सत्यमेव जयते

आयुक्तकाकार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeal Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
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(क)	फ़ाइल संख्या / File No.	GAPPL/ADC/GSTP/3470-3471/2023 3529 -3535
(ख)	अपील आदेश संख्याऔर दिनांक / Order-In –Appeal and date	AHM-CGST-002-APP-JC-156-157/2023-24 and 22.03.2024
(ग)	पारित किया गया / Passed By	श्री आदेश कुमार जैन, संयुक्त आयुक्त (अपील) Shri Adesh Kumar Jain, Joint Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of Issue	26.03.2024
(ङ)	Arising out of Order-In-Original No. 12/AC/D/2023-24/FRC dated 31.07.2023 passed by The Assistant Commissioner, CGST, Division-IV, Ahmedabad North Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	1. M/s Reign Foor Beverages Private Limited (GSTIN: 24AAICR9120R1ZT) Opp. Raj Metals 1, Maha Gujarat Industrial Estate 44A/45A, Moriya, Taluka-Sanand, Ahmedabad, Gujarat-382213 2. Shri Viral Bipinbhai Palan, Director of M/s Reign Foor Beverages Private Limited.

(A)	इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी /प्राधिकरण के समक्ष अपील दायर कर सकता है। Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.
(i)	National Bench or Regional Bench of Appellate Tribunal framed under GST Act/CGST Act in the cases where one of the issues involved relates to place of supply as per Section 109(5) of CGST Act, 2017.
(ii)	State Bench or Area Bench of Appellate Tribunal framed under GST Act/CGST Act other than as mentioned in para- (A)(i) above in terms of Section 109(7) of CGST Act, 2017
(iii)	Appeal to the Appellate Tribunal shall be filed as prescribed under Rule 110 of CGST Rules, 2017 and shall be accompanied with a fee of Rs. One Thousand for every Rs. One Lakh of Tax or Input Tax Credit involved or the difference in Tax or Input Tax Credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to a maximum of Rs. Twenty-Five Thousand.
(B)	Appeal under Section 112(1) of CGST Act, 2017 to Appellate Tribunal shall be filed along with relevant documents either electronically or as may be notified by the Registrar, Appellate Tribunal in FORM GST APL-05, on common portal as prescribed under Rule 110 of CGST Rules, 2017, and shall be accompanied by a copy of the order appealed against within seven days of filing FORM GST APL-05 online.
(i)	Appeal to be filed before Appellate Tribunal under Section 112(8) of the CGST Act, 2017 after paying – (i) Full amount of Tax, Interest, Fine, Fee and Penalty arising from the impugned order, as is admitted/accepted by the appellant; and (ii) A sum equal to twenty five per cent of the remainingamount of Tax in dispute, in addition to the amount paid under Section 107(6) of CGST Act, 2017, arising from the said order, in relation to which the appeal has been filed.
(ii)	The Central Goods & Service Tax (Ninth Removal of Difficulties) Order, 2019 dated 03.12.2019 has provided that the appeal to tribunal can be made within three months from the date of communication of Order or date on which the President or the State President, as the case may be, of the Appellate Tribunal enters office, whichever is later.
(C)	उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट**www.cbic.gov.in**को देख सकते हैं। For elaborate, detailed and latest provisions relating to filing of appeal to the appellate authority, the appellant may refer to the website**www.cbic.gov.in.**

ORDER-IN-APPEAL

BRIEF FACTS OF THE CASE:

M/s. Reign Food Beverages Pvt. Ltd., opp. Raj Metals 1 Maha Gujarat Industrial Estate 44A/45A, Moriya, Taluka - Sanand Ahmedabad Gujarat-382213, (GSTIN 24AAICR9120R1ZT) (hereinafter referred to as *"the appellant-1"*), and Shri Viral Bipinbhai Palan, Director of M/s Reign Food Beverages Pvt. Ltd. (hereinafter referred to as *"the appellant-2"*) have filed appeals against Order-In-Original No. 12/AC/D/2023-24/FRC dated 31.07.2023 (hereinafter referred to as the *"impugned order"*) passed by the Deputy Commissioner, CGST & C.Ex., Division-IV, Ahmedabad-North Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. Facts of the case in brief, are that the appellant-1 is engaged in manufacturing and supplying Carbonated Beverages, Aerated Drinks, Flavored Drinks etc., classifying under HSN 2202, 22029920 & 22029090. On the basis of intelligence to the effect that the Noticee has been supplying their products without proper discharging GST by way wrong classification of their products under HSN 22029020 since July 2017, the investigation was initiated by the Directorate General of Goods & Service Tax Intelligence, Surat Zonal Unit on 29.12.2019. It appeared that the Noticee has been wrongly classifying their products such as 'Sosyo Mixed Fruit', Masala Jeera Kashmira' and 'Jeera Xtreme' under chapter sub-head 22029920 and wrongly paying CGST@ 12% and SGST@ 12%. Their products have been classifiable under Chapter Sub-head 22021010 as "Aerated Waters" and liable to tax CGST @ 14% & SGST @ 14% and Cess @ 12%. Therefore, the Appellant-1 appeared liable to pay differential tax of CGST of Rs.25,47,608/-, SGST of Rs. 25,47,608/- and Cess of Rs.38,21,413/-.

Therefore a show cause Notice was issued to the appellants asking them as to why:

"(i) The Products 'Sosyo Mixed Fruit', 'Masala Jeera Kashmira' and 'JeeraXtreme' manufactured and supplied by the Noticee should not be classified as 'Aerated Waters' under Tariff Item 22021010 instead of 'Fruit Juice based drinks' under Tariff Item 22029020 or 22029920;

(ii) CGST of Rs. 25,47,608/- and SGST of Rs. 25,47,608/- should not be demanded under Section 74(1) of the CGST Act, 2017 and SGST Act 2017;

(iii) Compensation cess of Rs. 38,21,413/- should not be demanded under Section 74(1) of the CGST Act, 2017 and SGST Act, 2017 along with interest under Section

50 of the CGST Act, 20172 read with Section 11(1) and 11(2)of the Goods and Services Tax (Compensation to States) Act, 2017;

(iv) Penalty under Section 74(1) and Section 122 of the CGST Act, 2017 should not be imposed upon them on tax amount shown at (ii) and (iii) above;

10. Shri Viral Bipinbhai Palan, Director of M/s Reign Foods & Beverages pvt. Ltd., has also been called upon as to why penalty under Section 137 of the CGST Act12017 read with Section 74 and Section 122 of the CGST Act, 2017 read with provision under SGST and IGST Act, 2017 and Section 11(1) and 11(2) of the Goods and Services Tax (Compensation to States) Act, 2017, should not be imposed for mis-classifying the goods with intent to evade GST."

