

**AUTHORITY FOR ADVANCE RULINGS
(CENTRAL EXCISE, CUSTOMS AND SERVICE TAX)
NEW DELHI**

Hon'ble Mr. Justice P.K.Balasubramanyan (Chairman)
Mr. Y.G. Parande (Member)

The 23rd March, 2012

Ruling No.AAR/44/CE/02/2012.

In

Application No. AAR/44/CE-I/6/2011

Applicant : M/s Danone Foods and Beverages(I) Pvt.Ltd.,
11th Floor, Building No.8, Tower C,
DLF Cyber City, DLF Phase-II,
Gurgaon - 122002

Commissioner
Concerned : The Commissioner of Central Excise,
Central Excise Commissionerate
SCO-6, Sector-1, Rohtak

Present for applicant : Sh. V. Lakshmi Kumaran, Advocate
Ms. Shruti Rasnatak, Advocate

Present for the
Commissioner : Sh. Sumit Kumar (AR)

Ruling

(By Y.G. Parande)

M/s Danone Foods and Beverages India Pvt. Ltd. (the applicant) have filed this application under Section 23C of the Central Excise, 1944 seeking a ruling on the classification of two products proposed to be manufactured by them, namely “**Yum Creamy**” and “**Yum Chusky**” under the Central Excise Tariff Act, 1985 (CETA), and

the eligibility of “**Yum Chusky**” for exemption under Notification No. 01/2011- CE dated 01/03/2011.

2. The applicant is a wholly owned subsidiary of an Indian company, namely, M/s Danone India Pvt. Ltd., which, in turn, is a wholly owned subsidiary of a foreign holding company M/s Danone Asia PTE Limited, Singapore.

3. After perusal of the application and consideration of the comments sent by the concerned Commissioner i.e. Commissioner of Central Excise, Rohtak, the Authority vide its Order dated 13th December, 2011 allowed the application for ruling on the following two questions.

1. What would be the classification of the fermented milk product, namely, “Yum Creamy” and non-fermented milk based beverage namely, “Yum Chusky” under the Central Excise Tariff Act, 1985; and
2. Whether the exemption under Notification No. 01/2011-CE dated 01/03/2011 in respect of flavoured milk of animal origin would be available to the product “Yum Chusky”.

4. We have considered the application and heard Shri. V. Lakshmi Kumaran, Advocate, for the applicant and Shri. Sumit Kumar, A.R., for the Commissioner.

5. The applicant states that they have been engaged in trading of dairy products such as flavoured yogurts, packaged dahi and chocolate and vanilla flavoured smoothies and are now entering into manufacturing. For this purpose they have set up a manufacturing unit situated in Phase II, Food Park, Industrial Estate, RAI, Sonapat, Haryana in which they propose to manufacture a fermented milk product namely “**Yum Creamy**” and non-fermented milk based beverage namely “**Yum Chusky**”. The details of the composition of these products and the manufacturing process are as follows:

Yum Creamy : This product has the following composition:

(a) Whole cow milk	83.04%
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(b) Sugar	13.00%
(c) Strawberry flavour	0.04%
(d) Vitamin	0.42%
(e) Culture dream (bacterial culture for fermentation)	0.0015%
(f) Rice flour	2.50%
(g) Wheat flour	1.50%

The product is manufactured by mixing all the ingredients, except the bacterial culture, in a mixing tank and sterilizing the resultant mixture in a sterilizer where it is heated to a temperature of around 128⁰ C. Thereafter, the mixture is stored in a fermentation work tank wherein the bacterial culture is added to and it is left to stand for 7-8 hours, leading to the formation of fermented milk. The fermented milk so formed is then put in an agitator wherein it is blended into a creamy texture. This creamy product obtained is packed and sold as a fermented milk product.

“Yum Chusky” has the following composition:

(a) Water	30.15%
(b) Whole cow milk	51.00%
(c) Sugar	12.00%
(d) Cocoa powder Gerkens	1.20%
(e) Wheat flour	3.50%
(f) Rice flour	1.70%
(g) Chocolate flavor	0.06%
(h) Vanilla flavour	0.03%
(i) Vitamin	0.36%

The manufacturing process of “Yum Chusky” also involves mixing all the ingredients together and passing the mixture through a sterilizer where it is heated to a temperature of around 142^o C. Such high temperature cooks the starch in the cereals and increases the viscosity of the mixture. The product so obtained is a milk based beverage, which is then packed and sold. It was also stated that the use of rice/wheat flour as stabilizing agents was an innovation of the applicant which had been validated by the National Dairy Research Institute after conducting extensive tests and trials. The Institute’s report has been furnished with their application.

6. The applicant has expressed the view that the product “Yum Creamy” will be classifiable under heading 04039090 of CETA and the product “Yum Chusky” would get classified under heading 22029030 of the CETA. Further, the latter product will also be eligible for the exemption under notification No. 1/2011 – CE dated 01/03/2011 as it satisfies the description “flavoured milk of animal origin” mentioned in the said notification.

7. “Yum Creamy” is a product made by fermentation of milk and contains, apart from cow’s milk, sugar, flavour, vitamins, wheat flour and rice flour. Heading 0403 of CETA reads as follows:

Butter milk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavoured or containing added fruit, nuts or cocoa.

The relevant HSN notes under Chapter 4 state that this chapter covers:

- (I) Dairy Products:
 - (A) Milk, i.e. full cream milk and partially or completely skimmed milk.
 - (B)
 - (C) Butter Milk, curdled milk and cream, yogurt, kephir and other fermented or acidified milk and cream.
 - (D).....
 - (E).....

