

**MAHARASHTRA AUTHORITY FOR ADVANCE RULING**

**GST Bhavan, 8<sup>th</sup> floor, H-Wing, Mazgaon, Mumbai - 400010.**

**(Constituted under section 96 of the Maharashtra Goods and Services Tax Act, 2017)**

**BEFORE THE BENCH OF**

**(1) Shri B. Timothy, Addl. Commissioner of Central Tax, (Member)**

**(2) Shri B. V. Borhade, Joint Commissioner of State Tax, (Member)**

GSTIN Number, if any/ User-id		27AADCS3124K1ZD
Legal Name of Applicant		<b>Sun Pharmaceutical Industries Ltd.</b>
Registered Address/ Address provided while obtaining user id	"SUN HOUSE", Western Express Highway, Goregaon (E), Mumbai - 400 063. Maharashtra, India.	
Details of application		GST-ARA, Application No. 88 Dated 22.10.2018
Concerned officer		Dy. Commr. of S.T.(E-611)LTU-IV, Mumbai
Nature of activity(s) (proposed / present) in respect of which advance ruling sought		
A	Category	Factory/ Manufacturing ,
B	Description (in brief)	The applicant is engaged in the manufacturing & trading of pharmaceutical, nutraceutical and allied products. The applicant manufactured a certain nutritional product Prohance-D for diabetic people.
Issue/s on which advance ruling required		(i) Classification of goods and services or both.
Question(s) on which advance ruling is required		As reproduced in para 01 of the Proceedings below.

**PROCEEDINGS**

**(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)**

The present application has been filed under section 97 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by **Sun Pharmaceutical Industries Ltd.**, the applicant, seeking an advance ruling in respect of the following questions.

**1. What is the appropriate classification of the Applicant's product, Prohance - D (Chocolate)?**

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provision under the MGST Act. Further, henceforth for the purposes of this Advance Ruling, a reference to 'GST ACT' would mean CGST Act / MGST Act .

**02. FACTS AND CONTENTION - AS PER THE APPLICANT**

The submissions, as reproduced verbatim, could be seen thus-

**"STATEMENT OF RELEVANT FACTS HAVING A BEARING ON THE QUESTION(S) ON WHICH ADVANCE RULING IS REQUIRED.**

M/s Sun Pharmaceutical Industries Limited (hereinafter referred to as “Applicant”) having its corporate head office at, “SUN HOUSE” Western Express Highway, Goregaon(E), Mumbai-400063 is engaged in the business of manufacturing and trading of pharmaceutical products, nutraceutical and allied products falling under Chapter 28 & 30 of the Customs Tariff Act,1975 and is registered as per the GST laws.

The Applicant is engaged in the production and marketing of a nutritional powder/food for special dietary use called Prohance - D which is specially designed to serve as a nutritional powder for people with Diabetics. The said product is sold in powder form and is required to be mixed with drinking water and used as a partial meal replacement/Breakfast replacement / Evening snack/healthy bedtime snack or as directed by a Physician/dietician for diabetics. Prohance-D will be known in the market as “diabetic Product” as it is sugar free, low on GI (Glycemic Index) and contains Isomaltulose - a low glycemic carbohydrate that helps minimize blood sugar spikes (See Exb.-A). In other words, the Prohance -D would be marketed as Diabetic food as well as sold by the applicant specially meant for Diabetic people only. The said product provides all required macro nutrients as well micro nutrients to a Diabetic person, provides energy from high quality protein & fat, & is rich in dietary fiber and MUFA (Mono Unsaturated Fatty Acids) that support heart health. The photo of the labels containing the declaration of Prohance -D has been enclosed as "Exh - B". The applicant proposes to produce two variants of Prohance-D, namely (ii) Prohance-D - Vanilla flavor; and (ii) Prohance-D Chocolate flavour.

Notification No.1/2017-Central Tax (Rate) dated 30.06.2017 provides for applicable rates of GST on the supply of goods. Sl. No. 46A of Schedule - II to Notification No.1/2017- Central Tax (Rate) dated 30.06.2017 reads as under:

Sch.	Sl. No.	Chapter Heading/ Sub - Heading	Description of Goods	Rate of Tax (CGST)
II	46A	2106 90 91	Diabetic foods	6%

Corresponding notification of relevant State GST Act also provides rate of 6% on the aforesaid item. Therefore, Diabetic Food of Heading No. 2106 90 91 are covered by Sl. No. 46A of Schedule II and attract effective GST @12%.

Sl. No. 12C of Sch-III to Notfn. No.1/2017- CT (Rate) dt 30.06.2017 reads as under:

Sch.	Sl. No.	Chapter Heading/ Sub -Heading	Description of Goods	Rate of Tax (CGST)
II	12C	1806	Chocolates and other food preparations containing cocoa	9 %

Therefore, the “Chocolates and other food preparations containing cocoa” of Heading No. 18.06 are covered by Sl. No. 12C of Schedule III and attract GST @ 18%.

In the aforesaid transaction, there exists an ambiguity pertaining to the HSN classification of the product Prohance-D Chocolate. As stated above, Prohance - D manufactured by the Applicant in chocolate flavor in order to make the said product appealing to the end consumer, without altering the diabetic nature of the same.



**STATEMENT CONTAINING APPLICANT'S INTERPRETATION OF LAW AND/OR FACTS, AS THE CASE MAY BE IN RESPECT OF QUESTION(S) ON WHICH ADVANCE RULING IS REQUIRED.**

**APPLICANT'S INTERPRETATION**

**THE PRODUCT "PROHANCE-D (CHOCOLATE)" AS MANUFACTURED BY THE APPLICANT IS "DIABETIC FOOD" ALONE AND IS CLASSIFIABLE UNDER HEADING 2106.90.91 TO CHAPTER 21 OF THE CUSTOMS TARIFF ACT, 1975**

Chapter 21 of Custom Tariff Act, 1975 covers "Miscellaneous edible preparations". Heading No.21.06 under the said Chapter covers "Food preparations not elsewhere specified or included". In other words, the Chapter Heading 2106 is **residuary heading** which covers all the products not specified elsewhere in the tariff. The relevant extract of the said heading is reproduced under for ready reference:

HS Code	Description of goods	Unit
(1)	(2)	(3)
2106	<b>Food preparations not elsewhere specified or included</b>	
2106 10 00	Protein concentrates and textured protein substances.....	Kg
2106 90	- Other:	
	--- Soft drink concentrates:	
2106 90 11	Sharbat..	Kg
2106 90 19	Other.	Kg
2106 90 20	--- Pan masala	Kg
2106 90 30	--- Betel nut product known as Kg "Supari" .....	Kg
2106 90 40	--- Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup	Kg
2106 90 50	--- Compound preparations for making non-alcoholic beverage .....	Kg
2106 90 60	Food flavoring Kg material.....	Kg
2106 90 70	Churna for pan	Kg
2106 90 80	Custard powder	Kg
	. --- Other	
<b>2106 90 91</b>	<b>Diabetic foods.....</b>	<b>Kg</b>
2106 90 92	Sterilized or pasteurized millstone....	Kg
2106 90 99	---- Other	Kg

It is clear that Chapter Heading 21.06 90 91 specifically covers "Diabetic foods" alone. In this respect, it is pertinent to analyse the meaning of the term "Diabetic foods".

**MEANING OF "DIABETIC FOODS"**

The Oxford Dictionary of Food & Nutrition by David A. Bender defines "dietetic foods" as under:

***"Dietetic Foods- Foods prepared to meet the particular nutritional needs of people whose assimilation and metabolism of foods are modified or for whom a particular effect is obtained by a controlled intake of foods or individual nutrients. They may be formulated for people suffering from physiological disorders or for healthy people with additional needs."***

The said dictionary further defines "diabetic foods" as under:

***"Diabetic foods- Loose term for foods that are specially formulated to be suitable for consumption by people with diabetes mellitus, generally low in carbohydrate (and specially sugar), and frequently containing \*sorbitol, xylulose, or sugar derivatives that are slowly or incompletely absorbed."***

Reference may further be made to the *Food Industries Manual* by M.D. Ranken which provides a definition of a "Diabetic Jam". The said manual defines "Diabetic Jam" as "**Diabetic Jam (sorbitol-based)** -- Diabetic are unable to metabolize the sugars normally present in jams and marmalades, but they are able to take in sorbitol, a polyhydric alcohol derived from glucose. Specially prepared jams and marmalades are therefore manufactured for diabetics in which sorbitol, usually as a syrup, is used as a direct replacement for sucrose and glucose. The same manufacturing methods are used but it is necessary to increase the quantity of pectin since pectin/sorbitol gets are weaker than comparable sugar based gels." The Food Safety and Standards Act, 2006 (FSSAI) also makes a reference to "foods for special dietary purposes". In this regard, it is pertinent here to mention that the Courts in the past have referred to statutes to assist in the classification of a certain product. A judgment on the point is that of **Connaught Plaza Restaurant (P.) Ltd.v. Commissioner of Central Excise**, New Delhi reported at [2003] 154 ELT 187 where the court permitted the use of a Statute (Prevention of Food Adulteration Act, 1954) for HSN classification. The court accepted the decision in *State of Maharashtra Vs. Baburao Ravaji Mharulkar*, AIR 1985 S.C. 104, where it was observed that:

"..the common parlance understanding of the term ice cream can be inferred by the definition of ice cream in Prevention of Food Adulteration Act, 1954 and the Rules made thereunder; that as per paragraph A.11.20.08 of Appendix B to the Rules, 1955 Ice cream shall contain not less than 10.0 per cent milk fat, 3.5 per cent protein and 36.0 per cent total solids except that when any of the aforesaid preparations contains fruits or nuts or both, the content of milk fat shall not be less than 8.0 per cent by weight; that in the case of *State of Maharashtra Vs. Baburao Ravaji Mharulkar*, AIR 1985 S.C. 104, the respondents were held to be liable for conviction as the ice cream sold by them was found to contain 5.95 percent of milk fat as against prescribed 10% milk fat and as the product in question does not contain more than 5% of fat, it cannot be called "softy ice cream"."