3. The adjudicating authority vide the impugned order, ordered as under:

(i) "I confirm the products 'Sosyo Mixed Fruit', Masala Jeera Kashmira' and 'Jeera Xtreme' manufactured and supplied by the Noticee as 'Aerated Waters' and classify the same under Tariff Item 22021010;

(ii) I confirm and order to recover CGST of Rs.25,47,608/- and SGST of Rs.25,47,608/- under Section 74(1) of the CGST Act, 2017 and SGST Act, 2017;

(iii) I confirm and order to recover Compensation cess of Rs.38,21,413/- under Section 74(1) of the CGST Act, 2017 and SGST Act, 2017 along with interest under Section 50 of the CGST Act, 2017 read with Section 11(1) and 11(2)of the Goods and Services Tax (Compensation to States) Act, 2017;

(iv) I confirm and order to recover interest under Section 50 of the CGST Act, 2017 read with Section 11(1) and 11(2) of the Goods and Services Tax (Compensation to States) Act, 2017 read with Section 11(1) and 11(2) of the Goods and Services Tax (Compensation to States) Act, 2017 on tax amount at (ii) and (iii) above;

(v) I impose penalty of Rs. 89,16,629/- [CGST Rs. 25,47,608/-, SGST of Rs.25,47,608/- plus Cess amount of Rs. 38,21,413/-] under Section' 74(1) and Section 122 of the CGST/SGST/IGST Act, 2017 read with Section 11(1) and 11(2) of the Goods and Services Tax (Compensation to States) Act, 2017 on tax amount at (ii) and (iii) above;

(vi) I impose a penalty of Rs. 10,00,000/- upon the Director Shri Viral Bipinbhai Palan under Section 137 of the CGST Act, 2017."

4. Being aggrieved with the impugned order, the appellant-1 preferred appeal on the following grounds:

- *the Appellant has submitted various documents indicating that the Appellant is engaged in manufacturing of fruit juice based drinks. Some of the documents submitted by the Appellant during the course of investigation proceedings are listed below for the purpose of ready reference:*
- *The purchase register providing the amount of juice procured and utilized,*

- *The sales wise report of the relevant period indicating the sales of Fruit drinks.*
- *FSSAI certificates issued to Appellant as manufacturer of Fruit pulp or fruit juice based drinks.*
- *The copy of the letter dated 14.3.2020 is enclosed as Annexure-12.*
- *In this regard, it is submitted that it is a settled principle of law that the show cause notice is the foundation of any proceeding and the same should be issued after due consideration of all the relevant facts and documents. However, in the present case, even after the Appellant submitted various documents/submissions including the documents listed at paragraph above to substantiate the fact that all the Fruit drinks manufactured and supplied by it contain the requisite amount of fruit content during the investigation proceedings, the same have not been appreciated while issuing the SCN by the Department.*
- *The formol number, or formol titration, measures the total amino it is submitted that in the test reports of RFL, Ghaziabad it is mentioned that the method used for determining the fruit juice content in the samples was the method prescribed in Clause 2.11 of the FSSAI Manual of Methods of Analysis of Foods (Fruits and Vegetables), 2016 (hereinafter referred to as the "FSSAI Manual, 2016"). However, none of the test reports mention the formol number of the drinks as determined by the Laboratory even after the same being the sole criterion to determine the fruit content as provided under the said Manual.*
- *acid (NH2-R-COOH) concentration and is the basic parameter measured to determine quantity of the fruit juice in a particular drink under Clause 2.11 of the FSSAI Manual, 2016. The test reports merely provide that there is nil fruit juice content without even providing the formol number determined by the said labs, which is the function of the quantity of fruit juice.*
- *It is submitted that the test reports of CRCL, New Delhi and RFL, Ghaziabad have been provided to them only with the present SCN which was received by the Appellant on 28.10.2020. It is submitted that the test reports were shown to Shri Viral Bipinbhai Palan Hajoori on 19.03.2020, however the same were never provided to the Appellant till the receipt of the present SCN for analyzing the same and proceeding for a re-test.*
- *In this regard, it is submitted that since the seal of the samples were broken on the date of testing, the test results should have been immediately communicated to the Appellant to afford it a chance of request of retesting the samples. However, since the results were communicated to the Appellant only after eight (8) to nine (9) months from the date of testing, the said reports cannot be relied upon for the determination of the classification of the Fruit drinks supplied by the Appellant as the Fruit Drinks become subject to deterioration as soon as the seal of the samples are broken, the same being perishable in nature.*
- *It is further submitted that observations made in the test reports of both RFL, Ghaziabad and CRCL, New Delhi are verbatim similar which may suggest that the Laboratories have been tutored to provide the same.*
- *It is further stated that the panchanama drawn on the date of drawl of samples at the premises of the Appellant as well as the SCN at paragraph 3.3 provide that 4 samples each of all the three drinks were drawn from the*

premises of the Appellant on 29.12.2021. One sample was given to the Appellant. A copy of the Panchnama is enclosed as RUD-II to the SCN.

- *However, the test reports of CRCL, New Delhi enclosed as RUD-IV to the SCN provide that 3 samples each of the drinks Sosyo Mixed Fruit and Jeera Xtreme were tested at the said laboratory, i.e. CRCL, New Delhi. Further, the test reports of RFL, Ghaziabad enclosed as RUD-V of the SCN provide that 1 sample of each drink was tested at the said laboratory.*
- *If the above were true, the Appellant would not have been left with any samples of the drinks Sosyo Mixed Fruit and Jeera Xtreme after giving 3 samples to CRCL, New Delhi as only four samples were drawn out which one was handed over to the Appellant.*
- *The above facts clearly illustrate the conflicting facts in the reports, which further indicate that the reports have been made with the sole intent to cast the liability on the Appellant. Further, as submitted above, the said test reports are the sole basis for the Department to allege that the Appellant has misclassified its Fruit drinks. Thus, placing reliance on the reports for passing the order would be incorrect.*
- *Since it is not clear whether the number of samples mentioned on the test reports were actually tested at the said laboratories as the total of all the test reports leads to a mathematical inconsistency, the said reports cannot be relied upon to allege any misclassification on the part of the Appellant .*
- *It is further submitted that the Appellant was handed over two sealed bottles on 29.12.2019 which were thereafter forwarded by the Appellant for testing of the fruit juice content in them. However, as mentioned in the Panchanama dated 29.12.2019 as well as paragraph 3.3, only four samples were drawn by the Department. In view of the said facts, there being three samples at the disposal of CRCL, Delhi and one sample at the disposal of RFL, Ghaziabad for testing the fruit juice content in them is a logical inconsistency and is not possible. In view of the above, it becomes clear that the test reports of CRCL, New Delhi and RFL, Ghaziabad have various logical inconsistencies and it is submitted that the same cannot be relied upon for the determination of the fruit juice content in the Fruit drinks supplied by the Appellant .*

