

**Read :**

- (1) Application dt.Nil (received on dt.05.06.2009) from M/s.Neulife Nutrition Systems, holder of 279400008355V.
- (2) Addendum dt.11.03.2014 to application received on dt.05.06.2009.
- (3) Application dt.10.03.2014 from M/s. Neulife Nutrition Systems Pvt. Ltd., holder of TIN-27425236165V.
- (4) Written submission dt.29.03.2014 by M/s.Neulife Nutrition Systems.
- (5) Written submission dt.02.04.2014, dt.11.04.2014 and dt.23.06.2014 by both the applicants'.

**Heard:**

- (1) On dt.01.04.2014, Shri Ghanekar, Sales Tax Practitioner, Shri Vinayak Patkar, Advocate and Shri Samit Gupta [Partner, M/s.Neulife Nutrition Systems and Director, M/s. Neulife Nutrition Systems Pvt. Ltd.] attended the hearing on behalf of both the applicants'.
- (2) On dt.24.06.2014, Shri Samit Gupta [Partner, M/s.Neulife Nutrition Systems and Director, M/s. Neulife Nutrition Systems Pvt. Ltd.] attended the hearing on behalf of both the applicants'.

### PROCEEDINGS

(under section-56(1)(e) and section-56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2009/Adm-3/28/B- 3  
No.DDQ-11/2014/Adm-6/06

Mumbai, dt. 18/07/2014

This is a set of 2 applications involving a common issue for determination. M/s.Neulife Nutrition Systems, a partnership firm was taken over by M/s. Neulife Nutrition Systems Pvt. Ltd. on and from 1<sup>st</sup> April, 2011. M/s. Neulife Nutrition Systems dealing in non alcoholic beverage concentrates in powdered form had applied for determination of rate of tax applicable to the sales of certain products. M/s. Neulife Nutrition Systems Pvt. Ltd. has continued to deal in those products after the takeover of the business. Both the applicants' have their address at A-11, Shriram Indl. Estate, 1<sup>st</sup> floor, Naigaum Cross Road, Near Wadala Telephone Exchange, Wadala, Mumbai-400031. It is sought to know the rate of tax applicable to the following products mentioned in the bills presented for determination :

M/s. Neulife Nutrition Systems	INE/1922/10- 11/LCL dt.15.03.2011	1) 100% Whey Gold (French Vanilla 2Lbs and Mocha Capuccino 1 Lbs) 2) Platinum Hydrowhey (Turbo Chocolate 3.5 Lbs) 3) Serious Mass (Straw 12 Lbs)
	INE/1629/10- 11/LCL dt.31.01.2011	1) PRO Complex GAINER (Choc 10.16 Lbs and Straw 10.16 Lbs) 2) True Mass (Chocolate 5 Lbs)
	INE/1517/10- 11/LCL dt.15.01.2011	1) Syntha 6 (Chocolate 5 Lbs)
M/s. Neulife Nutrition Systems Pvt. Ltd.	INE/LCL/12- 13/1884 dt.13.03.2013	1) 100% Whey Gold (Straw 2.07 Lbs, Cookie & Cream 2.073 Lbs, Choco Mint 2.073 Lbs, Straw 5.174 Lbs and Vanilla Ice Cream 5 Lbs) 2) Syntha 6 (Chocolate 5 Lbs)
	INE/LCL/12- 13/1863 dt.12.03.2013	1) Serious Mass (Choc 6 Lbs) 2) Platinum Hydrowhey (Chocolate 3.5 lbs)
	INE/LCL/12- 13/1698 dt.13.02.2013	1) True Mass (Chocolate 5.75 Lbs and Strawberry 5.75 Lbs)
	INE/LCL/12- 13/1263 dt.14.12.2012	1) PRO Complex GAINER (Choc 3 Lbs)
	INE/LCL/12- 13/1212 dt.12.12.2012	1) Jumbo (chocolate 10lbs, 6.4lbs Chocolate 2860g and 10lbs Strawberry 4400g) 2) Jumbo Professional (chocolate 7.15lbs) 3) Zero Carb Isobest (Capuccino 2lbs and Vanilla Veryberry 2lbs) 4) 100% Whey Protein Professional (5.2lbs Straw White Chocolate)

## 02. FACTS AS INFORMED AND CONTENTION

The facts and contention as appearing in the application are reproduced verbatim thus:-

### M/s.Neulife Nutrition Systems

- "We are manufacturers of Non Alcoholic Beverage Concentrate" in powdered form known as "100% Whey Gold Standard and also Classic Whey". The manufacturing is located at Optimum Nutrition Inc. 700 N Commerce Street, Aurora, IL, USA, 60504.
- The product manufactured by us contains protein in different flavors. The manufacturing process, in brief as under-  
Manufacturing Process:-

