box, jar, bottle, bag, or carton, drum, barrel, or canister) designed to hold a pre-determined quantity or number, which is indicated on such package.

The condition for any package to be considered as a unit container is that it should be designed to hold a pre-determined quantity or number.

4. Meaning of brand name and registered brand name

Explanation (ii)(a) to the aforesaid both Notification no. 1/2017-CT (rate) and 2/2017-CT (rate) provides the meaning of both brand name and registered brand name.

The meaning of brand name has been provided as below:

a) a name or a mark, such as symbol, monogram, label, signature or invented word or writing which is used in relation to such specified goods

b) goods for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified goods and some person using such name or mark

c) with or without any indication of the identity of that person.

Further, the meaning of registered brand name will include those brands which are registered under the Trademarks Act 1999, Copyrights Act 1957 or any other law. The cut off date which is to be considered will be 15th May 2017 or any subsequent date.

5. Annexure providing for foregoing of actionable claim

The annexure which provides for the procedure of foregoing an actionable claim or enforceable right provides the following in both the rate and exemption notification:

For foregoing the actionable claim or enforceable right on the brand name, the following is required:

a) File an affidavit with jurisdictional commissioner of Central tax

b) Clearly print in indelible ink on the unit container that such actionable claim or enforceable right has been foregone

B. Whether manufacturer's name on the unit container can be construed as brand name?

Before proceeding with this question, it is important to first understand as to what would be the impact of the manufacturer's name being considered as a brand name. If the same is considered as a brand name, then one can state that both kinds of products dealt by the company will be construed as holding a brand name. Further, the impact will be that if one is to surrender the enforceable rights or forego the actionable claim, then even the product which contains the registered brand name may not be allowed to be sold through the same company.

To ensure that both the products with or without registered brand name are allowed to be sold as taxable and exempt products respectively, it is important to establish that mere mention of the manufacturer's name should not be considered as a brand name.

The reasoning for the given matter is as below:

i. The mentioning of the name of the manufacturer on the unit container is a statutory requirement in terms of the Section 18 of the Legal Metrology Act 2009 read with the Legal Metrology (Packaged Commodity) Rules 2011 and Section 23 of the Food Safety and Standards Act 2006 read with Chapter 2 of the Food Safety Standards (Packaging and Labelling) Regulations 2011. Without this inscription, the said product cannot be sold in the market. If the intention was to consider all such products as branded, then there will not be any unbranded products in the market at all. Having said that it cannot be assumed that in all cases where only the manufacturer's name is mentioned, the product is to be considered as unbranded.

ii. The judgement of Appellate Authority for Advance Ruling in the case of M/s Aditya Birla Retail Limited [2018-TIOL-09-AAAR-GST] has drawn this analogy of manufacturer's name and brand name very clearly. In the case of Aditya Birla Retail Limited, 'Aditya Birla Retail' already owns a brand in the said name. This means that even if one were to remove the brand and logo of Aditya Birla, still the manufacturer's name 'Aditya Birla Retail Limited' is sufficient to establish the connection between the brand and the product. The main criteria for proving a product to have a brand name

is by clearly establishing a connection between such name and the product. Removing such brand names and keeping only the manufacturer's name may not result in identification of the product in every case. This is particularly true where the brand name is vastly different from the trade name of the manufacturer.

iii. The Department in the case of Tarai Foods Limited vs CCEx, Meerut – II [2006 (198) ELT 323 (SC)], the Supreme Court examined whether the name of the manufacturer printed on the package in terms of a legal requirement can be construed as a brand name. The following was held in the said case:

"Under the Standard Weights and Measures (Packets Commodities) Act, 1977 every packet is required to bear thereon or on a label squarely affixed thereto a definite, plain and conspicuous declaration as to, inter alia, the name and address of the manufacturer (see Rules 6 & 10). In other words, unit containers would have to bear the name of the manufacturer. If the name of the manufacturer were to be a brand name then this would mean, that there would be no unbranded unit container at all in law and the distinctiveness of T.H. 2001.10 would be meaningless

Furthermore, the definition of the words 'brand name' shows that it has to be a name or a mark or a monogram etc. which is used in relation to a particular product and which establishes a connection between the product and the person. This name or mark etc. cannot, therefore, be the identity of a person itself. It has to be something else which is appended to the product and which establishes the link"

The definition of brand name given in the erstwhile regime and the GST regime are very similar. Referring to the earlier definition, the Supreme Court clearly held that the identity of the person cannot be considered as the brand name. Further, it was clearly stated that if the name of the manufacturer is construed to be a brand name, then there will be no unbranded product at all. It has to be something which is appended to the product. Even if one is to deliberately remove the brand name to avail the nil rate of tariff, he can still avail the exemption.