RFL's letter (enclosed with the test reports of RFL, Ghaziabad as RUD-V to the SCN) to the Ld. Deputy Director, Directorate General of Goods and Service Tax Intelligence, Surat (hereinafter referred to as "Ld. Deputy Director") dated 24.02.2020, it has been mentioned that RFL, Ghaziabad received the samples RFB-01 to RFB-03 from DGGI vide letter No. DGGI/SZU/Gr-04/12/(04)33/2019 dated 29.11.2019.

- *In this regard, it is submitted that the samples of the Fruit drinks were drawn from the premises of the Appellant only on 29.12.2019. Thus, the sample could never have been given on 29.11.2019. Further, it is submitted that it is matter of serious doubt whether DGGI actually sent the samples drawn from the premises of the Appellant to RFL, Ghaziabad and whether the test reports dated 23.01.2020 of RFL Ghaziabad relate to samples drawn from the premises of the Appellant .*
- *Further, the contents of the letter dated 24.02.2020 of the Director, RFL, Ghaziabad to Ld. Deputy Director are directly contradictory to the Certificates of analysis [form A of regulation 2.2.2 of Food Safety and*

Standards (Laboratory & Sample Analysis) Regulations] Nos. 21/Jan/20-Guj, 22/Jan/20- buj and 23/Jan/20-Guj appended to the test reports of RFL, Ghaziabad enclosed with the test reports of RFL, Ghaziabad which provide that the samples were received on 03.01.2020 vide letter bearing reference No. DGGI/SZU/Gr-04/12/(04)33/2019 dated 29.12.2019. This clearly shows t he unscrupulous manner in which the test reports have been issued with the sole aim to cast the liability on the Appellant .

- *Further, it is submitted that the Certificates of Analysis provide that the samples were tested between 06.01.2020 and 22.01.2020. However, paragraph 3.6 of the SCN provides that the test results were shared with the DGGI officials only on 24.02.2020 vide letter begring F. No. C.01-27/20-RFL/174 dated 24.02.2020, i.e., after a delay of one month from the date of testing.*
- *Such a delay of communicating the test results in respect of perishable goods such as fruit juice based drinks is directly against Clause 142 of the Manual of Revenue Laboratories under the Central Board of Excise and Customs (hereinafter referred to as the "CRCL Manual"), wherein it has been prescribed that the remnant samples should be carefully preserved till such time the analytical report furnished by the Chemical Examiner is accepted by the owners (manufacturers) who may be advised to ask for a retest within one month if they propose to question the results of analysis.*
- *The Appellant was shown the copy of the test result after one month from the date of analysis. Hence, the Appellant was left with no opportunity to demand for a retest even if the test results would have been communicated on the same day of receipt of the same by DGGI.*
- *Moreover, it is submitted that all the reports of CRCL, New Delhi mention (at Note 4 of the test reports) that the samples were tested at RFL, Ghaziabad. The said Note clearly implies that the samples were not tested at CRCL, New Delhi, and should not be counted as another report separate from the test reports of RFL, Ghaziabad. It is reiterated that 3 samples of two Fruit drinks were given only to CRCL for testing and none to RFL as fourth one was handed to Appellant.*
- *The Tests reports state that the samples were received on 02.01.2020, whereas the test reports of RFL, Ghaziabad are issued on 23.01.2020, which is again directly contradictory to the disclaimer made at Note 4 of the said reports as if the same were first tested at RFL, Ghaziabad and then sent to CRCL, New Delhi, the date of receipt for CRCL, New Delhi should have been a date post 23.01.2020.*
- *1.5. The purpose of sending the samples to two laboratories to obtain a second opinion regarding the fruit juice content in the Fruit drinks supplied by the Appellant has failed as both the tests for the three Fruit drinks have been conducted by RFL, Ghaziabad.*
- *Thus, it is submitted that on account of the prima facie irregularities in the reports, the same cannot be held to be conclusive for determination of fruit content in the Fruit drinks manufactured and supplied by the Appellant*
- *As stated above, the Appellant forwarded the sealed samples handed over to it at the time of drawal of samples by the DGGI officials on 29.12.2019 were forwarded to Bee Pharmo Labs Pvt. Ltd., Hatkesh Rd, Hatkesh Udhog Nagar, Mira Road, Mira Bhayandar, Maharashtra 401107 (hereinafter*

referred to as "Bee Pharmo Lab") vide its letter dated 24.02.2021 for determining the fruit juice content in them.

- *Thereafter, the Appellant has received the test reports dated 04.03.2021 from Bee Pharmo Lab which clearly provide that the fruit juice content in the said samples is more than 10%. The testing method adopted by the Bee Pharmo Lab has also mentioned as the method prescribed in the FSSAI Manual, 2016. ....*
- *It is further submitted that the % of fruit juice as per the test reports is in conformity with the quantity of fruit juice purchased from M/s. Sosyo Hajoori. A detailed working of the same is enclosed.*
- *It is pertinent to mention that the Appellant has been regularly procuring fruit juice from M/s. Sosyo Hajoori. The quantum of the fruit juice so procured matches with consumption of the fruit juice used in manufacturing the fruit drinks.*
- *The Id. Adjudicating Authority in Para 19 - page 21 of the Order in Original relying upon the test reports of RFL, Ghaziabad and CRCL, Delhi stated that, "the test reports of samples drawn of their products clearly indicate no presence of fruit juice". Your honour the Id. Adjudicating Authority did not took into consideration the test reports of other laboratories viz. M/s Bee Pharmo Labs Pvt. Ltd & Lilaba Analytical Laboratories. Further, no other findings has been given contrary to the other documentary evidences submitted by the Appellant.*
- *Your honour it is well-settled law that the test reports are not conclusive evidence. Thus, based on test report of RFL, Ghaziabad and CRCL, Delhi the allegation cannot be proved.*
- *It is submitted that the Appellant has diligently maintained records of procurement and usage of fruit juice for the purpose of using the same in manufacturing the Fruit drinks, such as the stock register, inward and outward register for fruit juice, day-wise consumption of fruit juice and purchase invoices. It is submitted that the said documents clearly provide that the Appellant procured a substantial amount of fruit juice for using the same in manufacturing the Fruit Drinks.*
- *In this regard, it is pertinent to mention the Fruit drinks are being sold and purchased as a drink based on a fruit juice. Thus, the commercial identity of the Fruit drinks is that of a drink with fruit content in it. In this regard, it is further submitted that in the beverage industry, various kinds of aerated beverages exist- Plain aerated water known as soda, Carbonated beverage with no fruit juice, Carbonated beverage with fruit juice etc.*
- *Your honour will appreciate that at the time of search on stock of 29.12.2019 goods lying in the factory premises must have been verified by the visiting officer and available stock must have been compared with the book balance as The Officers also visited the godown of the Appellant. There is no mentioned of any no discrepancy found in the stock in the Panchnama dt. 29.12.2019 he fruit pulp and fruit juice concentrates purchased by the Appellant was used in the manufacturing of fruit drinks. There is no evidence to prove disposal of fruit pulp/ or fruit juice concentrates in any other manner than the use of the same in the manufacturing of Fruit juice-based drinks.*