----- Emphasis Supplied

Section 22 of the said FSSAI Act, 2006 is reproduced below for ready reference:

"22. Genetically modified foods, organic foods, functional foods, proprietary foods, etc.

Save as otherwise provided under this Act and regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, nutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.

Explanation - For the purposes of this section, -

(1) "foods for special dietary uses or functional foods or nutraceuticals or health supplements" means:  
(a) foods which are specially processed or formulated to satisfy particular dietary requirements which exist because of a particular physical or physiological condition or specific diseases and disorders and which are presented as such, wherein the composition of these foodstuffs must differ significantly from the composition of ordinary foods of comparable nature, if such ordinary foods exist, and may contain one or more of the following ingredients, namely: -

(i) plants or botanicals or their parts in the form of powder, concentrate or extract in water, ethyl alcohol or hydro alcoholic extract, single or in combination;



(ii) minerals or vitamins or proteins or metals or their compounds or amino acids (in amounts not exceeding the Recommended Daily Allowance for Indians) or enzymes (within permissible limits);

(iii) substances from animal origin;

(iv) a dietary substance for use by human beings to supplement the diet by increasing the total dietary intake;

(b) (i) a product that is labelled as a "Food for special dietary uses or functional foods or nutraceuticals or health supplements or similar such foods" which is not represented for use as a conventional food and whereby such products may be formulated in the form of powders, granules, tablets, capsules, liquids, jelly and other dosage forms but not parenterals, and are meant for oral administration; (ii) such product does not include a drug as defined in clause (b) and ayurvedic, sidha and unani drugs as defined in clauses (a) and (h) of section 3 of the Drugs and Cosmetics Act, 1940 (23 of 1940) and rules made thereunder; (iii) does not claim to cure or mitigate any specific disease, disorder or condition (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act; (iv) does not include a narcotic drug or a psychotropic substance as defined in the Schedule of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985) and rules made thereunder and substances listed in Schedules E and El of the Drugs and Cosmetics Rules, 1945;

(2) "genetically engineered or modified food" means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology;

(3) "organic food" means food products that have been produced in accordance with specified organic production standards;

(4) "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe;

Provided that such food does not contain any of the foods and ingredients prohibited under this Act and regulations made thereunder."

Further, the Notfn dated 23.11.2016 issued by FSSAI Regulation No.8 states that:

8. Food for special dietary use, other than infants, and those products intended to be taken under medical advice. -

(1) No food business operator shall manufacture, formulate or process an article of food for special dietary use unless-

(i) specially processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions, namely:-

(a) low weight, obesity, diabetes, high blood pressure;

(b) pregnant and lactating women; and

(c) geriatric population and celiac disease and other health conditions.

(ii) The food business operator shall clearly indicate on the label whether or not the food for special dietary use is to be taken under medical advice;



(iii) A food business operator may manufacture or sell an article of food for special dietary use in single use packaging or in dosage form, namely, granules, capsules, tablets, pills, jelly, semi-solid and other similar forms, sachets of powder, or any other similar forms of liquids and powders designed to be taken in measured unit quantities with a nutritional or physiological effect;

(iv) A food business operator may formulate an article of food for special use in formats meant for oral feeding through a enteral tubes but shall not be used for parenteral use;

(v) An article of food for special dietary use shall not include the normal food which is merely enriched or modified with nutrients and meant for mass consumption, intended for improvement of general health for day to day use and do not claim to be targeted to consumers with specific disease conditions and also not include the article of food intended to replace complete diet covered under food for special medical purpose specified in regulation 9.

(2) (i) The articles of food for special dietary use **shall contain** any of the **ingredients** specified in Schedules I or Schedule II or Schedule III or Schedule IV or Schedule VI or Schedule VII or Schedule VIII. (ii) A food business operator may use the ingredients specified in the Schedules referred to in clause (i) of sub regulation (2) in manufacturing food for special dietary use without prejudice to modifications for one or more of these nutrients rendered necessary by the intended use of the product.

... Emphasis Supplied

Schedule VIII of the Notification stated above is extracted below for ready reference:

**Schedule - VIII**

[See regulations 3.(13), 6.(2)(1), 7.(2)(i), 8.(2)(i), 9.(2)(i) and 11.(1)(1)]

**List of prebiotic compounds**

S. No.	Prebiotic Compounds
1	Polydextrose
2	Soybean oligosaccharides
3	Isomalto-oligosaccharides
4	<b>Fructo-oligosaccharides</b>
5	Gluco-oligosaccharides
6	Xylo-oligosaccharides
7	<b>Inulin</b>
8	<b>Isomaltulose</b>
9	Gentio-oligosaccharides
10	Lactulose
11	Lactoferrin
12	Sugar alcohols such as lactitol, sorbitol, maltitol, inositol, isomalt
13	Galacto-oligosaccharides



A combined reading of the above provisions clarifies that FSSAI recognized "food for special dietary uses" (specially processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions such as diabetes) are recognized as a separate category of foods. FSSAI streamlines the purview of the said foods by providing a *list of ingredients* that must be contained for any food to qualify as a "food for special dietary uses". At this point, it is pertinent to analyse the meaning of the term "Food" before we analyse whether the product under consideration is a "Diabetic Food".

The term 'food' has been defined in Section 2() of the FSSAI Act as under:

“(j) Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances:

Provided that the Central Government may declare, by notification in the Official Gazette, any other article as food for the purposes of this Act having regards to its use, nature, substance or quality;

Further, "food" has also been defined has been defined in Webster's international Dictionary as "nutritive material absorbed or taken into the body of an organism which serve, for purposes of growth, work or repair and for the maintenance of the vital process."

Further reliance can be placed on the Supreme Court judgment in the case of CCE Vs. Parle Exports (P) Ltd. reported at 1988 (38) ELT 741. In the said case, the issue before the Supreme Court was as to whether non-alcoholic beverage is eligible for exemption as 'food products or food preparations' under Notification No. 55/75-CE. The Supreme Court held that the words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. The Court held that in ordinary and commercial parlance in India, food is considered as 'nutritive material absorbed or taken in the body of an organisation for the purpose of growth work or repair and for the maintenance of vital processes'.

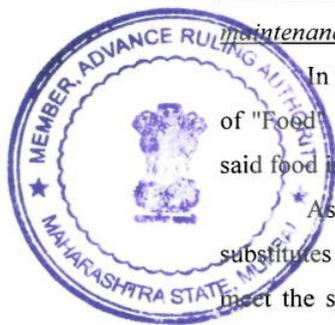
In the present matter, the product under consideration undisputedly is covered under the definition of "Food" as elaborated upon by the Supreme Court above. Thus, it is pertinent to analyse whether the said food is covered under the definition of "Diabetic Food" or not.

As stated above, the product under consideration is a specially designed nutritional powder which substitutes "sugar" for Maltodextrin, Fructose, Isomaltulose and Fibers (FOS, Inulin and Gum Arabic) to meet the special dietary requirements of Diabetic people. It is pertinent to note that ingredients like Isomaltulose, FOS - Fructo oligosaccharides and Inulin are covered under Schedule VIII of the above-mentioned notification prescribed by FSSAI. Thus, the said product is treated as a "food for special dietary uses" under FSSAI. The product also has other features also like it being sugar free, having low GI, having high fiber, being rich in MUFA. Thus, in this respect, it can be safe to contend that "Prohance - D" is a diabetic food to meet the special dietary requirements of Diabetic people.

