Equating “alcohol” with “food” – Will the next GST Council meeting lift India’s ‘spirits’?

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The liquor industry typically outsources many ancillary tasks such as brewing, bottling, packaging, etc., to third parties or job workers. Such work which includes the processing of raw material or working on the semi-finished goods of a (GST) registered entity by another entity are called job works. The rate at which GST is levied on job work services @12%, barring a few exceptions like on food and food products, on which GST is levied @5%.

The liquor industry has put forward its demand to include liquor in the category of ‘food and food products’, in order to decrease input costs and consequently, enable better management of their working capital.

This demand of the liquor industry was brought forward by one of the members of the GST Council (**Council**). The Council may consider a long-standing demand of the liquor industry - to consider 'alcoholic liquor for human consumption as food in the next council meeting. The industry demand to consider liquor as food/food product is primarily to assure that a lower GST rate of 5%, instead of 12%, is levied on services provided to the industry by job workers.

In this article we will see whether it is permissible for liquor to be categorized under ‘food and food products’ for the purpose of availing lower rate of GST on job work services?

Section 2(68) defines Job Work as follows:

“...any treatment or process undertaken by a person on goods belonging to another registered person...”

Notification No. 11/2017- Central tax (rate) (**Exemption Notification**) provides for the GST Rate applicable on services by way of Job work in relation to food and food products falling under Chapters 1 to 22 in the First Schedule to the Customs Tariff Act, 1975 (51of 1975) is 5%. Liquor is categorized under chapter 22 of this schedule.

In the case of **Crown Beers India Ltd.[TS-567-AAAR-2019-NT],** the AAAR of Maharashtra stated that the Exemption Notification applies only to food and food products, which must be construed strictly. Accordingly, it was held that liquor does not qualify for a reduced rate of GST @ 5%, as it cannot be categorized under ‘food and food products.’ The relevant text of the judgment is as follows:

“...There is no dispute about classification of Beer under heading 2203 but all the products classifiable under Chapter 1 to 22 do not attract 2.5% CGST under entry no. 26(f) of Notification no. 11/2017-C.T.(Rate) dt. 28.06.2017. Only food and food products of these chapters are eligible for this exemption. Now, it is to be seen whether alcoholic liquor for human consumption can be considered as food for the purpose of exemption under the said notification. There is no definition of food and food products under GST Acts. However, Hon’ble Supreme Court has discussed this issue in detail in the matter of Collector of Central Excise Vs Parle Exports (P) Ltd. reported in 1998(38) E.L.T.741(S.C.) and decided that non -alcoholic beverages were not eligible to exemption as food products. Everything consumed by human cannot be considered as food or food products for the purpose of exemption from GST...

...we conclude that the benefit of exemption under entry no. 26(f) of Notification 11/2017-C.T.(Rate) dt. 28.06.2017 is not available to alcoholic liquor for human consumption. In view of the above discussions and finding, we are of the opinion that the activities performed by the PIL, on the goods of Appellant, are in the nature of the Job work and accordingly attract 18% GST.”

The AAAR relied on the judgment of the Hon'ble Supreme Court in **Collector of Central Excise v. Parle**

Exports (P) Ltd., 1988 (38) E.L.T. 741 (S.C.) where a similar issue was discussed in detail. The Supreme Court held that non -alcoholic beverages were not eligible to exemption as food products. Everything consumed by human cannot be considered as food or food products for the purpose of exemption from GST. The context, spirit, and reason of law need to be examined to extend the exemption.

The Supreme Court itself relied on the judgment of *Parle Exports (Supra),* in **Kalyani Breweries Ltd. v. Asst. Collector of Customs, Calcutta**, 2001 (134) ELT 12 (SC), wherein it affirmed the decision of the High Court of Calcutta which held that a labelling machine for beer bottles cannot be considered in relation to 'food and food products' for the purposes of the Exemption Notification. The relevant text of the judgment is as follows:

"Whereas the Single Judge of the High Court came to the conclusion that such a machine would be entitled to the exemption under the notification, the Division Bench, on the other hand, took a different view after referring to a decision of this Court in ***Collector of Central Excise v. Parle Exports (P) Ltd. - 1988 (38) E.L.T. 741 (S.C.),*** *whereby interpreting an exemption notification it was held by this Court that soft drink base was not covered by the term "food preparation" and bearing in mind the purpose of the exemption notification it could not be contended that an expensive item like the same was intended to be given exemption at the cost of public exchequer. The Court held that automatic bottle labelling machines which are used in connection with labelling of beer bottles would not be entitled to be exemption. In coming to this conclusion, the High Court also took into consideration the provisions of Article 47 of the Constitution of India which contains the Directive Principles of State Policy whereby the State is to make endeavour to bring about prohibition of intoxicating drinks and drugs which are otherwise injurious to health except for medicinal purposes. It is not in dispute that on the bottle of beer in view of alcoholic content a statutory warning is printed to the effect that the same is injurious for health. We agree with the High Court that, under the circumstances, beer per se cannot be regarded as a food article for the purpose of said notification and, therefore, the machine will not be entitled to any exemption."*

It is seen that as per Notification No. 11/2017- Central tax (rate) GST Rate applicable on services by way of Job work in relation to food and food products falling under Chapters 1 to 22 in the First Schedule to the Customs Tariff Act, 1975 (51of 1975) is 5%. Since liquor is categorized under Chapter 22 of the First Schedule to the Customs and Tariffs Act, 1975, allowing it to be categorized under 'food and food products' would reduce the GST to be paid on job work services to 5%, thereby significantly reducing costs. However, the courts have refrained from including liquor under the category of 'food and food products'.