- *Further, the Appellant has also availed ITC on the basis of invoices of fruit pulp/ and fruit juice concentrates. The Investigating Officers did not raise allegation on the eligible of ITC. There is no demand of reversal of ITC so availed by the Appellant in the show cause notice, that itself means that the Department has accepted the fact that fruit pulp/ and fruit juice concentrates has been used by the Appellant for the purpose of manufacturing of fruit-based drinks.*
- *in view of the legal position, entire demand proposed is without jurisdiction in as much as the period covered by the notice was in respect of a period that was anterior to date on which the samples were taken by DGGI,*
- *Therefore, reclassification of the fruit drinks on account of results of test report was established by the department only for the period post withdrawal of samples. Even if the report of CECL in respect of goods of particular batch is considered to be correct, it cannot be applied for the goods of past batches for which the department does not have any evidence to prove the goods to be same as found for which samples were drawn. Therefore, the demand of GST denying the goods of batches other than the batches from which samples were drawn to be Fruit juice-based drinks is not sustainable.*
- *Your honour in the matter of M/s. Sosyo Hajoori Beverages Pvt. Ltd, the Id. Adjudicating Authority dropped the demand of GST for all prior batches for which samples were not available vide OIO No. 34/ADJ-GST/ADDL-S/2023-24 dt. 21.09.2023.*
- *It is submitted that the demand of interest under Section 50 of the CGST Act read with Section 20 of the IGST Act, Section 50 of the Gujarat State GST Act and Section 11 of the Compensation Cess Act is not sustainable since the Appellant has not contravened any of the provisions of the Act and Rules made thereunder.*
- *The Appellant further submits that there are a number of judgments wherein Hon'ble Tribunal has held that if there is difference of opinion about classification between the importer and department, penalty is not imposable. The Appellant places reliance upon the case of Baltar Agrochem & Feeds pvt. Ltd vs. Commissioner of C. Ex., Pune, 2012 (277) E.L.T. 382 (Tri- Mum).*
- *Thus, it is humbly submitted that the present case also involves classification of fruit drinks under the relevant tariff entry, therefore no penalty is imposable upon the Appellant and the same is liable to be dropped.*

Further, Appellant-2 has filed the appeal on the following grounds:

"A penalty of Rs. 10,00,000/- has been confirmed against the Appellant under section 137 of the CGST Act, 2017 read with section 74 and section 122 of the CGST Act (Para 7.0 of the SCN) on the ground that the appellant played a key role in supply of the fruit drinks by M/s Reign Food Beverages Private Limited by way of aiding1 abetting and concerning himself with the offence committed by the company as he did not ensure the correct classification of the fruit drinks with the intention to evade higher payment of tax.

In this regard it is submitted that the penalty imposed on the appellant under Section 137 of the GGST Act1 2017 is not legally sustainable. in this regard, reliance is placed on the decision of the Hon'ble Supreme Court in Amrit Foods U Commissioner,2005 (490) ELT 433 (SC)

It is submitted that the present case is not that of non-payment of tax on the part of the Appellant, but that of adopting a different classification that was is construed to be correct by the Department. It is submitted that even if any additional tax burden was imposed on the Fruit Drinks manufactured by the Appellant, the same would be borne by the consumers of the Appellant and not the Appellant itself. Thus, the Appellant had no intention to change the classification in order to pay lesser tax. It is further submitted that M/s Reign Food Beverages Private Limited has maintained detailed records of procurement and consumption of fruit juice as also other capital goods like the deep freeze refrigerators to store the fruit juice procured by it. The company has filed all the returns in a timely fashion and there is not intention to evade tax. Thus, Section 74 of the CGST Act is also not imposable in the present case as it is submitted that M/s Reign Food Beverages Private Limited has paid all the tax applicable on the manufacture and supply of the fruit drinks and the present case is not one of short payment or non-payment of tax. It is further stated that the appellant has not engaged in any fraudulent activities and has provided as the relevant information and documents to the department as and when required."

PERSONAL HEARING:

5. Personal hearing in this case was held on 19.12.2023. Shri Anish Goyal, Chartered Accountant appeared in person, on behalf of the Appellants as authorized representative. He submitted that the case is regarding classification of Fruit Based Drinks. The test report relied upon by the Department has not been given to them, as per Department's instructions in this regard. The same has been given along with SCN i.e. after 9 months.

Further, they have purchased fruit concentrate as per Food Safety and Standards Authority of India (FSSAI) requirement for Food based drinks also submitted the test report by National Accreditation Board for Testing and Calibration Laboratories (NABL) approved Labs.

He further, submitted that in the identical cases booked by DGGI have been dropped by the respective authorities. He further reiterated the written submissions and requested to drop the proceedings. Copy of OIA in case of M/s. HNB Foods have been submitted during P.H.

6 DISCUSSION AND FINDINGS:-

6.1 I have carefully gone through the facts of the case and the submissions made by the Appellant-1 and Appellant-2 and find that the Appellant-1 is mainly

contesting with classification of fruit based drinks and that the test reports relied upon by the Department have been given only along with SCN i.e. after 9 months. They have classified the disputed goods under correct head and therefore paid the tax correctly and no penalty is imposable. Appellant-2 is mainly contesting with the penalty imposed upon him under Section 137 of the CGST Act, 2017 read with Section 74 & Section 122 of the CGST/GGST Act, 2017 and read with section 11(1) and 11(2) of GST (Compensation to States) Act,2017 for misclassifying the goods of the Appellant-1 to evade payment of GST. As the issue involved is arising out of the same Order-in-Original, I am taking up both the appeals together for deciding the issues.

