

GST on Pre-packaged, Labelled Food Items sold in Retail / wholesale Pack

Introduction:

Various food items viz., wheat, rice, certain flours, paneer, honey, certain meat, certain fish, etc. (**notified products**) were hitherto exempt from GST subject to the condition that they are not sold under any registered 'brand name' or are sold under a brand name on which the actionable claim or enforceable right in the court of law is foregone.

Phase 1 – During implementation of GST:

Initially, on implementation of GST the exemption for these products was not available if sold under a "registered brand name". However, this led to

- a. Large scale de-registrations of brand names in order to avail exemption.
- b. Also, even if the Trade Mark (hereinafter referred to as '**TM**') is de-registered, but if it was well known brand, the user of the TM could still sue others for passing off under the common law. Thus, even after de-registration of the brand name, the seller was still having similar rights as was available when the brand name was registered.

Phase 2 – Initial amendment in the GST law:

In this backdrop, an amendment was brought to all these kind of entries, to exempt only those goods which are not put in a unit container and which bore either a "registered brand name" or a brand name on which actionable claim or enforceable right in the court of law was not foregone. This required all the users of un-registered brand name to forego their rights by way of filing an affidavit.

The term 'registered brand name' was borrowed from the Trade Marks Act, 1999 and the Copyright Act, 1957. However, there was a lot of ambiguity in the industry regarding various procedural and legal aspects, including multiple interpretations on certain issues. Due to this many enjoyed the exemption but were always fearing what would be the point that the department officers would raise in order to tax their products, in case they came under their scanner.

There were lot of gaps in the implementation / enactment of the provision since the due date of filing affidavit was not mentioned, format of affidavit not provided, and many other such aspects which kept the taxpayers guessing - how and what has to be done to be eligible for the exemption.

Some of the issues and ambiguities were:

- a. What are all the aspects on the packing that constitute a brand name?
- b. Whether mention of name of manufacturer because of statutory requirement under FSSAI and Legal Metrology can make a product branded?
- c. Implication of usage of similar or identical brand name without knowledge
- d. By when the affidavit is to be submitted?
- e. What should be the content of the affidavit to be filed?

- f. Whether there is a need of intimating changes in packing?
- g. Procedural aspects of filing affidavit in case of Job work/contract manufacturing including consequences for persons in the entire chain of supply in case the owner of brand name does not file affidavit, and many more.

Most of the applications before the advance ruling authorities were disposed off in favour of the department based on absurd interpretations that only led to added confusion and unrest among the trade.

Phase 3 – Amendment by way of 47th GST Council Meeting:

Amidst confusion galore, now in the 47th meeting of the GST Council, it has been recommended to revise the scope of exemption i.e., to exempt only those items which are not pre-packaged, labelled retail pack in terms of Legal Metrology Act. In other words, the pre-packaged, labelled retail pack are to be taxable.

In this regard, amendments were made by notification No. 6/2022-CT Rate dated 13th Jul 2022 whereby a host of these items were eligible for exemption only in case they **were other than 'pre-packaged and labelled'**. This phrase was defined in the notification as:

*The expression 'pre-packaged and labelled' means a 'pre-packaged commodity' as defined in clause (l) of section 2 of the Legal Metrology Act, 2009 (1 of 2010) where, the package in which the commodity is pre-packed or a label securely affixed thereto is **required to bear the declarations under the provisions of the Legal Metrology Act, 2009 (1 of 2010) and the rules made thereunder.***

Therefore, it would be imperative for us here to understand the meaning of the above terms from the Legal Metrology Act. Section 2(l) of the Legal Metrology Act, 2009 (LMR) defines pre-packaged commodity as *"pre-packaged commodity" means a commodity which **without the purchaser being present is placed in a package** of whatever nature, whether **sealed or not**, so that the product contained therein has a **pre-determined quantity**.*

From the above, it comes out that the commodity must be pre-packed and kept ready for sale to a customer in a pre-determined quantity. Though this can be sealed or otherwise.

This means that if the following are satisfied, the goods will be **liable to GST** irrespective of whether there is any brand name or not.

- a. If the goods are packed in a package of a pre-determined quantity,
- b. The package can be whether or not sealed, and
- c. It should be a package which is required to adhere to the provisions of the LMR and rules thereunder, regarding declarations to be made on the package.

Relevant provisions of Legal Metrology Act and Rules for Retail Trade:

As per section 18 of the Legal Metrology Act, 2009 it is mandatory that for sale, manufacture, etc. of any pre-packaged commodity, the package bears declarations and particulars as prescribed under the rules. On examination of the Legal Metrology (Packaged Commodities) Rules, 2011 (Rules) the following are found relevant:

- a. Rule 3 under Chapter II which relates to **Retail sale** – This rule lists out the packaged commodities in respect of which the provisions of this chapter **would NOT BE applicable**. It covers:
 - i. packages of commodities containing **quantity of more than 25 kilogram or 25 litre**;
 - ii. cement, fertilizer and **agricultural farm produce** sold in bags **above 50 kilogram**; and
 - iii. packaged commodities meant for **industrial consumers or institutional consumers**.
- b. Rule 6 under the same chapter – lists out the declarations that need to be made on the packages to which this chapter applies.