iv. Further, the Tribunal in the case of Commissioner of Central Excise vs Synotex Industries 2012 (278) ELT 90 (Tri – Kolkata) held the following:

"If the Revenue's plea that indicating the manufacturer's name would amount to affixing brand name is accepted, then all the goods containing manufacturer's name would be branded goods which is highly illogical. In fact in respect of the packaged goods, there are statutory requirements that the manufacturer's or packer's name and address should be indicated on the packages of the goods under the standards of Weights & Measures Act, 1976 and the rules made thereunder. Indicating the names and address of the manufacturer on the packages cannot be construed as affixing the brand name as has been held in the case of Rajdoot Paints Ltd. & Kalvert Foods India Pvt. Ltd. (mentioned supra)."

v. In the case of CCEx vs Pepsi Foods Ltd [2015 (322) ELT A325 (SC)], the issue under consideration was whether the printing of the name of the brand owner could be construed to make the package a branded product. The Hon'ble Supreme Court while taking note of the definition of 'brand name' (which is similar to meaning provided to the phrase under the Exemption Notifications), and the decision in the case of Tarai Foods (supra), upheld the decision of the Hon'ble Tribunal in the assessee's own case, CCEx v. Pepsi Foods Ltd., [2003 (156) E.L.T. 1013 (Tri. - Del.)] and in the case of Nirula and Company Pvt. Ltd. v. CCEx [2005 (186) E.L.T. 412 (Tri.-Del.)], stating that mere printing of the name of the company on unit container does not make the package branded, unless the brand itself is printed specifically.

vi. The decision of Commissioner of Central Excise, Trichy vs Grasim Industries Ltd [2005 (183) ELT 123 (SC)] is used by the Department very frequently to infer that the name of the company 'Grasim Industries Limited' used on the package can be equated as a brand name. However, it should be pointed out here that the facts of the said case are vastly different to the issue at hand. In the said case, the manufacturer was a subsidiary of the Grasim Industries Limited. The requirement as per the law was to only show the name of the said manufacturer and not the name of 'Grasim Industries Limited'. There is also no denial that the purpose of using the words: "Manufactured by Dharani Cements Ltd., A Subsidiary of Grasim Industries Ltd." was with an intention of indicating a connection between the product i.e. the cement and M/s. Grasim Industries Ltd. This was only for gaining mileage before its customers. Thereby, the intent was to market the product using the brand of 'Grasim Industries'. Thereby, the name of the manufacturer was considered as a brand name in the given case.

From the above it can be inferred that for the manufacturer's name to be considered as a brand name, one should be correlate the brand with the manufacturer. If the brand is registered in different name than the manufacturer's name, this correlation will not be possible. Thereby, merely mentioning of the company name on the package cannot be equated with mentioning of brand name.

C. Where unbranded goods are sold from an exclusive retail outlet

In the case of Commissioner of C. Ex, Chennai – II versus Australian Foods India (P) Ltd [2013 (287) ELT 385 (SC)], if a final product is marked or stamped with a brand name, it is clearly to be classified as branded goods. To stretch this principle to imply that one not marked by any brand is an unbranded goods, is untenable. In case a scrutiny of the goods itself fails to reveal a brand name then the search must not end there. One ought to look into the surrounding circumstances of the goods to decipher, if it is in fact branded or not. Hence, we hold that it is not necessary for goods to be stamped with a trade or brand name to be considered as branded goods under the SSI notification, discussed above. A scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same. The most important of these factors is the specific outlet from which the goods are sold.

Even in the judgement of Authority for Advance Ruling in the case of Aditya Birla Retail Limited, one of the contributory factors for an adverse ruling against the applicant was that even after the removal of the brand name from the product, the said goods were being sold from the exclusive store of 'More'. This means that the said goods did not have any market in the smaller segment apart from such exclusive store. The surrounding environment through which such goods were sold was an important contributing factor for deciding whether the goods being sold are branded or not.

D. Whether exemption is product based or person based

It may be noted that the exemption notification no. 2/2017-CT (rate) dated 28th June 2017 through which the goods are sold provides exemption only on the goods being sold and not the person who sells such goods. The specific product should not have a registered brand name or a brand name for which the right is surrendered. Merely because a person is selling

a category of goods which are taxable does not mean that the other category of goods which are exempt would also become taxable.

A person can sell goods both under the category of registered brand name and another without such brand name. This is why the exemption has been provided only on wheat under HSN code 1001 if they are not sold under a registered brand name or a brand name where the enforceable rights on the said goods are present and not the person who is selling the said goods.