6.2 So the issue to be decided in the present appeal is:

Whether the impugned order passed by the adjudicating authority is proper or otherwise?

6.3. At the foremost, I observed that in the instant case the "impugned order" is of dated 31-07-2023 and the present appeals are filed on 19.10.2023. As per Section 107(1) of the CGST Act, 2017, the appeals are required to be filed within three months time limit. Therefore, I find that the present appeals are filed within normal period prescribed under Section 107(1) of the CGST Act, 2017. Accordingly, I am proceeding to decide the case.

6.4 I observe that the appellant-1 has been manufacturing and supplying "carbonated Beverages, Aerated Drinks, Flavoured Drinks etc. classifying under HSN 2202, 22029920 & 22029090. The appellant-1 has classified their products, i.e. 'Sosyo Mixed Fruit' 'Masala Jeera Kashmira' and 'Jeeraextreme' under tariff item 22029920 and paying GST @ 12%. However on verification by the DGGI, it was found that as per the food safety and standards Authority of India (FSSAI) the necessary condition required to be fulfilled to classify the products under HSN 22029020/22029920, that the Fruit Juice in beverages manufactured by the Appellant-1 should not be less than 5% whereas the percentage of fruit juice in beverages manufactured by the Appellant has been less than 5%. Therefore the 'Sosyo Mixed Fruit' 'Masala Jeera Kashmira' and 'Jeeraextreme' is found to be classifiable under tariff item 22021010 attracting GST @ 28% and Compensation Cess @ 12% as per Notification No.1/2017-CT (Rate) dated 28.06.2017.

6.5 During the course of Inspection, a panchnama dated 29.12.2019 was drawn and four samples of each of the three products were drawn which were

sent to the CRCL, New Delhi for (i) to ascertain the fruit content (m/m) in percentage in the sample (ii) to ascertain whether the samples are aerated or otherwise. The CRCL has carried out test on the samples drawn from the premises of the Noticee. The CRCL has submitted test reports to the effect that there has been no fruit juice in the products of the Noticee. The samples were also sent to the Referral Food Laboratory (RFI,), Ghaziabad and RFL has also submitted test report to the effect that fruit juice content has been NIL.

6.6 The adjudicating authority has found the products 'Sosyo Mixed Fruit' 'Masala Jeera Kashmira' and 'Jeeraextreme' manufactured and supplied by the appellant-1 which merits classification as 'aerated waters' under tariff item 22021010 and confirmed the demand of CGST Rs.25,47,608/-, SGST Rs.25,47,608/- and compensation Cess of Rs. 38,21,413/- under Section74(1) of the CGST/GGST Act, 2017 along with interest under Section 50 of the CGST/GGST Act, 2017read with Section 11(1) and 11(2) of the Goods & Service Tax (Compensation to states) Act, 2017 and penalty under Section74(1) and Section 122 of the CGST/GGST/IGST Act, 2017 read with Section 11(1) and 11(2) of the Goods & Service Tax (Compensation to states) Act, 2017.

6.7 The Appellant-1 however, has contended that the learned adjudicating authority has erred in not considering the fact that test reports of CRCL, NEW Delhi and RFL, Ghaziabad cannot be relied upon due to the prima-facie irregularities in them. Further that the said test reports cannot be relied upon for the purpose of classification of the Fruit Drinks manufactured by the Appellant-1 due to the following irregularities in them:

a. Neither of the test reports provide the Formol Number determined while testing the samples
b. Belated sharing of test reports with the Appellant rendering the demand for retesting redundant;
c. Identical observations by both the laboratories;
d. Inconsistency in the number of samples tested at both laboratories in comparison to the number of samples drawn as per the panchanama.

6.8 Further the appellant-1 have contested that the fruit drinks manufactured by them are classifiable as tariff item 2202 90 20 and that FSSAI certificates issued to them are as manufacturer of Fruit pulp or fruit juice based drinks.

6.9 Regarding objection pertaining to Formol Number along with number of test reports sent, report received from both the authorities and practices followed in toto and calculation done according to the formula as per FSSAI manual have already been clarified by Shri G.P.Sharma Director, National Food

Laboratory, Kolkata as mentioned in the impugned order at para-18 as cross examined on 28.04.2022 and Shri Viran Palan, Director of the appellant-1 was also present, therefore I am not going deep into the discussion on these issues.

6.10 I observe that the Appellant-1 is engaged in manufacture and supply of following brands of carbonated fruit-based drinks viz Sosyo Mixed Fruit, Kashmira Masala Jeera and Jeera Xtreme. The appellant-1 uses the major ingredients for manufacturing the above said fruit drinks like Water, Sugar, Orange juice/lime juice, Carbon Dioxide, Sweetener, concentrate unit which includes essence, flavor, preservative etc.

Masala Jeera Kashmira

Purified Water, Cane Sugar, fruit juices from concentrate (Apple 7%, Lemon 3%), CO2 (INS-290), iodised Salt, Citric Acid (INS-330), Permitted natural colour (INS-150D), Permitted Class II Preservative (INS-211), Vitamin C(INS-300), Added flavours natural and nature identical flavouring substances of jeera and spices.

Sosyo Mixed Fruit

Purified Water, Cane Sugar, Mix Fruit juice (apple & lemon) reconstituted from concentrate – 1.39 % (10.00%), CO2 (INS-290), Citric Acid (INS-330), Stabiliser (INS-414, INS-445), Permitted Class II Preservative (INS-211),Vitamin C (INS-300), Added flavours natural and nature identical flavouring substances of mixed fruit.

Jeera Xtreme

Purified Water, Cane Sugar, Fruit Juice from concentrate (Apple 10%), CO2 (INS-290), iodised salt, Citric Acid (INS-330), Permitted Natural Food Colour (INS-150D), Permitted Class II Preservative (INS-211), Vitamin C (INS-300), Added flavours natural and nature identical flavouring substances of jeera and spices.

6.11 Further, the Appellant-1 have also submitted in the statement of facts, the process of manufacturing Fruit Drinks from Drawing water from the bore well, Purification of water, preparation of sugar syrup , Thermal processing of juice, Blending Mixing of all ingredients, transferring the mixture to blending tank, further to beverage processor, where it is mixed with water, pasteurization of the mixture, carbonation of the mixture where it is charged with Co2 gas of food grade, to filling it in Pet Bottles, automatically on machine and fixing brand labels on the bottles. The bottles are printed with batch number, date of mfg. etc. The appellant-1 has classified the said fruit drinks as fruit juice-based drink as tariff item 2202 9020 and paid applicable rate of GST. The Appellant in the invoice also described the fruit drinks as Sosyo fruit-based drink.