**PROHANCE-D CHOCOLATE IS CLASSIFIABLE UNDER CHAPTER HEADING 2106 90 91 IRRESPECTIVE OF THE COCOA CONTENT IN THE SAID PRODUCT**

Chapter 18 of the CTA, 1975 covers "Cocoa and Cocoa Preparations". Heading No.18.06 of the said Chapter covers "Chocolate and other food preparations containing cocoa". The relevant extract of the same is provided below for ready reference:

18.6	- Chocolate and other food preparations containing cocoa (+).
1806.10	- Cocoa powder, containing added sugar or other sweetening matter



1806.20	- Other preparations in blocks, slabs or bars weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg
	- Other, in blocks, slabs or bars :
1806.31	- Filled
1806.32	- Not filled
1806.90	- Other

The HSN Explanatory notes of the said Chapter Heading 1806 is reproduced below for ready reference:

*Chocolate is composed essentially of cocoa paste and sugar or other sweetening matter, usually with the addition of flavouring and cocoa butter; in some cases, cocoa powder and vegetable oil may be substituted for cocoa paste. Milk, coffee, hazelnuts, almonds, orange peel, etc. are sometimes also added.*

*Chocolate and chocolate goods may be put up either as blocks, slabs, tablets, bars, pastilles, croquettes, granules or powder, or in the form of chocolate products filled with creams, fruits, liqueurs, etc.*

*The heading also includes all sugar confectionery containing cocoa in any proportion (including chocolate nougat), sweetened cocoa powder, chocolate powder, chocolate spreads, and, in general, all food preparations containing cocoa (other than those excluded in the General Explanatory Note to this Chapter).*

*Chocolate enriched with vitamins is also classified in this heading.*

*The heading does not include:*

*(a) White chocolate (composed of cocoa butter, sugar and powdered milk) (heading 17.04).*

*(b) Biscuits and other bakers wares covered with chocolate (heading 19.05).*

*Subheading Explanatory Note.*

*Subheading 1806.31*

*For the purpose of this subheading the term "filled" covers blocks, slabs or bars consisting of a centre composed of, e.g., cream, crusted sugar, desiccated coconut, fruit, fruit paste, liqueurs, marzipan, nuts, nougat, caramel or combinations of these products, enrobed with chocolate. Solid blocks, slabs or bars of chocolate containing, for example, cereal, fruit or nuts (whether or not in pieces), embedded throughout the chocolate, are not regarded as "filled".*

Chapter 18 which only pertains to "Chocolate and other food preparations containing cocoa, intends to cover all those products which have the presence of Cocoa in it. However, we need to place reliance on Chapter 19 wherein products which have marginal content of Cocoa present in them are still classifiable under Chapter 19 and not Chapter 18. It is further submitted that Chapter 18 does not intend to cover any and all the food preparations containing cocoa. It is evident by the explanatory notes to the entry, which clearly states "The heading also includes all sugar confectionery containing cocoa .....(other than those excluded in the General Explanatory Note to this Chapter)". It logically follows that since the explanatory notes speak about food preparations containing cocoa in general and not necessarily all the food preparations containing cocoa. **Thus**, diabetic food which exists as a separate entry (even though in the residuary portion of Hdg No.21.06) cannot be made to mean food preparations in general to be covered under Hdg No.18.06.



It is pertinent here to mention that there exists a similar distinction made in the explanatory notes to Chapter 19.01. Here, the entries under Heading No.19.01 pertain to:

- a. *food preparations of flour, groats, meal, starch or malt extract not containing cocoa or containing less than 40% by weight of cocoa calculated on a defatted basis.*
- b. *Food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a defatted basis.*

The explanatory note pertaining to food preparations of flour, groats, meal, starch or malt extract states that:

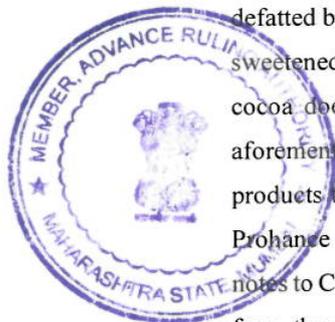
*The heading covers a number of food preparations, which derive their essential character from such materials whether or not such ingredients predominate by weight or volume.*

*Other substances may be added to these main ingredients, such as milk, sugar, eggs, casein, albumin, fat, oil, flavouring, gluten, colouring, vitamins, fruit or other substances to improve their dietetic value, or cocoa, in the latter case, in any proportion less than 40% by weight of cocoa calculated on a defatted basis.*

It is pertinent here to mention that, the explanatory notes to the Hdg No.19.01 of HSN consider that the broad classification of the products shall be determined taking into consideration the essential character of the ingredients. It further concludes that certain other substances for flavouring, colouring or even cocoa may be added & the same shall not alter the classification and make it classifiable under Heading No.18.06. Anything and everything in sky containing very minuscule content of cocoa cannot be blindly covered under Heading No.18.06. Further, the said explanatory notes explicitly provide that goods of heading 04.01 to 04.04, not containing cocoa or less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included shall come under Heading No.19.01 only despite being sweetened or "despite containing cocoa". An interpretation of Chapter 19 implies that in situations where cocoa does not determine the character of the product, the same was not taken into account for the aforementioned cases, and a similar view should be followed in cases pertaining to classification of products to be considered as diabetic food covered under Chapter 21. Attention is drawn to the fact that Prohance - D (Chocolate), merely contains 3% Cocoa Powder. (See "Exhibit - A"). As per the explanatory notes to Chapter 19 the product under consideration, which contains less than 5% cocoa should be excluded from the scope of Chapter Heading 18 and be classifiable under Chapter Heading 2016 as a "Diabetic Food".

Pertinent here to mention a judgment on point is that of **The Commissioner of Central Excise vs. Britannia Industries. Ltd** reported at **2005 (183) ELT 257 (Tri-Mumbai)**, the dispute in this case is regarding the classification of the product wafer which contain chocolate. The relevant extract of the case is:

"3. *Considering the material on record it is found that based on the classification of the Chocolate Cream placed between two sliced biscuits-wafers and the fact that the said Chocolate cream would be classifiable under heading 1803 do not enthruse us to classify the biscuits, in this case, on the ground as taken irrespective of the fact of percentage of Cocoa in the entity, the ground taken that the decision relied upon by the Commissioner (Appeals) in the appellant's own case vide order No. 802/86 dated 03/09/86 was as*



regards the classification in case of Bourbon Cream manufactured by the respondents in the year 1986, which was under the erstwhile tariff and was based on the applicability of ISI specification for use of chocolate and that decision cannot be applied to the facts of this case as ISI and the Prevention of Food Adulteration Act, would not rule the classification to be arrived under the tariff based on HSN cannot be accepted, as the classification of the "chocolate cream" which forms a layer between two slices of biscuits cannot determine the classification of the biscuits itself. **There is no material to consider that the biscuit is a cocoa product merely because of its certain percentage of cocoa which do not even predominate, were found in such entity.** The entities are understood and have to be classified, as such they cannot be called chocolate for the reason as given".

From the above judgement it can be said the ingredient should determine the classification of a product & here in this case cocoa is not the main ingredient, the identity of an article is associated with its primary function and utility. Hence Prohance-D should not be classified under Chapter 18 only on the basis of miniscule quantity of cocoa contained in it.

Reliance is also placed in case of Abbott Healthcare Pvt. Ltd and Ors. Vs **Commissioner of Custom (General and CFS)** reported at MANU/CM/0434/2015. In this case appellant herein filed Bill of Entry No. 6750153 dt. 07.05.2012 for clearing the goods for home consumption, described them as 'Mama's Best India Chocolate 400 grams'. Appellant also claimed that the subject goods are classifiable under CTH/CETH 19.01 90 90 claiming the concessional BCD as being supplies from AIFTA Country of Origin under Notification No. 46/2011 (Sr. No. 158) as the goods were covered by the Country of Origin Certificate issued by Director General of Customs, Singapore. The dispute in this case is regarding the classification of the goods imported by the appellant. The assessee was claiming classification of the goods under CTH 1901 while Revenue was trying to classify the same under CTH 21.06. The court in Para held



"the ingredients of the product as has been claimed by the appellant in their letter dt. 6.6.2012 as containing (a) Skim milk powder (64.7%), (b) Lactose (15.2%), (c) Sucrose (12%), (d) Cocoa Powder (2.5%), (e) Oligofructose (2.2%), ) Minerals and Vitamins is not disputed by the revenue. The main ingredients as indicated hereinabove in the letter by the appellant would indicate that the product predominantly contains milk and milk derivative. The said product would have got ordinarily classified under Chapter Heading 0404 as product containing natural milk constituents, whether or not containing added sugar or other sweetening matter, not elsewhere specified or included (as per the CTH reproduced hereinabove), but since the product imported by the appellant contains various other minerals and cocoa powder to the extent of 2.5%, the said product does not merit classification under Chapter Heading 0404. This would take us to the next available chapter heading which this product can be classified is 1901. The chapter notes of heading No. 1901 specifically indicates that the goods of headings 0401 to 0404 which do not have cocoa containing more than 5% by weight are classified under the said heading 1901. As is already recorded by us, there is no dispute as to the claim of the appellant that the imported goods contain cocoa of 2.5%, and hence Chapter Note of Chapter Heading 1901 clearly applies to the goods imported and the product merits to be classified under 1901 as being specific entry. As against this, the Revenue's claim that the product fall under Chapter 2106 is misplaced as we agree with the contentions

raised by the Ld. Counsel that the said heading 2106 would cover the residual products which are not classified elsewhere".

Hence Prohance-D should not be classified under Chapter 18 only on the basis of miniscule quantity of cocoa contained in it.

**DIABETIC FOOD covered under Tariff Item No.2106 9091 should be read as 'diabetic foods in all its forms'.**

Further, the term 'diabetic food' shall construe to mean *diabetic foods in all its forms* as there is no restrictive meaning attached to the term. Further, in common parlance any food engineered to suit the needs of a diabetic person is referred to as a diabetic food. Through various judicial pronouncements of the Hon'ble Supreme Court in the past it has been established that "in all its forms" shall have an impliedly wide meaning, placing reliance on the case of *Indian Carbon Ltd. v. Supdt. Of Taxes* reported at AIR 1972 SC 154 the court read down Section 14(i) of the Central Sales Tax Act, 1956 and held that *coke in all its forms* shall include petroleum coke as well. Further in the case of *Mineral Sales Corpn. v. C.S.T. [46 STC 208(All)]* the Hon'ble court observed that the phrase "in all forms" has a wider connotation than the phrase "of all kinds" and shall imply all the various forms in which a thing manifests itself.