The Products in question are dietary supplement in powdered form. They are a mix of protein powders derived from different high protein sources such as Whey Soya and Casein with added Malt, Vitamins, flavors and sweetness. "Whey" is the remnant of the cheese making process and is known as "Sweet Dairy Whey". This is then filtered through different processes such as Ion Exchange or Ultra filtration to obtain "Whey Protein Concentrate (WPC) or Whey Protein Isolate (WPI). These two items are the starting raw materials for the manufacture of finished protein products/powders. The protein powders in the native forms are very bitter in taste and thus unpalatable as well as non-soluble. They have to undergo agglomeration i.e. a process of dispersing particle size to facilitate solubility in liquids. Flavors and sweetners as well as cocoa are then added to the blended proteins to make them palatable. The finished products are available in different flavors such as Chocolate, Strawberry, Vanilla, Banana, Fruit Punch etc.

#### Method of Preparation of a Beverage:-

Serving size of each product is mentioned on the product label in the nutrition facts panel. The powder is then added to water, juice or milk to make it a palatable beverage, which can be enjoyed by the user. The product can be enjoyed cold or at room temperature. The dry powder cannot be 'eaten' directly as it will lead to choking. Beverage from the product has to be prepared by the user. The product is mainly made in "flavored form" because it could have not have been consumed because of bitter taste of proteins. It is mainly used as a dietary supplement by active and exercising individuals, athletes, sportsmen etc. It is also consumed by individuals who need more proteins for maintaining general health and immunity. It is a kind of beverage like Horlicks, Bournvita etc mainly taken for maintenance of general health, immunity and peak performance.

#### Classification of the product:-

##### 1) Flavored Whey Protein Powder:-

These are classified either under chapter 04041010 or 35022000. Where the protein content is below 80% they are classified as under 04041010. Where the protein content is more than 80% it is classified as under 35022000. The powders sold under the name "100% Whey Gold Standard" are not medicines but they are dietary supplements.

Maharashtra Value Added Tax Act 2002 (as brought in force on 1.4.2005) is in force in the state of Maharashtra since 1.4.2005, Schedule "C" specifies goods on which tax rate is 4%. Items not covered by Schedule "C" or "D" get covered by schedule E and the tax rate is 12.5% the products contained in schedule were amended by State Govt and Entry 107 of the said schedule was substituted by a new entry on 1.2.2006. In the newly substituted entry 107, there are seven sub clauses (a) to (g). The relevant sub clause for our purpose is clause (g) and the said clause reads as under:-

##### **"POWDER, TABLETS and cubes and other solids or liquids from which Non-Alcoholic Beverages are prepared."**

We are selling "100% Whey Gold" in powdered form. It is a mixture of proteins with added malt vitamins flavors and sweeteners for consuming the same; it has to be converted into a "Beverage" form. It is soluble in water, milk or juice. The above entry is applicable to products from which "Beverages are prepared. The Mumbai High Court in the case of "Food specialties Ltd" (97 STC 407) has explained the meaning of the word "Beverages" as under:

##### **1. Any liquid for drinking other than water**

2. In Webster's 3<sup>rd</sup> International dictionary it is described as under:

"Liquid for drinking especially such liquid other than water (as milk, fruit juice, beer) usually prepared (as by flavoring, heating, and mixing" before consumption."

3. The Random House Dictionary of the English language (College edition) describes beverages as "any liquid other than water. According to us when the powders are put in water, milk or fruit juice, a beverage is prepared. In view of insertion of clause (g) in entry 107(11) of schedule C we are of the view that our product gets covered by the said entry and the tax rate is 4% only.

In the connection we would like to invite your honour's attention to the DDQ order d-23.12.2008 passed in the case of Pushpam Health care products (DDQ No 11-2006/AOM/50/B-1). The product in the case was "Mango Fruit Drink". In the said under your honour has held the product as covered by C-107 (11) (9) of M.V.A.T. Your honour has extensively considered the meaning of the phrase 'Non-Alcoholic Beverage' the said product was also of a kind of Dietary supplements. The ratio of the DDQ order is clearly applicable to our case. The directions for use given in the label. You can just add one rounded scoop of 100% Whey Gold Standard to a glass filled with 6-8 Oz of water, non fat milk or juice then mix it with a spoon. Stir for about 20 seconds or until powder is completely dissolved.

The Madras High Court has held "Horlicks" as a Beverage (7955L 421). The plain meaning of the entry is if a Non Alcoholic beverage is prepared from powder, Tablets or cubes then the product gets covered by the scope of 107 (11) (T) (g) of M.V.A.T. Act, 2002.