6.12 To decide whether the of the 'Sosyo Mixed Fruit' 'Masala Jeera Kashmira' and 'Jeeraextreme' , falls under tariff item 2202 90 20, first of all I refer to the Chapter / Heading / Sub-heading / Tariff item along with description of goods under Schedules as notified vide Notification No.01/2017-CT (Rate) dated 28.06.2017 and the amendments issued further by CBIC.

Schedule II –6%

S.No.	*Chapter / Heading / Sub-heading / Tariff item*	*Description of Goods*
48	*2202 90 20*	*Fruit pulp or fruit juice based drinks*

The above entry was substituted vide Notification No.12/2022 dated 30.12.2022 (effective from 01.01.2023) as under:

Schedule II –6%

S.No.	*Chapter / Heading / Sub-heading / Tariff item*	*Description of Goods*
48	*2202 90 20*	*Fruit pulp or fruit juice based drinks (Other than Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice.*

Schedule II -- 14%

S.No.	*Chapter / Heading / Sub-heading / Tariff item*	*Description of Goods*
12	*2202 10*	*All goods [including aerated waters], containing added sugar or other sweetening matter or flavoured*

The following entry was inserted vide Notification No.8/2021 dated 30.09.2021 (effective from 01.10.2021) as under:

Schedule II -- 14%

S.No.	*Chapter / Heading / Sub-heading / Tariff item*	*Description of Goods*
12 B	*2202*	*Carbonated Beverages of Fruit Drink or Cabonated Beverages with Fruit Juice.*

6.13 Further I refer the Circular No.189/2023-GSTdated 13.01.2023 issued by CBIC, wherein clarification regarding GST rates and classification of certain goods based on the recommendations of the GST Council in its 48th meeting held on 17.12.2022 has been issued. The relevant portion of the said clarification is as under:

"4. Clarification regarding 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice':

4.1 Representations have been received seeking clarification regarding the applicable six-digit HS code for 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice'.

4.2 On the basis of the recommendation of the GST council in its 45thmeeting, a specific entry has been created in notification No. 1/2017-Central Tax (Rate), dated the 28th June, 2017 and notification No. 1/2017-Compensation Cess (Rate), dated the 28th June, 2017, vide ***S. No. 12B in Schedule IV and S. No. 4B*** *in Schedule respectively, with effect from the 1stOctober, 2021, for goods with description 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice'.*

4.3 It is hereby clarified that the applicable six-digit HS code for the aforesaid goods with description 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice' is HS 2202 99. The said goods attract GST at the rate of 28% and Compensation Cess at the rate of 12%. The S. Nos. 12B and 4B mentioned in Para 4.2 cover all such carbonated beverages that contain carbon dioxide, irrespective of whether the carbon dioxide is added as a preservative, additive, etc.

4.4 In order to bring absolute clarity, an exclusion for the above-said goods has been provided in the entry at S. No. 48 of Schedule-II of notification No. 1/2017-Central Tax (Rate), dated 28thJune, 2017, vide notification No. 12/2022-Central Tax (Rate), dated the 30th December, 2022."

6.14 From the above, I observe that the goods with description 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice' is HS 2202 99 and attract GST at the rate of 28% and Compensation Cess at the rate of 12%. The S.Nos. 12B and 4B (48) mentioned in Para 4.2 cover all such carbonated beverages that contain carbon dioxide, irrespective of whether the carbon dioxide is added as a preservative, additive, etc.

6.15 It is observed that though the said **entry of 12 B "Carbonated Beverages of Fruit Drink or Carbonated Beverage with Fruit Juice"** is created in Schedule IV of CGST Notification No.01/2017-CT(Rate) dated 28.06.2017, from the date 01.10.2021, vide the Notification No.8/2021-CT(Rate) dated 30.09.2021, the same is done for ease of understanding, as representations were received by the CBIC seeking clarification regarding the applicable six-digit HS code for 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice'.

6.16 Even otherwise, it is clear from this entry that the said "Carbonated Beverages of Fruit Drink or Carbonated Beverage with Fruit Juice" was

classifiable under Chapter Heading/Sub-Heading/Tariff item under 22010 (All goods [including aerated waters], containing added sugar or other sweetening matter or flavoured] and therefore the sub entry12B has been created for better understanding/clarity of the HS code for 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice'.

6.17 Further, for absolute clarity, an exclusion for the above said goods has been provided in the entry at S.No.48 of Schedule-II of the Notification No.1/2017-CT(Rate) dated 28.06.2017 vide Notification No.12/2022-CT(Rate) dated 30.12.2022 i.e. instead of "Fruit pulp or fruit juice based drinks" against Sl.No.48 (2202 90 20) of Schedule-II, the entry **"Fruit pulp or fruit juice based drinks [other than Carbonated Beverages of Fruit Drink or Carbonated Beverages with Fruit Juice]** has been substituted. This also implies that the classification of carbonated fruit-based drinks viz. Sosyo Mixed Fruit, Kashmira Masala Jeera and Jeera Xtreme manufactured and supplied by the appellant-1 would not attract classification under Chapter Head 2202 90 20.

6.18 As regards to the products are required to fulfill the regulations under the Food Safety and Standard's (Food Products Standard and Food Addictives) Regulations, 2011 as amended, I first refer copy of the Licence dated 01.06.2018 valid till 31.05.2021 issued by the Designated Officer Food & Drug Control, ADMN. Ahmedabad, produced by the Appellant-1, wherein at Product Description at Sl. No.1, it has been mentioned that "Ready to serve fruit juice base drink 14.1.2.4" along with other product.

