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Sanitizer : Classification

HSN Code 3004 or 3808?

One basic thing should be clearly understood by all that classification of any product as medicament or cosmetics is only and exclusively governed by the provisions of Drugs & Cosmetics Act, 1940. Production/ manufacture/ storage/sale of these products is governed by the provisions of the Act of 1940 including Drugs and Cosmetic Rules, 1945 made there under and notifications issued from time to time in exercise of the powers conferred under the Act/Rules.

The legal position needs to be clarified at this stage that no ministry/GST Council is legally competent to declare a product as medicament including sanitizers. In continuation it should be added that GST Council is capable to declare rate of GST on medicament and not classification of sanitizer i.e. medicament or not? It is in the exclusive domain of Drug Controller of the State where product is being manufactured/sold.

1. The problem of classification arose because AYUSH Mantralaya issued a Notification dated 02/04/2020 inviting manufacturers to come forward to manufacture Sanitizer. Obviously such Sanitizer should be classifiable as medicament Ayurvedic / Homeopathic / Unani / Tibbi/ Siddha.
2. The DIRECTORATE GENERAL OF GST INTELLIGENCE dated 10/06/2020 issued instructions stating that Sanitizer are liable to

be classified under HSN Code 3808 and therefore liable to tax @ 18% instead of @ 12% and termed it as evasion of tax.

3. For manufacture / sale of Sanitizer Drug Licenses were issued in past to number of manufacturers by the Competent Authority of the State, accordingly the Sanitizer are medicament. I have gone through bills of supplies by the Drug License holder to AIMS, Military Canteens and Drug License Holders. Meaning clearly that the Sanitizer in common and commercial circle are understood within the broad meaning of medicine.

4. Even WHO while provisionally classifying sanitizer under Chapter 3808 have clarified in no uncertain terms that this classification have no legal binding on the member countries and they will be governed by the law of the said country.

Therefore, to classify sanitizer on the basis of alcohol dominance, clearly is an attempt which is not at all subject matter of Ministry of Finance.

5. Sanitizer, a word now spread in public domain due to Covid-19 but is not a new word in the medical profession particularly in the field of surgery.

Before the start of Covid-19 pandemic the main consumption of sanitizer was in Central Government/ State Government / Military Hospitals/ Private Hospitals. It needs no arguments that purchases by this class of sanitizers for over half of century was subject to manufacture/sale by a Drug License Holder.

6. The Classification of Sanitizer in HSN Code 3808 (perhaps barrowed from WHO letter/classification) is completely wrong:-

Chapter 38
Miscellaneous Chemical Products

Note:

1. This chemical does not cover:
 - (a)...
 - (b)...
 - (c)...
 - (d)medicaments (Heading3003 or 3004).

3808	Insecticides, rodenticides, fungicides, herbicides, anti-sprouting 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, sulphur-treated bands, wicks and candles, and fly-papers).	12% IGST or 6% CGST + 6% SGST/ UTGST
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A. Because Chapter – 38 begins with words B insecticide, B pesticides and ends with the phrase “Similar other product”. Clearly it begins with specific mention of certain products which are not suitable to human skin.

B. Therefore applying the principle of Eejusdem Generis, as explained by the Apex Court in the case reported as Rainbow Steels Ltd. Vs. CST, UP.(1981, 47 STC 298), the phrase “similar other products” will carry only and only one meaning clearly excluding the product for human skin.

The principle is explained in Maxwell on the Interpretation of Statutes (12th Edition), at page 289, thus:

“Where two or more words which are susceptible of analogous meaning are coupled

together, *noscuntur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, the meaning of the more general being restricted to a sense analogous to that of the less general.”

C. When Competent Authority, Drug Controller of States issued Drug License to any manufacturer to produce/sell Sanitizer then according to the law laid down by the Supreme Court in the Case of M/s. Ponds India Ltd. Vs. Commissioner Trade Tax 2008 NTN, SC-169. Unless some cogent reliable material is available Department cannot after a period of time will be permitted to switch over to another entry i.e. from medicament to insecticide etc. The plea was totally rejected by the Hon’ble Apex Court.

D. Therefore, no formidable, valid and legal reasons are stated in the circular dated 10/06/2020, it appears incorrect and unjustified approach in the eye of law, printed herein above.

7. Hon’ble Supreme Court of India M/s. Icpa Health Product (P) Ltd. Vs. Commissioner of Central Excise, Vadodara Civil Appeal No. 4766-4768 of 1998 decided on 20/04/2004.

“Thus, if a product comprises of two or more constituents which have been mixed together for therapeutic or prophylactic uses, then it would be medicament. As stated above, the Appellants

products were examined by the Chemical Examiner who has opined that these products have therapeutic properties. Also admittedly these products are used for disinfecting the skin prior to surgery. As per Concise Oxford Dictionary, 9th Edition, the term “Prophylactic” would mean “intending to prevent diseases, a preventive medicine or course of action”. It is clear that the Appellants’ products are used as a cleanser for cleaning of wounds and abrasions and minor cuts and to disinfect the skin prior to surgery. They, therefore, also have prophylactic uses. As the products have therapeutic properties and prophylactic uses they are Medicament falling under Chapter 30.

Chapter 30
Pharmaceutical Products

3004	Medicaments (Including veterinary medicaments) used in bio-chemic systems and not bearing a brand name	Kg	2.5%	2.5%	5%	Nil
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As they fall under Chapter 30 by virtue of Note 1(c) to Chapter 38, they do not fall within Chapter 38. It will therefore have to be held that the products cannot be classified under Tariff item 38.08. In this view of the matter, the impugned judgment cannot be sustained and is accordingly set aside. It is held

that the Appellants' products will be classifiable under Tariff Item 3003.10”

The extent or the quantity of medicament used in a particular product will also not be a relevant factor. Normally, the extent of use of medicament ingredients is very low because a larger use may be harmful for the human body. The medicinal ingredients are mixed with what is in the trade parlance called filler or vehicles in order to make the medicament useful. To illustrate an example of Vicks Vaporub is given in which 98 per cent is said to be paraffin wax, while the medicament part, i.e. menthol is only 2 per cent. Vicks Vaporub has been held to be medicament by this Court in Collector of Central Excise v. Richardson Hindustan Ltd. 1 [1989] 42 ELT A100 (SC). Therefore, the fact that the use of medicinal element in a product was minimal does not detract from it being classified as a medicament.