It is contended here that the sole parameter to determine whether a certain food is diabetic is whether it substitutes traditionally easily digestible carbohydrates in the foods with those which can be slowly processed by a person with diabetes. The fact that a certain array of flavors exist in a certain diabetic food cannot come to mean that every different flavor shall determine the different character of the food. As "Prohance-D Chocolate" is in nature of a diabetic food and is accorded a FSSAI classification as the same, it is apt to classify Prohance -D (chocolate) under Tariff Item No.21.069091, which covers diabetic foods in all its forms.'

**Prohance™-D Chocolate**

**INGREDIENTS:** Maltodextrin, Sunflower seed oil (High oleic acid), Calcium caseinate, Whey protein isolate, Soy protein isolate, Isomaltulose (6.1%), Rapeseed oil - low erucic acid, Fructose, Fructo-oligosaccharides, Cocoa powder (3.0%), Gum arabic, Minerals, Inulin, Sunflower seed oil, Antioxidants (Soy lecithin, L-Ascorbic acid, TBHQ), Myo-inositol, Choline bitartrate, Vitamins, L-Carnitine, Taurine, Artificial sweetener (Sucralose), Acidity regulator (Citric acid).

**Regulatory Category:** FOOD FOR SPECIAL DIETARY USE. Food for people with Diabetes.

**DIRECTIONS FOR USE:**

1. Take 175 ml of drinking water
2. Add 6 leveled scoops (Approx. 50g) of Prohance™-D Chocolate Powder
3. Stir continuously until dissolved and consume immediately

**When to Consume Prohance™-D Chocolate?**

- As a partial meal replacement - 1 serving of Prohance™-D Chocolate can be used before a major meal (e.g., lunch/dinner).
- or as a Breakfast replacement;
- or as an Evening snack/healthy bedtime snack;
- or as directed by your physician/dietician



**Additional submissions on 22.01.2019**

**A. PROHANCE - D IS A "FOOD PREPARATION"**

Since the term "Food Preparations" has not been defined under the CTA, 1975 nor under the GST law, reliance is required to be placed on other sources for interpreting the meaning of the term "Food" and "Food Preparations".

Further, reliance can be placed on the Supreme Court judgment in the case of CCE Vs. Parle Exports (P) Ltd. reported at 1988 (38) ELT 741. In the said case, the issue was whether "non-alcoholic beverage" is eligible for exemption as 'food products or food preparations' under Notification No. 55/75-CE. The Supreme Court held that the words used in the provision, imposing taxes or granting exemption should be understood in the same way in which these are understood in ordinary parlance in the area in which the law is in force or by the people who ordinarily deal with them. **The Court held that in ordinary and commercial parlance in India, food is considered as 'nutritive material absorbed or taken in the body of an organisation for the purpose of growth work or repair and for the maintenance of vital processes'.**

In the present matter, it is submitted that the label of the sample product clearly states that Prohance - D (Chocolate) is a "*nutritional powder*" which can be used as a "*partial meal replacement*" by people who have "*Special Dietary needs*". The label specifically also states that the said product is "*Food for Special Dietary Use*"/"*Food for people with Diabetes*" and not for "*Medicinal Use*". The subject product is being marketed as a "Diabetic Food" only which provides a "*Balanced Portion-Replacement*" for "Diabetic people", designed to "*Deliver High Standard Nutrition*". Hence it is submitted that "Prohance - D (Chocolate)" is in the nature of "*nutritive material absorbed or taken in the body of humans for the purpose of repair and maintenance of vital processes*" and thus covered within the purview of the term "Food Preparation".

**B. PROHANCE - D (CHOCOLATE) IS A "FOOD PREPARATION" CLASSIFIABLE UNDER EITHER CHAPTER 21 OF THE CUSTOMS TARIFF ACT, 1975**

Chapter Heading 18 of the CTA covers "*Cocoa and cocoa preparations*". HSN Explanatory Notes to Chapter Heading 18.06 of the CTA states as under:

"18.06.- *Chocolate and other food preparations containing cocoa (+) 1806.10. - Cocoa powder, containing added sugar or other sweetening matter 1806.20 - Other preparations in blocks, slabs or bars weighing more than 2 kg or in liquid, paste, powder, granular or other bulk form in containers or immediate packings, of a content exceeding 2 kg*

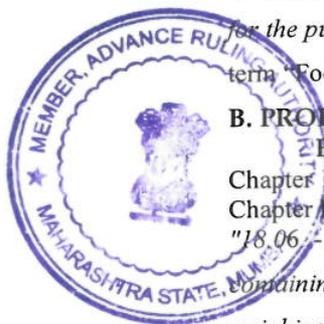
- *Other, in blocks, slabs or bars :*

18.06.31 - *Filled*

1806.32 --*Not filled*

1806.90 - *Other*

*The heading also includes all sugar confectionery containing cocoa in any proportion (including chocolate nougat), sweetened cocoa powder, chocolate powder, chocolate spreads, and, in general, all food preparations containing cocoa (other than those excluded in the General Explanatory Note to this Chapter)*



Here attention is drawn to the language of the explanatory notes which states that the heading includes certain goods which can be broken down into the following parts:

- (i) **All sugar confectionery** containing cocoa in any proportion' (including chocolate nougat);
- (ii) Sweetened cocoa powder;
- (iii) Chocolate Powder;
- (iv) Chocolate Spreads; *and*
- (v) **in general, all food preparations containing cocoa** (other than those excluded in the General Explanatory Note to this Chapter).

At the outset, it is pertinent to note that the said heading covers "*All sugar confectionaries containing cocoa in any proportion*" as stated in the above extract. "Prohance - D (Chocolate)" is not a sugar confectionary and thus, is not covered under the said description of Heading 18.06.

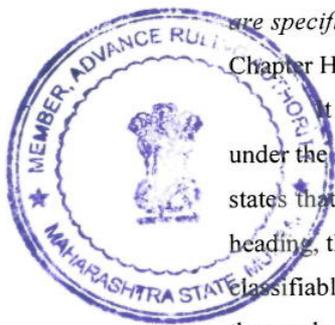
It is pertinent to note that the phrase "*cocoa in any proportion*" is specially used in context of "**All sugar confectionaries**" only. From this, we understand that the proportion of cocoa must be relevant/important for the other description of products that have been elucidated in the HSN explanatory notes. Other products that are specifically covered under the heading are sweetened cocoa powder, Chocolate powder & Chocolate spread, all of which generally contain a substantial amount of cocoa which gives these products, the characteristic features of being cocoa based products.

"Prohance - D (Chocolate)" is not covered under any of the said descriptions of products that are classifiable under Chapter Heading 18.06. Thus, it is pertinent to refer to the residuary description of products covered under the said Chapter Heading. The last description in the HSN Explanatory to Chapter Heading 18.06 states that "In general, All food preparations containing cocoa (Excluding those which are specifically excluded in the General Explanatory Notes to the said Chapter)" are included in the said Chapter Heading.

It is important to interpret the said entry in context of our findings in the first description covered under the said Chapter Heading. While the HSN explanatory Notes to Chapter Heading 18.06 specifically states that "*All sugar confectionaries containing cocoa in any proportion*" is classifiable under the said heading, the wording of the residuary description states that "*All food preparations containing cocoa*" is classifiable under the said heading. Here, in relation to food preparation, the explanatory note states that the product must contain cocoa but does not comment on the proportion of the same. In absence of the phrase "any proportion", *it is concluded that the proportion of "cocoa" in "food preparations" is important to determine whether a food preparation is classifiable under Chapter Heading 18.06.* In order to determine what proportion of cocoa in a food preparation is substantial proportion of cocoa to be classifiable under Chapter Heading 18.06, reference can be made to Chapter Headings that are specifically excluded the said chapter.

**Chapter Heading 19.01 of the CTA states as under:**

*Malt extract; food preparations of flour, groats, meal, starch or malt extract, not containing cocoa or containing less than 40% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included; food preparations of goods of headings 04.01 to 04.04, not containing cocoa or containing less than 5% by weight of cocoa calculated on a totally defatted basis, not elsewhere specified or included.*



As per the said Chap. Heading, "Food Preparations" containing "less than 5% cocoa" shall remain classifiable under Chap Hdg 19.01 irrespective of the cocoa content in the said preparations. From the said heading, it can be inferred that a threshold of "5% cocoa" can be used to determine whether a "food preparation" contains a substantial amount of cocoa to be classified under Chapter 18.06.

"Prohance - D (Chocolate)" contains 3% cocoa as a flavouring agent, merely to make the product more palatable to the taste buds of Diabetic consumers and to provide customers with a variety of flavours to choose from. Addition of 3% cocoa does not change the essential characteristic of the product under consideration. In this respect, "Prohance-D (Chocolate)" shall not be covered under the last description of the HSN Explanatory Note and thus, shall be squarely excluded from classification under Chapter Heading 18.06 of CTA.

