



Taxability of Pre-Packaged and Labelled Products



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Background

Recently, the GST council in its 47th meeting had recommended to reconsider the scope of exemption available to specified food items, grains etc. when the same were either not branded, or right on the brand has been foregone. The GST council recommended to exclude pre-packaged and pre-labelled retail pack in terms of Legal Metrology Act, from exemption available to such specified food items under Notification No. 02/2017 (CTR) (**‘Exemption Notification’**).

Hitherto, the GST was exempt on specified pre-packed food items such as wheat, rice, honey etc. when they were not sold under a *registered brand name* or *brand name on which actionable claim or enforceable right in respect of such brand name has been foregone voluntarily*.

Amendments in Rates

Further, as stated above, in order to revise the scope of exemption available to such large range of goods, the Government *vide* Notification No. 6/2022-CT (Rate) and 07/2022-CT(Rate) (**‘Amendment Notification’**) has made necessary changes to Notification no. 01/2017- CT (Rate) (**‘Rate Notification’**) and Notification No. 02/2017 -CT (Rate) (**‘Exemption Notification’**). Pursuant to such amendments, specified goods sold in pre-packaged and labelled form are liable to GST and exemption has been granted to such specified goods if they do not qualify as *“pre-packaged and labelled”*.

Interestingly, the amendment notifications has defined the expression *‘pre-packaged and labelled’* to mean 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*.

From above amendment, it is apparent that goods will be taxed if the following two conditions are satisfied:

- The product is a 'pre-packaged commodity'

- The 'pre-packaged commodity' is required to bear the declarations under the provisions of the Legal Metrology Act, 2009 (1 of 2010) and the rules made thereunder

Legal Metrology Act and rules

At this juncture, it becomes pertinent to refer to Section 2(1) of Legal Metrology Act, 2009 ('LMA') which states that '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 above, a view can be taken that a commodity is pre-packed when a product of pre-determined quantity has been packed before the arrival of the customer, whether or not sealed. Further, the definition as per amendment notification, imposed the condition that the package is required to bear a declaration as provided under the provisions of the LMA and rules made thereunder.

Section 18 of the LMA read with Chapter II of Legal Metrology (Packaged Commodities) Rules, 2011 ('LMR') provides for the applicability of provisions of LMA to packages intended for retail sale. Chapter III of the said Rules deals with the provisions applicable to wholesale packages.

It may be noted that following category of packaged commodities intended for retail sale have been excluded from the applicability of the LMA:

- a. packages of commodities containing quantity of more than 25 kg or 25 litres;
- b. cement and fertilizer sold in bags up to 50 kg;
- c. packaged commodities meant for industrial consumers or institutional consumers.

It is highlighted that as per the recent amendment to the rate notification and exemption notification, GST shall be applicable on goods qualifying as 'pre-packed and labelled items' that are required to bear declaration applicable under the LMA. Thus, in case the provisions of LMA and LMR are not applicable on any pre-packaged commodity, the same will not qualify as pre-packaged and labelled commodity as defined under GST laws and hence will fall under the exemption notification.

As far as retail sale is concerned, provisions of LMA and LMR are not applicable on packages sold over 25kg or 25l; or Cement or fertiliser sold over 50kg; or packaged commodity meant for industrial or institutional consumers (excluded retail commodities). Hence, it can be said that any commodity falling under the above category fails to qualify the definition of pre-packaged and labelled goods and hence should not be leviable to GST.

However, it would be pertinent to highlight that the rate/exemption notification has not restricted itself to retail packs as compared to what was recommended in press release. Hence, it is observed that the impact of this amendment is not restricted to pre-packed commodities meant for retail sale but can also be seen on the wholesale packages. Reference in this regard is to be made to Chapter III of LMR which provides for provisions relating to wholesale packages. Rule 24 of LMR states that *every wholesale package shall bear thereon a legible, definite, plain and conspicuous declaration as to –*

- (a) The name and address of the manufacturer or importer or where the manufacturer or importer is not the packer, of the packer;*
- (b) the identity of the commodity contained in the package; and*
- (c) the total number of retail package contained in such wholesale package or the net quantity in terms of standard units of weights, measures or number of the commodity contained in wholesale package;*

Provided that nothing in this rule shall apply in relation to a wholesale package if a declaration similar to the declarations specified in this rule, is required to be made on such wholesale packages by or under any other law for the time being in force.

From bare reading of the above provision, it appears that provisions of LMA and LMR are not applicable on wholesale package where declaration similar to declaration under Rule 24 is also prescribed under any other law (e.g. Food Safety and Standards Act, 2006 in case of foods and edible items). Consequently, such wholesale packages which are exempted from the applicability of LMA Act, fail to qualify as pre-packaged and labelled commodity as defined under GST thereby qualifying for the exemption from the levy of GST.

From a bare reading of the provisions of LMA and LMR it appears that all kinds of wholesale packages shall be exempt from the applicability of Legal Metrology Act if they bear similar declarations under any other law for the time being in force. Therefore, such wholesale packages should be excluded from the definition of pre-packaged and labelled commodity thereby qualifying for exemption from levy of GST. For instance, sale of rice in 30kg packet to grocery store should not be liable to tax as declaration under FSSAI is required thereby exempting it from LMA. Even 47th GST Council had very specifically recommended to revise the scope of exemption notification to the extent of pre-packed commodities meant for retail sale. Therefore, the above interpretation seems to be in consonance with the intent of GST council.

However, the intention of lawmakers has been to tax pre-packaged and pre-labelled retail pack. Hence, pleading exemption for all types of wholesale packages will be highly disputable. For instance, the wholesale package consisting of multiple retail packages is not intended to be excluded from the taxable net as the same will ultimately intended for retail sale in pre-packed form.

Conclusion:

From conjoint reading of provisions of GST laws read with LMA and LMR, a view is possible that following commodities shall be exempt from the levy of GST:

- a. Packages more than 25kg/25 Ltrs intended for retail sale;
- b. Packages more than 50kg in case of cement and fertilisers intended for retail sale;
- c. Packages which are meant for industrial consumers or institutional consumers irrespective of their weight/quantity;
- d. Wholesale packages sold in bulk for further sale in smaller quantities and not in pre-packaged form which does require declaration to be put under LMR.

To put it in perspective, reference may be made to following illustrations:

Illustration A: *Pre-packed rice of 24 Kg intended for retail sale shall be liable to GST.*

Illustration B: *Pre-packed rice of 30 Kg intended for retail sale shall be exempt from levy of GST.*

Illustration C: *Wholesale package of 40 Kg rice (regulated under FASSAI) sold to retailer who subsequently sells the same to consumer in various smaller quantities shall be exempt from levy of GST. From retailer perspective, if retailer pre-packs and label the commodity, it will attract 5%. However, if retailer does the packing in the presence of the customer, then no tax shall be levied on such sale.*

Illustration D: *Wholesale package of 40 Kg of any product (not required to put declarations under any other law) shall be liable to GST.*

Illustration E: *Wholesale package of 40 kg of a product having 40 retail packets of 1 Kg each shall be liable to pay GST.*

However, considering the language adopted by the notification and the recommendation of GST council meeting, the above issue can still be a matter of interpretation thereby opening a Pandora box of litigation. Hence, it is advisable that a suitable clarification is sought from the CBIC on the applicability of GST on sale of pre-packed commodities to avoid any litigation on the above matter.