The note further states that the products mentioned at items (A) to (E) above may contain, in addition to natural milk constituents, small quantities of stabilizing agents which serve to maintain the natural consistency of the product during transport in liquid state (disodium phosphate, trisodium citrate and calcium chloride, for instance) as well as very small quantities of anti-oxidants or of vitamins not normally found in the product. Certain of these products may also contain small quantities of chemicals (e.g., sodium bicarbonate) necessary for their processing; products in form of powder or granules may contain anti-caking agents (for example, phospholipids, amorphous silicon dioxide).

8. The HSN Notes for the heading 0403 state that the heading covers butter milk and fermented or acidified milk and cream curdled including milk, cream, yogurt and kephir and that the products of this heading may be in liquid, paste or solid (including frozen) form and may be concentrated or preserved. The note also states that apart from the additives mentioned in the General Explanatory Notes to this Chapter, the products of this heading may also contain added sugar or other sweetening matter, flavourings, fruit (including pulp and jams), nuts or cocoa.

9. It is, therefore, clear that heading 0403 permits addition of certain other ingredients which could be either stabilizers or sweeteners or flavoring agents. Therefore, dairy products classifiable under heading 0403 of CETA continue to remain classifiable under this heading even if they contain any of the aforementioned additives. "Yum Creamy" is made by mixing sugar, flavour, vitamins, wheat and rice flour with cow's milk. Since the stabilizers, sweeteners etc. are permissible additives as mentioned in the relevant HSN Notes, the product "Yum Creamy" will be correctly classified under heading 04039090 of CETA.

10. As to "Yum Chusky", its process of manufacture is similar to "Yum Creamy" with the difference that it does not involve fermentation of milk. It is a beverage manufactured by mixing water, sugar, cocoa powder, wheat / rice flour, flavours and vitamins in cow's milk and sterilizing the resultant mixture.

11. The HSN Explanatory Notes to Heading 0402 state, inter alia, that this heading does not cover (a) Curdled, fermented or acidified milk or cream (heading 0403) and (b)

Beverages consisting of milk flavoured with cocoa or other substances (heading 2202). According to the HSN Explanatory Notes under Chapter 22, this chapter does not include any liquid dairy products of chapter 4. Further, Note (B)(2) under heading 2202 states that the heading includes beverages ready for consumption that are based on milk and cocoa. Therefore, any beverages based on milk and flavored with cocoa or any other substance will fall for classification under Chapter Heading 22 of the CETA and appropriate heading would be 22029030 of CETA.

12. On the second question, namely the eligibility of the product “Yum Chusky” for exemption under Notification No. 01/2011 CE dated 01/03/2011, the applicant states that Serial No. 25 of said Notification specifically refers to heading 22029030 and mentions the description as “flavoured milk of animal origin”. The product “Yum Chusky” is squarely covered by this entry of the notification. It was also stated during the hearing that the applicant does not intend to avail of CENVAT credit in relation to this item. It would, therefore, be eligible for exemption provided under said notification.

13. In his comments on the application, the Commissioner of Central Excise, Rohtak has agreed with the proposed classification of both the products as well as the eligibility of “Yum Chusky” for the exemption under Notification No. 1/2011 – CE dated 01.03.2011, subject to the applicant fulfilling the relevant prescribed conditions in the said notification, while observing that the classification could change if the constituents of the products underwent a major change.

14. There thus is an agreement on all hands that the correct classification of product “Yum Creamy” would be under heading 04039090 of CETA and that of “Yum Chusky” under heading 22029030 of CETA. Consequently the product “Yum Chusky” would also be eligible for exemption, vide Serial No. 25 of the Table in the Notification No. 01/2011 dated 01/03/2011 subject to the applicant fulfilling the conditions of the said notification.

15. In the course of the arguments, Sh. Sumit Kumar, the learned AR, while agreeing with the applicant’s contention, submitted that the classification in this case was dependent upon the composition of the products in question. Hence any change in the composition had the potential to bring about an alternation in the correct classification and it would have been preferable in such a case if the products had been tested and

the composition firmed up so that the potential for any error in future in the matter of classification might be avoided. Shri Lakshmi Kumaran, in response to this, submitted that the composition of these products is clearly shown on the packages themselves as is required under law. Further, Danone, as a dairy major, were making products based exclusively on cow's milk and therefore there was no question of cow's milk being substituted by any alternative, such as synthetic milk, which could change the classification of its products. We note that in terms of the provisions of Section 23E (2) of the Central Excise Act, 1944, a Ruling of this Authority is binding only as long as there is no change in law or facts on the basis of which it is pronounced. The relevant facts have been clearly stated by the applicant in its application. It is always open to the department at any time, to verify whether the clearances, made by the applicant in terms of the ruling given by this Authority, conform to the facts stated by the applicant in the application.

16. We accordingly rule as follows:-

1. The products "Yum Creamy" and "Yum Chusky" shall be classifiable under headings 04039090 and 22029030 respectively of the Central Excise Tariff Act, 1985; and
2. The product "Yum Chusky" will be eligible for exemption under the Notification No. 01/2011 – CE dated 01/03/2011, subject to the applicant fulfilling the conditions prescribed in the said Notification.

Pronounced on 23rd March, 2012. .

Sd/-
(Y.G.Parande)
Member

Sd/-
(P.K.Balasubramanyan)
Chairman