It is noted that none of the ingredients covered under Chapter 19 are used in making the said product. The only ingredient that maybe contentious is "maltodextrin", which is a by-product of corn flour. However, it is important to understand the process by which maltodextrin is extracted from "corn flour" to determine whether the two can be deemed to be one and the same. The chemical process undertaken is stated below for your reference:

*Corn flour, also known as maize starch, means the starch obtained from maize. Maltodextrin is a purified, concentrated, nutritive mixture of saccharide polymers obtained by the partial hydrolysis of edible starch like Corn Flour (Maize Starch). Maltodextrins, also known as "hydrolysed cereal solids" are starch-conversion products that contain a relatively small amount of dextrose and maltose. Maltodextrins are produced from starch, usually corn. The starch, that is almost pure carbohydrate, is cooked or pasted to open a granule and then hydrolysed. Products can be made by hydrolyzing with acid or enzymes or with a combination of acid and enzymes. In terms of even taste, corn starch is bland or starchy whereas Maltodextrin has sweet taste.*

The chemical process undertaken on corn flour to obtain "Maltodextrin" completely changes the composition of the product by which maltodextrin is no longer identifies with the essential characteristic of "Corn Flour".

Since "Prohance - D (Chocolate)" does not contain any of the ingredients stated in Chapter 19, the same is squarely excluded from being classified under the said Chapter Heading.

Chapter 21 of the CTA covers "Miscellaneous edible preparations" and specifically covers "Food preparations not elsewhere specified or included". The said sub-heading can be interpreted in 2 ways:

- (i) Food Preparations covered under the sub-heading are not elsewhere specified or included. Thus, any "Food Preparation" that is specifically listed out under the said sub-heading shall be deemed to be classifiable only under the said sub-heading, as they are not specified elsewhere in the CTA; and
- (ii) Food Preparation which are not specified under any other heading shall be classifiable under the said sub-heading, or in other words, this is the residuary entry for "food preparations" nowhere else classified.

Further, attention is drawn to the HSN explanatory note to Chapter Heading 21.06 of the CTA which states as under:



**21.06 - Food preparations not elsewhere specified or included.**

2106.10 - Protein concentrates and textured protein substances

2106.90 - Other

Provided that they are not covered by any other heading of the Nomenclature, this heading covers:

- (A) Preparations for use, either directly or after processing (such as cooling, dissolving or boiling in water, milk etc.) for human consumption.

"Prohance-D (Chocolate)" is a food preparation meant to be consumed by people by dissolving the same in water/milk. It is thus a "food preparation", squarely covered under Chapter Heading 21.06 of the CTA. It is further to note that Tariff Item no. 2106 9091 of the CTA, specifically covers "Diabetic Foods". The product in question is marketed and sold as a "Diabetic Food". Thus, on the basis of the facts of the case as well as the perusal of Tariff Item no. 21.06 9091 it is clear that the product is squarely classifiable under the said Tariff Item as it is the most specific sub-heading entry available for "Prohance - D (Chocolate)" in the CTA.

**C. SPECIFIC ENTRY REGARDING SPECIFIC ITEM TO BE PREFERRED TO A GENERAL ENTRY – "PROHANCE-D" IS CLASSIFIABLE UNDER CHAPTER 21.06 OF THE CUSTOMS TARIFF ACT, 1975**

In the alternative, if it is contended by the Department Representative that Chap. Hdg. 18.06 & T. I. No. 2106 9091 are competing entries, then reliance shall have to be placed on the General Rules of Interpretation to determine the appropriate classification of our product. Rule 3(a) of the General Rules of Interpretation states that a specific heading must be preferred over a general heading.

The same principles were laid down in the case of *Shanti Surgical Put. Ltd. v. Commissioner of C. Ex. Kanpur* 2017 (6) G.S.T.L. 164 (Tri. – All.) (Refer Page no. 116 of "Index – 1" submitted during the admission PH) which states as under:

"In my opinion the basics of the classification are that initially an attempt should be made to search a specific entry where the goods can be classified as per the nomenclature & the constituent material. In case no specific entry is available the next attempt should be to find the nearest entry where the goods can be classified. In case both the attempts turn to be futile then the attempt should be made to consider the end uses, the inclusion & exclusion clauses provided in the section notes, the chapter notes and the explanatory notes given the HSN. While doing so the interpretation of the said Note will depend upon the context in which the entries have been worded. If an entry is clearly worded and is broad in character, the same would lead to the conclusion. An entry is to be given its ordinary meaning. If any goods fit in within one entry, the same for any purpose would not be held to be included in the other and in particular the residuary."

The same position was re-iterated in the case of *Rajdhani Seeds Corporation v. Commr. Of Cus. Nava Sheva* 2006 (198) E.L.T. 449 (Tri. - Del.) in which the six-digit specific entry was preferred over general entry for the classification of "cloves".

In order to determine the specific entry between Chapter Headings 18.06 and 21.06 9091, it is pertinent to interpret said headings with the help of the HSN Explanatory notes. As discussed above, the HSN explanatory notes to Chapter Heading 18.06 states that "All Food preparations containing cocoa"



shall be classifiable under the said Heading. Besides the fact that the Heading intends to cover only food preparations in which cocoa is contained in a substantial proportion, it is also pertinent to note that it is a "residuary entry" for food preparations containing cocoa in a substantial proportion.

In the case of *Commissioner of C.Ex., Mysire v. Anurag Foods & Appliances Ltd*, 2009 (234) E.L.T. 641 (Tri. - Chennai) it was held that Residuary entry is to be preferred only after it is exhaustively shown that the product was not covered in any specific heading. Hence it is pertinent to analyse whether Chap Hdg 21.06 of the CTA is more specific than Chap Hdg 18.06 which is **residuary in nature**.

**Chapter Heading 2106 of the CTA covers "Food Preparations not elsewhere specified".**

The interpretation of the said entry has two parts. First part covers food preparations which are specified under Chapter Heading 2106 of the CTA and thus, the entry is deemed to be "specific in nature" as the heading itself states that the said Food preparations are not elsewhere specified. Second part of the said heading covers food preparations which are not specified under the said heading and are not classifiable under any other heading. The second part is thus, a "residuary entry" for Food preparations, nowhere else classifiable. Tariff Item No. 2106 9091 of the CTA specifically covers "Diabetic Foods". Thus, "Diabetic Foods" falls under the first interpretation of Chapter Heading 2106 and Tariff Item No. 2106 9091 is deemed to be the "specific entry" for the classification of "Diabetic Foods".

Now that it has been established that Tariff Item no. 2106 9091 is the "specific entry" for classification of "Diabetic Foods", it is pertinent to analyse whether "Diabetic Foods containing Cocoa" shall also remain to be classifiable under the said Heading.

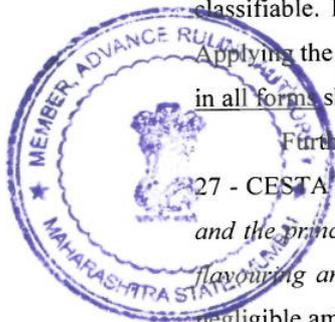
It has been established in the case of *Indian Carbon Limited v. S. Taxes* AIR 1972 SC 154 that a "goods in all its forms" are classifiable under the Chap Heading under which the principal good is classifiable. In the present matter, "Diabetic Foods" is classifiable under Tariff Item no. 2106 9091. Applying the principal in the said judgment to the present facts, it can be concluded that "Diabetic Foods" in all forms shall be classifiable under Tariff Item no. 2106 9091 of CTA.

Further, in the case of *Neulife Nutrition systems v. Commissioner of Central Excise* 2018 (4) TMI 27 - CESTAT Mumbai, it was held that "The description for 'whey' in heading no. 0404 is no different and the principle governing the classification of 'milk products' with addition can be no different when flavouring and sweetings have been added to whey". In other words, flavouring substances, added in negligible amounts, cannot determine change the classification of a product.

In the present matter, 3% cocoa is added to Prohance - D (Chocolate) as a flavouring agent, merely to make the product more palatable. Addition of the said 3% cocoa does not change the essential characteristic of the product under consideration. Hence in light of the *Neulife* judgment, it can be concluded that addition of flavouring substances shall not change the classification of the product and Prohance - D (Chocolate) shall continue to be classifiable under Tariff Item no. 2106 9091 of the CTA.

Thus, there exists 2 competing entries for the classification of "Prohance - D (Chocolate):

- (i) Chapter Heading 1806 of the CTA which is a "residuary entry" for food preparations containing cocoa.
- (ii) Tariff Item no. 2106 9091 of the CTA which a "specific entry" for "Diabetic Foods" in all forms.



As per Rule 3(a) of the General Rules of Interpretation, it is humbly submitted that Tariff Item no. 2106 9091 provides the most specific description for "Prohance - D (Chocolate)".