6.19 To view the said product under FSSAI, the following description is found:

Food Category System	*Food Category System description/ Name and types of product*	*FSSR sub Reg. No.*
14.1.2.4	*Thermally processed Concentrated Vegetable juice Pulp/puree*	*2.3.13*
14.1.4	*Carbonated Fruit Beverages or fruit drinks*	*2.3.30*

According to FOOD SAFETY AND STANDARDS (FOOD PRODUCTS STANDARDS AND FOOD ADDITIVES) REGULATIONS, 2011, CHAPTER 2 : FOOD PRODUCT STANDARDS are as under:

2.3: FRUIT & VEGETABLE PRODUCTS

(a) As per 2.3.13 Thermally Processed Concentrated Fruit / Vegetable Juice Pulp/ Puree

1. Thermally Processed Concentrated Fruit / Vegetable Juice Pulp/ Puree (Canned, Bottled, Flexible Pack And/ Or Aseptically Packed) means the

unfermented product which is capable of fermentation, obtained from the juice or pulp or puree of sound, ripe fruit(s) / vegetable(s), from which water has been removed to the extent that the product has a total soluble content of not less than ***double the content of the original juice/ pulp/ puree prescribed vide in regulation 2.3.6 and 2.3.7.*** *Natural volatile components may be restored to the concentrates where these have been removed. It may be pulpy, turbid or clear and preserved by heat, in an appropriate manner, before or after being sealed in a container, so as to prevent spoilage.*

2. The container shall be well filled with the product and shall occupy not less than 90.0 percent of the water capacity of the container, when packed in the rigid containers. The water capacity of the container is the volume of distilled water at 20°C which the sealed container is capable of holding when completely filled.

(b) As per 2.3.6: Thermally Processed Fruits Juices, The product shall meet the following requirements:—

FRUIT JUICES

	TSS Min(%)	*Acidity expressed as Citric Acid Max.(%)*
1. Apple Juice	*10*	*3.5 (as malic acid)*
2. Orange Juice (a) Freshly expressed	*10*	*3.5*
(b) Reconstituted from concentrate	*10*	*3.5*
3. Grape Fruit Juice	*9*	*–*
4. Lemon juice	*6*	*4.0(minimum)*
5. Lime juice	*-*	*5.0(minimum)*
6. Grape Juice		
(a) Freshly expressed	*15*	*3.5*
(b) Reconstituted from concentrate	*15*	*3.5*
7. Pineapple Juice		
(a) Freshly expressed	*10*	*3..5*
(b) Reconstituted from concentrate	*10*	*3.5*
8. Black Currant	*11*	*3.5*
9. Mango, Guava or any other pulp fruit	*15*	*3.5P*
10. Other fruit juices of single species- not very acidic	*10*	*3.5*
11. Other fruit juices of single species very acidic	*10*	*3.5*
12. Other fruit juices of single species or combination thereof - not very acidic	*10*	*3.5*

13. Other fruit juices of single species or combination thereof - very acidic *10* *3.5*

(c) As per regulation 2.3.7 Thermally Processed Vegetable Juices,

the product shall have total soluble solids free of added salts not less than 5.0 percent (w/w),

The product may contain food additives permitted in these regulations including Appendix A. The product shall conform to the microbiological requirements given in Appendix B.

The container shall be well filled with the product and shall occupy not less than 90.0 percent of the water capacity of the container, when packed in the rigid containers. The water capacity of the container is the volume of distilled water at 20°C which the sealed container is capable of holding when completely filled.

6.20 From the above regulations and standards of the Food Safety And Standards (Food Products Standards And Food Additives) Regulations, 2011, it is observed that the product under licence should be of the above standards i.e. there is a fixed percentage of minimum Total soluble solids and the product is concentrated. Whereas in the report of CRCL New Delhi as well as RFL Ghaziabad's test report, it is found as carbonated, as on opening sample gas was found released and there is no fruit juice content found and it is found as aerated, the relevant potion is reproduced as under:

CRCL Report dated 28.02.2020

Physical appearance: The sample was in the form of dark brown coloured liquid, free from visible fungal growth visible extraneous matter and sediments, On opening the sample, the gas was released, it is aerated.

Fruit juice content 'Nil'.

RFL Ghaziabad Report dated 23.01.2020

Physical appearance: Sample MS-1, 250ml PET was in the form of dark brown colour liquid, free from visible fugal growth visible extraneous matter and sediments, On opening the sample, the gas was released.

Sl.No.	*Parameter test*	*Name of method of test used*	*Remarks*
1	*Fruit juice content*	*2.11 FSSAI Manual (Fruits & Vegetable Products)*	*Nil*
2	*Whether aerated*	---	*Yes.*

(d) As per regulation 2.3.30 Carbonated Fruit Beverages or Fruit Drinks:

*1. **Carbonated Fruit Beverages or Fruit Drink** means any **beverage or drink which is purported to be prepared from fruit juice** and water or carbonated water and containing sugar, dextrose, invert sugar or liquid glucose either singly or in combination. It may contain peel oil and fruit essences. It may also contain any other ingredients appropriate to the products.*

2. The product may contain food additives permitted in these regulations including Appendix A. The product shall conform to the microbiological requirements given in Appendix B. It shall meet the following requirements:—

(i) Total Soluble solids (m/m) Not less than 10.0 percent
(ii) Fruit content (m/m)
(a) Lime or Lemon juice Not less than 5.0 percent
(b) Other fruits Not less than 10.0 percent

3. The product shall have the colour, taste & flavour characteristic of the product & shall be free from extraneous matter.
4. The container shall be well filled with the product and shall occupy not less than 90.0 percent of the water capacity of the container, when packed in the rigid containers. The water capacity of the container is the volume of distilled water at 20°C which the sealed container is capable of holding when completely filled.

6.21 It is observed that the Appellant-1 are having Licence for the **ready to serve fruit juice base drink (14.1.2.4)** falling under the FSSR sub Reg. No.2.3.13, which is **Thermally Processed Concentrated Fruit** however from the test reports as above, the requirements of Minimum Fruit Juice TSS are not met as required under the FSSAI Regulations as mentioned in the foregoing paras.

6.22 Further, the requirement of Total Soluble solids and fruit content as required under sub Reg.No. 2.3.30 Carbonated Fruit Beverages or Fruit Drinks, is also not met as required under the FSSAI Regulations as mentioned in the foregoing paras.

6.23 Therefore, I am of the view that the product under dispute does not fall under the heading i.e. **2.3.13 Thermally Processed Concentrated Fruit / Vegetable Juice Pulp/ Puree** which is obtained from the juice or pulp or puree of sound, ripe fruit(s) / vegetable(s), from which water has been removed to the extent that the product has a total soluble content of not less than **double the content of the original juice/ pulp/ puree prescribed vide in regulation 2.3.6 and 2.3.7.** for which the licence has been obtained.

6.24 I further observe that the product under dispute also does not fall under the heading **2.3.30 Carbonated Fruit Beverages or Fruit Drinks** under the

FSSAI Regulations, as the fruit juice content is NIL as per the test report conducted by CRCL New Delhi /Referral Board Laboratory.