Further, rule 26 provides for exemption in respect of certain packages, wherein it states that nothing contained in these rules shall apply to any package containing a commodity if:

- a. the net weight or measure of the commodity is **10g or 10 ml or less**, if sold by weight or measure;
- b.

Impact on Retail Trade:

Notified products which fall under this chapter i.e., packages of up to 25kg and 50kg (in case of agricultural farm produce) **will not be eligible for GST exemption** i.e., these products will be taxable.

Impact on wholesale trade:

When we come to taxability of such items sold in the course of wholesale trade, it is worthwhile to understand meaning of wholesale package as per LMR. The scope of wholesale package as per LMR includes:

- a. Wholesale packages are those which in turn have retail packages in those packages except packages given to an intermediary who would be selling the packed commodity in smaller packages.
- b. 10 or more retail packages sold as one pack to an end consumer will also get covered under 'wholesale package'.
- c. Any number of retail packages sold as one package to intermediary and not to a direct or single consumer – is also a wholesale package.

Further, there is specific packaging requirement of wholesale package in the LMR and anyone dealing with such goods is required to make disclosure on wholesale packages also.

If the impact of amendment on wholesale package is evaluated, it culls out that the wholesale package in the form of pre-packaged and labelled also gets covered within the tax net. **Though, this view is not coming out with the GST Council press release wherein specific mention was made for the retail package.** However, the intention of keeping wholesale package as

taxable might have been to keep the entire chain in the tax net with credit set off. This has also been clarified by the CBIC F. No. 190354/172/2022-TRU Dated 17.07.2022.

Impact on supply for industrial and institutional consumer:

It would be important here to understand the meaning of the term “Industrial consumer” which is defined under rule 2(bb) as “**industrial consumer**” to mean the consumer who buys packaged commodities directly from the manufacturer or from an importer or from wholesale dealer **for use** by that industry and the package shall have declaration ‘**not for retail sale**’;

Similarly, Rule 2(bc) defines “**institutional consumer**” to mean the institution which buys packaged commodities bearing a declaration ‘**not for retail sale**’, directly from the manufacturer or from an importer or from wholesale dealer **for use** by that institution and **not for commercial or trade purposes**;

Thereby goods sold in packages up to 25kg and 50kg (in case of agricultural farm produce) on which declaration ‘not for retail sale’ is printed and if these are not further sold to consumers and are instead used by the industries/institutions like manufacturer, hotel, airline, etc. then they **would be eligible for exemption under GST irrespective of the quantum of packaging.**

Our Analysis:

Key scenarios for understanding:

From the above, it can be derived that the following are the exclusions from LMR and the rules made thereunder, meaning that the **exemption under GST** would be applicable to these packages for the notified goods:

- a. Packages **more than** 25kg;
- b. Packages more than 50kg in case of agricultural farm produce.
- c. Packages of 10g/ 10ml or less, and
- d. **Packages (of whatever quantity)** which are meant for industrial consumers or institutional consumers.

The same is tabulated below for easy understanding:

S. No.	Size of package	Sold to	Purpose	Taxability under GST
1	Upto 25kg	Direct customer	Consumption	Taxable
2	Upto 50 kg for agricultural farm produce	Direct customer	Consumption	Taxable
3	Upto 25kg	Intermediary	Further sale	Taxable

4	Upto 50 kg for agricultural farm produce	Intermediary	Further sale	Taxable
7	Upto 25kg / 50 kg (agricultural farm produce)	Industrial/ institutional consumer	For use by it	Exempt
8	Package more than 25kg / 50 kg (agricultural farm produce)	Industrial/ institutional consumer/intermediary/ direct consumer	For consumption, further supply or any other purpose	Exempt
9	Wholesale Package up to 25 kg (in pre-packaged and labelled)	Retailer or intermediary	Further sale	Taxable
10	Loose package (wholesale as well as retail) without any predetermined quantity	Anyone	Any purpose	Exempt

Concluding remarks:

An amendment of this complexity, affecting so many products, there should have been more time given for the taxpayers to analyse the impact on their businesses and configure their systems to comply with the changes. The industry players will also have to ensure that changes in rate of GST for their goods i.e., becoming taxable, would require compliance with the provisions of anti-profiteering i.e., they would be required to pass on to their customers, any input tax credit benefits that they would be receiving.

[Views in this article are personal and cannot be regarded as a legal opinion. For any clarification/feedback please write to ashish@hiregange.com or shilpijain@hiregange.com or ravikumar@hiregange.com]