**D. SPECIFIC HEADING SHOULD BE PREFERRED AND IF THERE ARE TWO SPECIFIC HEADINGS, TO WHICH A PRODUCT CAN BE REFERRED, THE ONE OCCURRING SUBSEQUENTLY WILL PREVAIL – "PROHANCE - D (CHOCOLATE)" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 9091 OF THE CTA**

In the alternative, if the authorities are of the view that both of the entries under consideration are "specific in nature", the classification of "Prohance - D (Chocolate)" shall be subject to Rule 3(b) and Rule 3(c) of the General Rules of Interpretation which states as under:

**RULE 3**

*When by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows: (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. (a) Mixtures, composite goods consisting of different materials or made up of different components, and foods put up in sets for retail sale, which cannot be classified by reference*

*(b) 3(2), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.*

*(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to (a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable.*

*(c) When goods cannot be classified by reference to (a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.*

Rule 3(b) of the General Rules of Interpretation is applicable to mixture and composite goods. Thus, the same cannot be used to determine the classification of "Prohance - D (Chocolate)". Rule 3(c) on the other hand states that when classification cannot be determined by applying Rule 3(a) & 3(b) of the General Rules of Interpretation, then the product under question shall be classifiable under the heading which occurs last in numerical order among those which equally merit consideration. The same principal was upheld in the case of *Union of India v. Pesticides MFG. & Formulators Association of India*, 2002 (146) E.L.T. 19 (S.C.). Applying the said principal in the present matter, the latter of the competing headings i.e T.I. No. 2106 9091 should be applied in the present case.

**E. WHEN THERE ARE TWO COMPETING ENTRIES, THE HEADING BENEFICIAL TO THE ASSESSE IS TO BE ADOPTED - "PROHANCE - D (CHOCOLATE)" IS CLASSIFIABLE UNDER TARIFF ITEM NO. 2106 9091 OF CTA**

Further, cognizance must be placed on the landmark judgment in the case of *Commissioner of Central Excise v. Minwool Rock Fibres Ltd.* 2012 (278) E.L.T. 581 (S.C.) where the court held as under:

*"We have already noticed the relevant entries to which we are concerned with in this appeal. No doubt there is a specific entry which speaks of Slagwool and Rockwool under Sub-heading No.6803.00, but there is yet another entry which is consciously introduced by the Legislature under sub-heading No. 6807.10, which speaks of goods in which Rockwool, Slagwool and products thereof are manufactured by use of more than 25% by weight of blast furnace slag. It is not in dispute that the goods in question are those goods in which more than 25% by weight of one or more of red mud, press mud or blast furnace slag is used. If that be the case, then, in a classification dispute, an entry which is beneficial to the assessee requires to be applied and the same has been done by the adjudicating authority, which has been confirmed by the Tribunal."*

In the said case, both the competing entries dealt with the same product i.e "Slagwool" but with certain different specification. The latter of the two entries was specifically introduced on a later date with a lower rate of duty payable on the same. In analysing the appropriate classification of the slagwool in question, Tribunal was of the view that in such type of disputes, an entry which is beneficial to the assessee requires to be applied.

Here, the two entries under consideration is Chap Hdg 18.06 which covers "Food Preparations containing Cocoa" and Tariff Item no. 2106 9091 which covers "Diabetic Food". "Prohance - D (chocolate)" being a Diabetic Food containing cocoa satisfies conditions of both the entries. Although the essential characteristic of the product is "Diabetic Food" and "cocoa" is merely a flavouring agent, it may be argued that the cocoa content in the said product cannot be ignored thus making Chapter Heading 1806 and Tariff Item no. 2106 9091 competing entries. In such a scenario, reliance can be placed on the above stated judgment. As per Notification 1/2017 - C.T. (Rate) dated 28.06.2017 and as amended from time to time, "Diabetic Food" covered under Tariff Item no. 2106 9091 attracts GST at the rate of 12% and "Chocolates and other food preparations containing cocoa" covered under Chapter Heading 1806 attracts GST at the rate of 18%. Applying the principle laid down in the above stated judgment, when there are two competing entries in a classification dispute, the entry which is beneficial to the assessee is required to be applied, which in this case is Tariff Item no. 2106 9091.

It is further submitted that "Prohance - D (Chocolate)" is not a "Compound preparations for making non-alcoholic beverages" as has been contended by the Department in their submission in the Final PH. It is humbly submitted that the product under consideration is a beverage itself, and not a "Compound preparation" for a non alcoholic beverage.

**03. CONTENTION – AS PER THE CONCERNED OFFICER**

The submission, as reproduced verbatim, could be seen thus-

"The applicant has contended that the product is covered by heading 21 06 as 'Diabetic Food', which is taxable @ 12%. However it seen from the advertisement literature that the impugned product is not advertised as a Diabetic Food. The product is instead advertised as a product intended for the well-being and general health of a human being. It is nowhere projected as a product for Diabetic patients only. The literature shows that the product contains Prohance -D Powder which contains ingredients that helps to body to repair and regain the energy and the tissues and help to build them. It shows that the product is not exclusively meant only for Diabetic purpose.



The heading 2106 occurs in Schedule II, Schedule III and Schedule IV. Schedule II covers products taxable @ 12%. In the said Schedule, Diabetic Foods are covered and I have already given my say as to how the product is not covered by the schedule. In Schedule III of 18%, at item no 23, against heading 2106 the following description is found:-

*All kinds of food mixes including instant food mixes, soft drink concentrates, Sharbat, Betel nut product known as "Supari", Sterilized or pasteurized millstone, ready to eat packaged food and milk containing edible nuts with sugar or other ingredients, [other than Namkeens, bhujia, mixture, chabena and similar edible preparations in ready for consumption form]*

The impugned product does not fit in the description given above.

In the Schedule IV which covers products @ 28% , heading 2106 occurs at item no 9. The description is given below:-

*Food preparations not elsewhere specified or included i.e. Protein concentrates and textured protein substances, Sugar-syrups containing added flavouring or colouring matter, not elsewhere specified or included; lactose syrup; glucose syrup and malto dextrine syrup, **Compound preparations for making non- alcoholic beverages**, Food flavouring material, Churna for pan, Custard powder.*

After going through the uses of the ingredients as described above we can say that the product is covered by the description '**Compound preparations for making non-alcoholic beverages**' ( it is mixture of various items i.e. Maltodextrin, Sunflower seed oil, Calcium Caecinate, Whey Protein Isolate, Isomaltulose etc as mentioned above) and taxable @28%. The product is a powder which when mixed with milk gives a non alcoholic beverage.

#### 04. HEARING

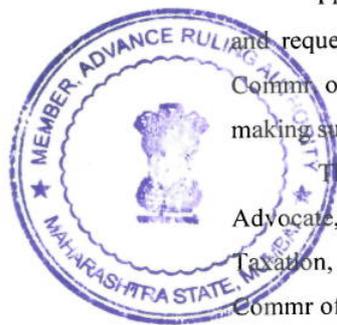
Preliminary hearing in the matter was held on 11.12.2018. Sh. Nirav Karia, Advocate, appeared and requested for admission of their application. Jurisdictional Officer Ms. Manjiri Phansalkar, Dy. Commr. of State Tax, E-611, Large Tax Payer Unit-IV, Mumbai also appeared and stated that they would making submissions in due course.

The application was admitted and called for final hearing on 09.01.2019. Sh. Nirav Karia, Advocate, Sh. Astha Sinha, Sh. Ankur Chavan, Sh. Pawan Jain and Sh. Kedar Senapati, AVP Indirect Taxation, appeared, made oral and written submissions. Jurisdictional Officer Ms. Manjiri Phansalkar, Dy Commr of State Tax, E-611, LTU-IV, Mumbai also appeared & made written submissions.

#### 05. OBSERVATIONS

We have gone through the facts of the case, documents on record and submissions made by both, the applicant as well as the jurisdictional office.

The Applicant, is engaged in the production and marketing of a nutritional powder/ food for special dietary use called Prohance – D ( in two different flavours, namely, Vanilla and Chocolate) which according to their submissions, is specially designed to serve as a nutritional powder for people with Diabetics, as it is sugar free and low on GI (Glycemic Index). The same is required to be mixed with drinking water and used as a partial meal replacement or as a Breakfast replacement or as an Evening snack/healthy bedtime snack or as directed by a Physician/ dietician for diabetic person. They have submitted that the said product would be marketed & sold as a Diabetic food for Diabetic people only.



They have submitted that Diabetic Food of Heading No. 2106 90 91 are covered by Sl. No. 46A of Schedule II to Notification No.1/2017-Central Tax (Rate) dated 30.06.2017 and attract effective GST @12%.

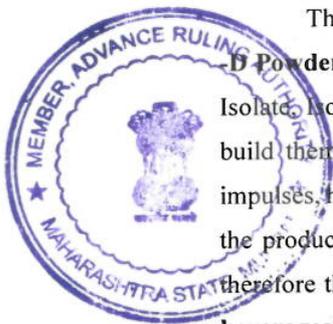
They have also submitted that "*Chocolates and other food preparations containing cocoa*" falling under Heading No. 18.06 are covered by Sl. No. 12C of Schedule III to Notification No.1/2017-Central Tax (Rate) dated 30.06.2017 and attract GST @ 18%. They are classifying the vanilla variant of their product as diabetic food and their query is regarding classification only in respect of the chocolate variant of their product where chocolate flavor is used in order to make the said product appealing to the end consumer, *without altering the diabetic nature* of the same. According to their submissions, "Prohance-D (Chocolate) manufactured by them as a diabetic food alone is classifiable under Heading 2106 90 91 of the Customs Tariff Act. The applicant has submitted that FSSAI has recognized "*food for special dietary uses*" (specially processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions such as diabetes) as a separate category of foods and as per the definition of the term 'food' in Section 2() of the FSSAI Act and the Webster's international Dictionary and as per the Supreme Court judgment in the case of CCE Vs. Parle Exports (P) Ltd. reported at 1988 (38) ELT 741 the product under consideration is covered under the definition of "Food". They have further submitted that the product under consideration is a specially designed nutritional powder which substitutes "sugar" for Maltodextrin, Fructose, etc., to meet the special dietary requirements of Diabetic people and since the said ingredients are treated as a "*food for special dietary uses*" under FSSAI.