This can also be evidenced from Q9 of the Food Processing FAQs released by the CBIC. As per the said question, a person can be indulged in selling both branded and unbranded rice. Here it has been clarified that one can have 90% of turnover from unbranded price and 10% from branded rice. They would still be treated as exempted for the unbranded rice and taxable for the branded rice. In fact, it has been provided that even under the same invoice, a person can sell both branded and unbranded products.

E. Impact of dealing in two different markets

It may happen that the customer base for the branded and unbranded products may be completely different. This means that the branded and unbranded may be sold in two different kinds of markets altogether. Branded products may be sold to quality sensitive group of persons whereas the unbranded may be sold to price sensitive customers. The question is based on the nature of the customers, can one decide the product to be branded or unbranded.

One of the major aspects to consider while deciding whether a product can be said to contain brand name is the surroundings through which the product is being sold. This has been provided in the judgements of Australian Foods (Supreme Court) and Aditya Birla (AAAR).

In case of Australian Foods, the Supreme Court held that a scrutiny of the surrounding circumstances is not only permissible, but necessary to decipher the same. The most important of these factors is the specific outlet from which the goods are sold.

Further, Aditya Birla AAAR provided the emphasis on the surrounding circumstances through the mentioning of the names ‘More’ and ‘Aditya Birla Retail’ on the packaging earlier and the

name of the company remaining earlier after removal of the said brand names. Due to the connection between the exclusive store 'More' from where the goods are sold, use of specific words like Choice, Value or Superior, mentioning of manufacturer's name after removal of brand name etc., the surrounding circumstances indicate that the goods still remain branded.

This aspect can also be gathered from the judgement of Abad Fisheries Private Limited. In the said case of Abad Fisheries, the goods were being sold to institutional customers after removal of the brand name 'Abad' from the said goods. However, the said goods are the same as the ones which were being sold with the brand name earlier. Since the institutional customers were buying such goods in bulk and are dealing with the company keeping in mind the reputation of the products, said goods continue to remain branded in the eyes of the customer. The said goods even without affixation of the brand are perceived as branded by the customer. As a result, the goods were classified under branded for which higher rate of tax is applicable. Thereby, the surroundings indicated that the product should be treated as branded even after removal of the brand name 'Abad' from it.

Thereby, the surroundings and the kind of customer base consuming the product have a significant role in classification of goods between branded and unbranded.

F. Price Difference

In the case of Nidhi Distributors vs Commissioner of Customs, Calcutta [1999] taxmann.com 1787 (CEGAT), price of branded goods cannot be used for valuation of unbranded goods because the price of branded goods are generally than the price of unbranded goods.

Though this is not a deciding factor, it is still a contributing factor in making the decision whether the goods should be considered as branded or unbranded.

G. Foregoing of actionable claim or enforceable right

It must be noted here that the exemption is on food products which bears an unregistered brand name for which the actionable claim or enforceable right is not available i.e. the same should be foregone voluntarily. For foregoing the actionable claim or enforceable right on such brand name, the following is required:

(a) One should file an affidavit to that effect with the jurisdictional commissioner of Central tax that he is voluntarily foregoing his actionable claim or enforceable right on such brand name

(b) One should on each such unit container, clearly print in indelible ink, both in English and the local language, that in respect of the brand name printed on the unit containers he has foregone his actionable claim or enforceable right voluntarily.

Conclusion

There are various factors which goes into contributing whether a product is treated to be treated as taxable and exempt where the same is dependent on the brand name with enforceable rights. One should carefully study the surrounding circumstances including the packaging of the product, its pricing, customer base, nature of its marketing etc. before arriving at the opinion about whether the same is exempted or not.

Further, the legal procedure of filing the declaration cum affidavit for surrender of rights on the brand name and mentioning of this fact on the packaging should be strictly adhered to if the products are treated as exempted. There have been several judgements in the past wherein adhering to the relevant procedure has been provided as a mandatory requirement for claiming exemption. Hence, not following the legal procedure strictly, the exemption on the products can be subject to challenge by the Department.

ADMIN OFFICE : MOOKERJEE HOUSE,
17, BRABOURNE ROAD, 2NDFLOOR
KOLKATA - 700001

PHONE NO : 03340687062, +919831912725

EMAIL ID : shubham@cakhaitan.com

WEBSITE : www.cakhaitan.com

FACEBOOK : https://www.facebook.com/shubham.khaitan.50

LINKEDIN : https://www.linkedin.com/in/shubham-khaitan-5a687064/

YOUTUBE : https://www.youtube.com/channel/UCU4QQj5MOuds0YR1REXzSTA