6.25 The test reports got conducted from the jurisdictional Laboratories are binding on the Department and in case there is no facility available, then the same are to be got done from other revenue laboratories which have the facility, instead of availing an outside Government Laboratory. Therefore, the test conducted from private laboratory cannot be relied upon.

6.26 If for a while, the test result of the sample got conducted by the appellant - 1 from M/s Bee Pharmo Labs Pvt.Ltd. Thane, dated 04.03.2021 is considered, wherein fruit juice content is 10.5%, then also the product is classifiable under 2202 10 as the Chapter Heading/Sub-Heading/Tariff item under 2202 10 (All goods [including aerated waters], containing added sugar or other sweetening matter or flavoured] and therefore the sub entry12B has been created for better understanding/clarity of the HS code for 'Carbonated Beverages of Fruit Drink' or 'Carbonated Beverages with Fruit Juice'.

6.27 I also observe that the Appellant-1 has taken Licence from Food & Drug Control Administration, Gujarat State for "Ready to serve Fruit juice base drink under food category system 14.1.2.4" which as per FOOD SAFETY AND STANDARDS (FOOD PRODUCTS STANDARDS AND FOOD ADDITIVES) REGULATIONS, 2011, CHAPTER 2 : FOOD PRODUCT STANDARDS falls under chapter 2.3: FRUIT & VEGETABLE PRODUCTS 2.3.13 Thermally Processed Concentrated Fruit / Vegetable Juice Pulp/ Puree as explained above. However, instead of production and supply of the same, the appellant-1 has produced the carbonated fruit juice based drinks which is contrary to the licence obtained and deliberately supplied the disputed goods by classifying the said goods under Tariff item 2202 90 20 "Fruit Pulp or fruit juice based drinks" under Schedule-II of the Notification No.1/2017 dated 28.06.2017 by paying GST @ 12% with an intention to evade tax.

6.28 Therefore I am of the view that the products 'Sosyo Mixed Fruit' 'Masala Jeera Kashmira' and 'Jeeraextreme' manufactured and supplied by the Appellant-1 is rightly classified under Tariff Item 2202 10 10 for the period under dispute, and the demand of tax confirmed of CGST of Rs.25,47,608/-, SGST of Rs.25,47,608/- and Cess of Rs. 38,21,413/- under Section 74(1) of the CGST/GGST Act read with IGST Act, 2017 along with interest under Section 50(1) of the CGST/GGST Act, 2017 and Section 11(1) an 11(2) of the GST (Compensation to states) Act, 2017 is legal and proper.

6.29 Further, as regards to imposition of Penalty under Section 74(1) of the CGST Act, 2017 read with Section 122(2)(b) of the CGST Act, 2017 and also read with similar provisions of IGST Act, 2017, I refer the same provisions, the text of which is as under:

"Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful-misstatement or suppression of facts.-

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

"Section 122. Penalty for certain offences.-

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,-

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher."

6.30 It is observed that the appellant-1 has knowingly classified their product under dispute under the wrong head thereby short paid the tax with intention to evade payment of GST which has been detected only by the DGGI, as explained in the foregoing paras.

6.31 Therefore, I am of the view that the penalty imposed under Section 74(1)of the CGST/GGST/IGST Act, 2017 read with Section 122(2)(b) of the CGST/GGST/IGST Act 2017, vide the impugned order, is proper and legal.

6.32 Further, with regard to penalty under Section 137 imposed on Appellant-2, I refer the relevant provisions of the CGST Act.

"Section 137. Offences by companies-

(1).....

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly"

6.33 Further, I refer instruction No. 04/2022-23 [GST – Investigation] dated 01-09-2022, issued by the CBIC wherein it has been stated that :

> *" Prosecution is the institution or commencement of legal proceeding; the process of exhibiting formal charges against the offender.....*
>
> *7.2 In case of filing of prosecution against legal person, including natural person:*
>
> *7.2.1 "----------Section 137 (2) of the Act provides that where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Thus, in the case of Companies, both the legal person as well as natural person are liable for prosecution under section 132 of the CGST Act."*

6.34 From the above, I understand that, only when it is proved that the offence has been committed by a Company and proved with the consent or connivance of or is attributable to any neglect on the part of the director etc., deemed guilty of that offence and proceeded against, is punished accordingly. However, as per the records available and submissions made by the appellants in the instant case, I have not come across any such proceedings initiated against the Appellant-1 or Appellant-2/the Director of Appellant-1, therefore, the penalty under Section 137 of the GST Act, 2017 is not imposable, at this stage. Further, I observe that no proceedings under Section 137 of the GST Act, 2017 have been initiated by the Department and neither adjudicating authority nor this appellate authority is the proper authority to initiate proceedings under Section 137 of the Act ibid and to impose punishment under Section 137. Therefore, I am of the view that the

impugned order passed by the adjudicating authority imposing penalty against Section 137 is not proper and legal.

7. In view of the above, I do not find any infirmity in the order passed by the adjudicating authority in respect of Appellant-1 and uphold the same. However, the penalty imposed vide the impugned order on (Appellant-2) is dropped. Accordingly, the impugned order is modified to this extent.

8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है ।

8. The appeal filed by the "Appellant-1 and Appellant-2" stands disposed of in above terms.

22/03/2024

(ADESH KUMAR JAIN)
JOINT COMMISSIONER (APPEALS)
CGST & C.EX., AHMEDABAD.

Date : .03.2024

ATTESTED.

(SUNITA D.NAWANI)
SUPERINTENDENT
CGST & C.EX.(APPEALS),
AHMEDABAD.

By R.P.A.D.

M/s. Reign Food Beverages Pvt. Ltd.,
opp. Raj Metals 1 Maha Gujarat Industrial Estate
44A/45A, Moriya, Taluka- Sanand Ahmedabad
Gujarat- 382213, (GSTIN 24AAICR9120R1ZT).

Shri Viral Bipinbhai Palan, Director,
M/s. Reign Food Beverages Pvt. Ltd.,
opp. Raj Metals 1 Maha Gujarat Industrial Estate
44A/45A, Moriya, Taluka- Sanand Ahmedabad
Gujarat- 382213.

Copy to:

1. The Principal Chief Commissioner of CGST & C.Ex., Ahmedabad Zone.
2. The Commissioner, CGST & C. Excise, Appeals, Ahmedabad.
3. The Commissioner, CGST & C.Ex, Ahmedabad-North Commissionerate.
4. The Dy / Assistant Commissioner, CGST & C.Ex, Division-IV Ahmedabad-North Commissionerate.
5. The Superintendent (Systems), CGST Appeals, Ahmedabad, for publication of the OIA on website.
6. Guard File/P.A. File.