The jurisdictional office has submitted that, as projected by the dealer on the internet, **Prohance D Powder** contains ingredients like Maltodextrin, Sunflower seed oil, Calcium Caeinate, Whey Protein Isolate, Isomaltulose etc, that helps to body to repair and regain the energy and the tissues and help to build them, Helps to improve general body health, the growth of body, good transmission of nerve impulses, hormone balance and increases muscle strength. The jurisdictional office has also submitted that the product in question is a powder which when mixed with milk gives a nonalcoholic beverage and therefore the same is covered by the description '**Compound preparations for making non-alcoholic beverages**' mentioned at item no. 9 in Schedule IV and taxable @28%.

The issue therefore before us is whether the subject product is a diabetic food or not and if not, whether it can be considered as product of cocoa or a compound preparation for making non-alcoholic beverages. To understand whether the subject product is a diabetic food we have to ascertain whether at all it is a 'food'.

As per the definition given in the Business Dictionary, '*food*' is an edible or potable substance (usually of animal or plant origin), consisting of nourishing and nutritive components such as carbohydrates, fats, proteins, essential mineral and vitamins, which (when ingested and assimilated through digestion) sustains life, generates energy, and provides growth, maintenance, and health of the body.

As per the definition given in the Merriam Webster Dictionary, '*food*'; is a material consisting essentially of protein, carbohydrate, and fat used in the body of an organism to sustain growth, repair,



*and vital processes and to furnish energy ; can be inorganic substances absorbed by plants in gaseous form or in water solution ; a nutriment in solid form or something that nourishes, sustains, or supplies.*

The FSSAI Act has defined food as :

*"(j) Food means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment but does not include any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, plants, prior to harvesting, drugs and medicinal products, cosmetics, narcotic or psychotropic substances.*

As per Webster's international Dictionary food is defined as a *"nutritive material absorbed or taken into the body of an organism which serve, for purposes of growth, work or repair and for the maintenance of the vital process."*

We find that the subject product is an edible substance consisting of nourishing and nutritive components such as carbohydrates, fats, proteins, essential mineral and vitamins and can be ingested and digested and provides nutrients to the human body. Hence we have no doubt that the subject product can be categorized as food.

Now we shall discuss whether the subject product can be considered as a diabetic food. The Oxford Dictionary of Food & Nutrition by David A. Bender defines "diabetic foods" as under:

*"Diabetic foods- Loose term for foods that are specially formulated to be suitable for consumption by people with diabetes mellitus, generally low in carbohydrate (and specially sugar), and frequently containing \*sorbitol, xylulose, or sugar derivatives that are slowly or incompletely absorbed."*

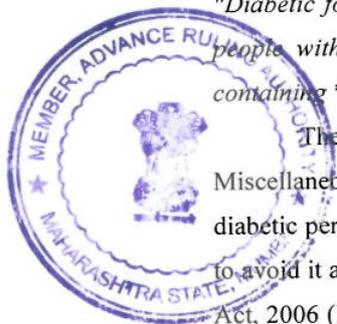
The GST Tariff, 2017 lists 'diabetic foods' under CH 2106 90 91 and Chapter 21 covers Miscellaneous edible preparations. However nowhere in the GST Laws is diabetic foods defined. A diabetic person is normally advised by medical practitioners to either cut down or sugar consumption or to avoid it altogether as it is available in the market. We therefore refer to the Food Safety and Standards Act, 2006 (FSSAI) which deals with the standard and safety norms in processed and packed foods since the subject product is also a processed and packaged food. The said Act makes a reference to "foods for special dietary purposes". Section 22 of the said Food Safety and Standards Act, 2006 is reproduced below for ready reference:

*"22. Genetically modified foods, organic foods, functional foods, proprietary foods, etc.*

*Save as otherwise provided under this Act and regulations made thereunder, no person shall manufacture, distribute, sell or import any novel food, genetically modified articles of food, irradiated food, organic foods, foods for special dietary uses, functional foods, nutraceuticals, health supplements, proprietary foods and such other articles of food which the Central Government may notify in this behalf.*

*Explanation - For the purposes of this section, -*

- (1) "foods for special dietary uses or functional foods or nutraceuticals or health supplements" means:*
- (a) foods which are specially processed or formulated to satisfy particular dietary requirements which exist because of a particular physical or physiological condition or specific diseases*



and disorders and which are presented as such, wherein the composition of these foodstuffs must differ significantly from the composition of ordinary foods of comparable nature, if such ordinary foods exist, and may contain one or more of the following ingredients, namely: -

- (i) plants or botanicals or their parts in the form of powder, concentrate or extract in water, ethyl alcohol or hydro alcoholic extract, single or in combination;
- (ii) minerals or vitamins or proteins or metals or their compounds or amino acids (in amounts not exceeding the Recommended Daily Allowance for Indians) or enzymes (within permissible limits);
- (iii) substances from animal origin;
- (iv) a dietary substance for use by human beings to supplement the diet by increasing the total dietary intake;

(b) (i) a product that is labelled as a "Food for special dietary uses or functional foods or nutraceuticals or health supplements or similar such foods" which is not represented for use as a conventional food and whereby such products may be formulated in the form of powders, granules, tablets, capsules, liquids, jelly and other dosage forms but not parenterals, and are meant for oral administration;

- (ii) such product does not include a drug .....
- (iii) does not claim to cure or mitigate any specific disease, ..... (except for certain health benefit or such promotion claims) as may be permitted by the regulations made under this Act;
- (iv) does not include a narcotic drug or .....

(2) "genetically engineered or modified food" means food and food ingredients composed of or containing genetically modified or engineered organisms obtained through modern biotechnology, or food and food ingredients produced from but not containing genetically modified or engineered organisms obtained through modern biotechnology;

- (3) "organic food" .....with specified organic production standards;
- (4) "proprietary and novel food" means an article of food for which standards have not been specified but is not unsafe:

Provided that such food does not contain any of the foods and ingredients prohibited under this Act and regulations made thereunder."

Notification dated 23rd December 2016 issued by the FSSAI Regulation No.8 states that:

8. Food for special dietary use, other than infants, and those products intended to be taken under medical advice. -

(1) No food business operator shall manufacture, formulate or process an article of food for special dietary use unless-

(i) specially processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions, namely:-

- (a) low weight, obesity, diabetes, high blood pressure;
- (b) pregnant and lactating women; and
- (c) geriatric population and celiac disease and other health conditions.



(ii) The food business operator shall clearly indicate on the label whether or not the food for special dietary use is to be taken under medical advice;

(iii) A food business operator may manufacture or sell an article of food for special dietary use in single use packaging or in dosage form, namely, granules, capsules, tablets, pills, jelly, semi-solid and other similar forms, sachets of powder, or any other similar forms of liquids and powders designed to be taken in measured unit quantities with a nutritional or physiological effect;

(iv) A food business operator may formulate an article of food for special use in formats meant for oral feeding through a enteral tubes but shall not be used for parenteral use;

(v) An article of food for special dietary use shall not include the normal food which is merely enriched or modified with nutrients and meant for mass consumption, intended for improvement of general health for day to day use and do not claim to be targeted to consumers with specific disease conditions and also not include the article of food intended to replace complete diet covered under food for special medical purpose specified in regulation 9.

(2) (i) The articles of food for special dietary use shall contain any of the ingredients specified in Schedules I or Schedule II or Schedule III or Schedule IV or Schedule VI or Schedule VII or Schedule VIII. (ii) A food business operator may use the ingredients specified in the Schedules referred to in clause (i) of sub regulation (2) in manufacturing food for special dietary use without prejudice to modifications for one or more of these nutrients rendered necessary by the intended use of the product.

C.10 Schedule VIII of the Notification stated above enumerates a list of prebiotic compounds which includes **Fructo-oligosaccharides, Inulin and Isomaltulose** (which are some of the ingredients used in the manufacture of the subject product.

Hence it is seen that FSSAI recognises "food for special dietary uses" (specially processed or formulated to satisfy particular dietary requirements which may exist or arise because of certain physiological or specific health conditions such as diabetes) as a separate category of foods.