The judgment delivered by the Supreme court in *Parle Export (Supra)* deals with a specific notification for exemption of certain articles, viz., food and food products, from the purview of customs and excise. This judgment was delivered prior to the introduction of the GST regime. It is incorrect to apply this ruling directly to our case. Further, this case dealt specifically with certain products, viz., the concentrated bases used for production of soft drinks and whether they were eligible for exemption under the said notification. We, on the other hand, are dealing with a case of job work services under the GST regime. Hence, this ruling should not be applied in our case.

The reliance placed on *Parle Exports (Supra)* by the AAAR in the case of *Crown Beers (supra),* the AAAR is also incorrect, according to which it was held that it is not the intent of the law to include an expensive item like liquor under the category of 'food and food products', at the cost of the public exchequer, solely based on the reason that it is consumed by people.

The Supreme Court in *Kalyani Breweries (Supra)* further referred to Article 47 of the Constitution of India, where it was stated that it is the duty of the Government to prohibit the sale of liquor, unless for medicinal purposes. It is not in dispute that on the bottle of beer in view of alcoholic content a statutory warning is printed to the effect that the same is injurious for health. Supreme Court agreed with the High Court that, under the circumstances, beer per se cannot be regarded as a food article for the purpose of the said notification and, therefore, the machine in question would not be entitled to any exemption. However, this judgment was delivered in light of a specific exemption notification with respect to machinery involved in production of food and food products. Accordingly, the court held that beer per se cannot be treated as a food product. We, on the otherhand are dealing with Job Work Services under the GST regime. Hence, it is incorrect to apply this ruling directly to our case.

The cases cited above have unanimously indicated that liquor cannot be regarded as a food or food product. However, these judgments were delivered in light of an Exemption Notification with respect to Customs. However, it cannot be said that these rulings apply directly in the case of job work services, since the purpose of customs and GST is different altogether.

Section 3(1)(j) of the Food Safety and Standards Act, 2006 defines the term "food" 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..."*

The above definition makes it clear that "alcoholic drinks" are also to be considered as food. Accordingly, the Food Safety Standards Association of India (**FSSAI**) has enacted the Alcoholoc Beverages Regulations, 2018.

Prior to the enactment of the Food Safety and Standards Act, there existed a Prevention of Food Adulteration Act, 1954, which defined food under section 2(v) as:

""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"

This definition was applied to even include chewing tobacco within the definition of food, as it is an article used for human consumption, in **Manohar Lal vs. State of U.P**., FAC 1991 (1) 60.

In the case of **Patiala Distillers and Manufacturers v. State of Himachal Pradesh & Ors.,** MANU/HP/0907/2012, the Himachal Pradesh High Court clearly stated that liquor fits within the definition of food as per the Prevention of Food Adulteration Act, 1954. The relevant text of the judgment is reproduced below:

"The 'food' has been defined in Section 2(v) of the Act and 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. In State of Himachal Pradesh Versus Sh. Raja Ram and another (1990) 2 FAC 231, the Division Bench has held that for purposes of the provisions of the Prevention of Food Adulteration Act, 'liquor' (including 'country liquor') is included in the definition of 'food' as contained in Section 2(v) of the Act. Therefore, contention of the petitioner that liquor is not 'food' under the Act has no force and is rejected."

Thus, the legislations regulation of food safety and standards in India have always included liquor within the purview of "food". In this sense, it is incorrect to not include liquor within the category of food and food products for the purpose of single legislation._

It can be concluded that we do not fully agree with the ruling of Maharashtra AAAR, in the case of *Crown Beers (Supra)* wherein it was held that beer cannot be categorized as food or food products, which attract GST at the rate of 5%. The decision relied upon by the AAAR in *Parle Exports* is only with regard to the Exemption Notification of Customs and should not be considered for applicability of liquor as food in relation to job work services under GST. Similarly, the scenario involved in *Kalyani Breweries* also deals with a specific notification applicable to the machinery involved in production of food products. Hence, this ruling is also inapplicable in our case.

Further, alcoholic drinks have been clearly included within the definition of food under various food safety laws in India. Therefore, alcohol may be considered under the category of food and food products for the purpose of GST rates on Job Work services. Probably we will wait and watch for the decision of the GST council on the said matter, till then the industry may beapprehensive of any suo-decision on this same.