We find that the subject product Prohance-D is a variation of another product i.e. Prohance, manufactured by the applicant. The ingredients of both are mentioned as under:-

PROHANCE INGREDIENTS	PROHANCE-D INGREDIENTS
MALTODEXTRIN	MALTODEXTRIN
SUNFLOWER SEED OIL (HIGH OLEIC ACID)	SUNFLOWER SEED OIL (HIGH OLEIC ACID)
CALCIUM CASEINATE	CALCIUM CASEINATE
WHEY PROTEIN ISOLATE	WHEY PROTEIN ISOLATE
SOY PROTEIN ISOLATE	SOY PROTEIN ISOLATE
RAPSEED OIL (LOW ERUCIC ACID)	RAPSEED OIL (LOW ERUCIC ACID)
FRUCTO-OLIGOSACCHARIDES	FRUCTO-OLIGOSACCHARIDES
COCOAPOWDER 3%	COCOAPOWDER 3%
MINERALS	MINERALS
SUNFLOWER SEED OIL	SUNFLOWER SEED OIL
ANTO OXIDANTS (SOYA LECITHIN, L-ASCORBIC ACID, TBHQ)	ANTO OXIDANTS (SOYA LECITHIN, L-ASCORBIC ACID, TBHQ)
CHOLINE BITARTRATE	CHOLINE BITARTRATE

VITAMINS	VITAMINS
TAURINE	TAURINE
L-CARNITINE	L-CARNITINE
ACIDITY REGULATOR (CITRIC ACID)	ACIDITY REGULATOR (CITRIC ACID)
SUGAR	
	ISOMALTULOSE
	GUM ARABIC
	INULIN
	MYO- INOSITOL
	SUCRALOSE
	FRUCTOSE

From the above comparison it is seen that while Prohance contains sugar, the subject product Prohance-D does not contain sugar. The additional ingredients that the subject product contains are (i) Isomaltulose, (ii) Gum Arabic, (iii) Inulin, (iv) Myo-Inositol, (v) Sucralose and (vi) Fructose. We shall now discuss the use of the additional ingredients on the basis of which it is sought to classify the Prohance D as a diabetic food.

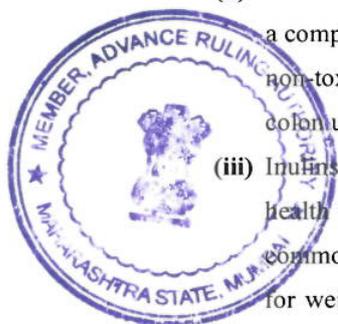
(i) **Isomaltulose** is a disaccharide carbohydrate composed of glucose and fructose. Isomaltulose is hydrogenated to produce isomalt, a minimally digestible carbohydrate that like dietary fiber is fermented in the large intestine or colon to short-chain fatty acids. Isomalt is used as a sugar replacer, for example in sugar-free candies and confectionery.

(ii) **Gum arabic** is used in the food industry as a stabilizer, emulsifier and thickening agent. Gum Arabic, a complex polysaccharide, is a soluble dietary fibre, primarily indigestible to humans and considered non-toxic and safe for human consumption. It is not degraded in the intestine, but fermented in the colon under the influence of microorganisms.

(iii) **Inulins**, a soluble fiber are a group of naturally occurring polysaccharides. Inulin has several important health benefits. It may promote gut health, help lose weight and help manage diabetes. Inulin is commonly used by mouth for high blood fats, including cholesterol and triglycerides. It is also used for weight loss, constipation, diarrhea, and diabetes. Inulins and oligofructose are not digested by human enzymes, making them unavailable for glucose release into the blood stream, ensuring that their consumption does not raise blood glucose levels. Organic inulin powder is a low-glycemic sweetener. Agave inulin is a preferred sugar substitute for diabetics because it does not cause spikes in blood sugar associated with common sweeteners and can be used to replace sugar, fat, and flour. Normal digestion does not break inulin down into monosaccharides, and therefore it does not elevate blood sugar levels and may, therefore, be helpful in the management of diabetes.

(iv) Myo-Innositol is a carbocyclic sugar and a sugar alcohol with half the sweetness of sucrose (table sugar) and helps to promote proper utilization of the hormone insulin.

(v) Sucralose is a zero-calorie artificial sweetener, and is made from sugar in a multi-step chemical process in which 3 hydrogen-oxygen groups are replaced with chlorine atoms. Sucralose is commonly used as a sugar substitute in both cooking and baking and is calorie-free. Sucralose is 400–700 times sweeter than sugar and does not have a bitter aftertaste. Sucralose is said to have little or no effects on



blood sugar and insulin levels. Sucralose may raise blood sugar and insulin levels in people who do not consume artificial sweeteners regularly. However, it probably has no effect on people who regularly use artificial sweeteners.

- (vi) The word "fructose" was coined in 1857 from the Latin for *fructus* (fruit) and the generic chemical suffix for sugars, *-ose*. Fructose also known as **fruit sugar**, is a monosaccharide. Pure, dry fructose is a sweet, white, odorless, crystalline solid, and is water-soluble. Fructose is found in honey, tree and vine fruits, flowers, berries, and most root vegetables and commercially, it is derived from sugar cane, sugar beets, and maize. Excessive consumption of fructose may contribute to insulin resistance leading to type 2 diabetes. Fructose exhibits a sweetness synergy effect when used in combination with other sweeteners. The relative sweetness of fructose blended with sucrose, aspartame, or saccharin is perceived to be greater than the sweetness calculated from individual components. Fructose is often recommended for diabetics because it does not trigger the production of insulin by pancreatic cells. Fructose has a lower glycemic index of 23, compared with 100 for glucose and 60 for sucrose. Fructose is also 73% sweeter than sucrose at room temperature, allowing diabetics to use less of it per serving. Fructose consumed before a meal may reduce the glycemic response of the meal. Fructose-sweetened food and beverage products cause less of a rise in blood glucose levels than do those manufactured with either sucrose or glucose.

In view of the above it can be said that the subject product, Prohance-D is different from the parent product in as much as it contains extra ingredients as mentioned in (i) to (vi) above, ingredients which along with the other regular ingredients may assist diabetics in replacing a meal or part of it. However we also find that the product is also advertised as providing Energy, Immune Health, Heart Health, Vitamins and Minerals and maintains cholesterol levels. On the container there is a mentioned that "*Prohance-D is a specially designed sugar free and low GI product. It contains Isomaltulose a low glycemic carbohydrate that helps minimize blood sugar spikes. It provides energy from high quality protein, fat and is rich in dietary fibre and MUFA that support heart health.*"

We therefore find from the above that the subject product is also advertised as having various other health benefits and to treat the same only as a diabetic food will not be proper in our view. Secondly, as per information available on the internet, the diabetic foods must contain high amounts of dietary fibre and some slow digestion agents. Though the preparation in question contains gum Arabic, it does not contains high amount of dietary fibre. A little amount of fibre as found in this preparation is found in all kinds of food and Prohance-D has no extra amount of fibre. It is also seen that there are no substances in its composition that help in slowing down of food moving through stomach and sugars moving to blood stream. In view of these deficiencies, the Prohance-D cannot be categorized as diabetic food.

Now that we find that the said Prohance -D is not a diabetic food, we will take up the other issue raised by the applicant i.e. whether the same can be treated as a product classifiable under Chapter 18/19 of the Tariff. Chapter 18 of the Customs Tariff Act, 1975 covers "*Cocoa and Cocoa Preparations*". Prohance -D is definitely not a cocoa product. We agree with the contention of the applicant that the chocolate flavor is used in order to make the said product more appealing to the end consumer. We find that the basic product is Prohance and Prohance D is a variation of the basic product. We also find that the



vanilla and chocolate flavours are just a kind of variation to attract the customers. Further we agree with the submissions made by the applicant that Prohance D will not be covered under Chapter 19.

We find that Chapter heading 2106 of the Tariff specifically covers "Food preparations not elsewhere specified or included" and in view of the submissions made by the applicant it is clear that "Prohance-D (Chocolate)" is a food preparation which is meant to be consumed by people by dissolving the same in water or milk. It is thus, a "food preparation", squarely covered under Chapter Heading 2106 of the Customs Tariff. We also find that both, the applicant as well as the jurisdictional officer are in agreement that the subject product falls under heading 2106 and we also have no doubt about the same. We however find that Prohance-D is a combination of various items as seen from the discussions above and can very clearly be treated as a compound preparation. This compound preparation is in powder form and can be consumed by direct mix with either water or milk. Further, the resultant beverage which is obtained after mixing the powder with water or milk is a non-alcoholic beverage and as such the Prohance-D will be clearly covered under the description 'Compound preparations for making non-alcoholic beverages' & therefore fall under Chap. Hdg 2106 90 50, thus attracting GST @ 18% as per Sch-III, Sr. No. 23.

05. In view of the extensive deliberations as held hereinabove, we pass an order as follows :

**ORDER**

(Under section 98 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

NO.GST-ARA- 88/2018-19/B- 10 Mumbai, dt. 23/01/2019

For reasons as discussed in the body of the order, the questions are answered thus –

Question :- What is the appropriate classification of the Applicant's product, Prohance - D (Chocolate)?

Answer :- The appropriate classification of the Applicant's product, Prohance - D (Chocolate) is 2106 90 50.



—sd—  
B. TIMOTHY  
(MEMBER)

—sd—  
B. V. BORHADE  
(MEMBER)  
**CERTIFIED TRUE COPY**

Copy to:-

1. The applicant
2. The concerned Central / State officer
3. The Commissioner of State Tax, Maharashtra State, Mumbai
4. The Chief Commissioner of Central Tax, Churchgate, Mumbai
5. Joint commissioner of State Tax , Mahavikas for Website.

  
**MEMBER**  
**ADVANCE RULING AUTHORITY**  
**MAHARASHTRA STATE, MUMBAI**

Note :- An Appeal against this advance ruling order shall be made before The Maharashtra Appellate Authority for Advance Ruling for Goods and Services Tax, 15<sup>th</sup> floor, Air India building, Nariman Point, Mumbai - 400021.