We are bonafide believing that the product is taxable @ 4%. In the event your honour feels that it is taxable @12.5%, we pray that the order be made effective from the date of communication of the order on us."

#### **M/s.Neulife Nutrition Systems Pvt. Ltd.**

- " M/s.Neulife Nutrition Systems, a partnership firm was registered under TIN No.27940008355V under MVAT Act,2002 and was dealing in non alcoholic beverage concentrates in powdered form. The applicant has taken over the said business of the firm on and from 1<sup>st</sup> April, 2011. The said firm has applied for determination of rate of tax applicable to the sales of certain products of the firm. The applicant has continued to deal in those products after the takeover of the business.
- The applicant has annexed herewith following invoices (as described on page 1). All the products mentioned in these invoices are the non alcoholic beverage concentrates in powdered form.
- The partnership firm had applied for determination on 5/6/2009. However, the application has not been decided so far. As aforesaid, the applicant has continued to deal in these products. The applicant is of the firm view that the products under consideration are covered under Entry No.107(11)(g) which existed on the Statute Book till 31.03.2013.
- However, it is learnt that Hon. Commissioner has interpreted this Entry No.107(11)(g) in the case of M/s Applied Nutrition Science in the manner different than the same was interpreted in some other Determination Orders rendered earlier. The partnership firm whose business the applicant has taken over had no opportunity to advance their views on the subject. The applicant therefore requests Hon'ble Commissioner to hear the applicant and determine the rate of tax under Section 56(1)(e) of the MVAT Act2002 qua the products of the applicant.
- The applicant further requests that in case of adverse determination, it may please be directed that the determination order would take effect from the date of the order of the Hon'ble Commissioner."

#### **03. HEARING**

Both the cases were taken up for hearing on dt.C. 31.2014. It was stated that a written submission is being given in the matter. The Determination Order in the case of M/s. Applied

Nutrition Sciences (No.DDQ-11-2010-Adm-3/48/B-3 dt.02.07.2013) was brought to the notice of the applicant. A request for prospective effect was made in case the coverage of the products under the entry C-107(11)(g) was not found acceptable. A similar written submission dt.29.03.2014 was given in the case of both the applicants', the only difference being the number of products and their flavours. It states thus –

- “ *The applicant is the dealer in 'non-alcoholic beverage concentrate' in powder form...Those products, their nature and the suggested use are stated below:* ”

Sr. No.	Product	Nature of Product	Suggested Use
1	100 per cent Whey Gold	Whey Protein Powder (Chocolate Flavour) (Cookies & Cream Flavour)	Daily use Several Times a day.
2	Platinum Hydro Whey	Whey Protein Powder (Turbo Chocolate Flavour)	Daily use Several Times a day.
3	Zero Carb Isobest	Whey Protein Powder (Cappuccino Flavour)	Daily use Several Times a day.
4	100% Whey Protein Professional	Whey Protein Powder (Vanilla Very Berry Flavour)	Daily use Several Times a day.
5	PRO Complex Gainer	Protein + Carbs Powder (Strawberry Cream Flavour) (Double Chocolate Flavour)	Daily use Several Times a day.
6	Serious Mass	Protein + Carbs Powder (Chocolate Flavour)	Daily use Several Times a day.
7	True Mass	Protein + Carbs Powder (Chocolate Milkshake Flavour) (Strawberry Milkshake Flavour)	Daily use Several Times a day.
8	Jumbo	Protein + Carbs Powder (Strawberry Flavour)	Daily use Several Times a day.
9	Jumbo Professional	Protein + Carbs Powder (Chocolate Flavour)	Daily use Several Times a day.
10	Syntha-6	Multi Protein Powder (Chocolate Milkshake Flavour) (Chocolate Milkshake Flavour)	Daily use Several Times a day.

- All these products are available in multiple flavours. The procedure of preparation of beverage from each of these products is described on the label of each product. On examining these labels you would find that:
  - a) These products are general-purpose protein powders from which non alcoholic beverages are prepared. Those are not special or specific goal oriented products although weight loss/gain, fat loss et cetera may be the incidental benefits.
  - b) These powders are sold in delicious flavours and the people are buying these powders for the flavours and also for the contents.
  - c) These powders do not need to be cycled and it can be taken continuously;
  - d) These powders do not need to be combined with any other product and can be reconstituted into a delicious beverage by simply reconstituting with water or milk;
- The applicant is of the considered view that the powders under consideration are squarely covered by entry number C-107(11)(g) of the MVAT Act, 2002 which reads as follows: ‘powders, tablets, cubes, crystals and other solids or liquids from which non-alcoholic beverages and soups are prepared’.
- Classification of the products:
  - The reasons for holding the view that the products are covered by entry no.107(11)(g) are stated

below:

- A. These powders are meant for one and all and are being sold and bought by the people for their flavours as well as their contents;
- B. Assuming but not accepting that the customers buy these products for their contents only, still, the entry as it stood on the statute book till March 31, 2013 did not exclude there from such powders. The entry has been enacted in widest possible manner having no exclusions.
- C.1. It is the settled principle of law that in construction of a statute much weight is required to be given to the interpretation put up on it at the time of enactment by those who have to construe, execute and apply the said enactment. Kindly see the apex court judgment in the case of K.P. Verghese v. Income Tax Officer reported in 1982 1 SCR 629. The State Legislature was aware of the view expressed by the then Commissioner of Sales Tax, Maharashtra State in his Determination Order No.1195/Adm-5/117 and 118/B-5 dt.8.5.1996 in the case of M/s. Alembic Chemical Works Co. Ltd. holding the identical product covered by the then identical entry No. C-II-47(3) under the repealed Bombay Sales Tax Act, 1959. The legislature was also aware that the Tribunal, in its judgment in Appeal No.97 of 1996 dated 31<sup>st</sup> October, 2003, set aside the impugned order only on technical ground.
- C.2. Our own High Court in the case of The Commissioner of Sales Tax Vs. Lala Lajpatrai Hotel reported in 35 STC 368 has in clear words observed that 'In interpreting the words of the entry, it would not be out of place to refer to former Act or Acts and to the ascertained evils to which the former Act or Acts had given rise'. Kindly also see the apex court judgment in Dr. Baliram Waman Hiray v. Mr. Justice B. Lentin & Another reported in 72 STC 384.
- C.3. Even otherwise the view expressed by the highest authority in the State has held field for almost 17 years. It should be normally adhered to and not disturbed. A different view would not only introduce uncertainty and confusion, it would also have the effect of unsettling the transactions which have been entered into on the faith of that view. Kindly see the judgment of our own High Court in the case of Merind Limited Vs. The State of Maharashtra reported in 136 STC 462.
- C.4. The rule of *Nocit a soiicis* says that while interpreting a word or an entry one has to consider the entire group in which such word or entry is placed. The items mentioned in entry no. C-107(11) were covered by different entries under the erstwhile Bombay Sales Tax, 1959. However, while amending the MVAT Act, 2002 on and from 1.02.2006, the legislature clubbed all the goods which can be eaten or drunk under one entry that is entry no.107(11) irrespective of the fact that some of those goods are not consumed by the major class of people in India e.g. Ham, Bacon, sausages, salami, Kababs (made of beef) etc. Even the nutritional value is not the criteria. Fruit squash and other types of Squashes are grouped together. Even qua soups there are two specific classes' viz. vegetarians and non vegetarians. The powders, tablets etc. mentioned in entry no. 107(11)(g) would, therefore, take into their coverage all kinds of goods from which the beverage can be prepared irrespective of the class of consumers.
- C.5. The explanation to sub-entry (11) excluded there from all the food items in that sub-entry when those are served for consumption. However, such exclusion did not apply to the clause (g). The reason being that the legislature is conscious about the fact that such products mentioned in that sub-entry are not sold by the Hotels and restaurants but are sold or supplied by the different kinds of dealers catering to the different kinds of consumers.
- C.6. The legislature excluded the clause (f) pertaining to the food stuffs and food provisions form the coverage of sub-entry no.(11) from 1<sup>st</sup> February, 2008. However, clause (g) was retained even thereafter till 31.3.2013. Such retention in our view was conscious. The legislature was aware of the fact that the goods mentioned in clause (g) included therein the goods having food or nutritional value and the Commissioner in the past had interpreted such goods as falling under the category mentioned in that clause. Still, the legislature retained this clause in the statute book till 31.03.2013.
- C.7. This clause was deleted thereafter for revenue purposes. If the said clause was not wide in its scope, there was no need to delete the same.
- C.8. Now kindly see the principles of interpretation laid down by the Supreme Court, when the provision is clearly worded:  
*Polestar Electronics Pvt. Ltd. Vs. The Additional Comitissioner of Sales Tax, Maharashtra State* reported in 41 STC 409.  
A statutory enactment must ordinarily be construed according to the plain natural meaning of its

language and no words should be added, altered or modified unless it is plainly necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. This rule of literal construction is firmly established and it has received judicial recognition in numerous cases.

Where there are two expressions which might have used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature used that one of the two expressions which would convey the intention less clearly, it does not intend to convey that intention at all.

When the court is construing a statutory enactment, the intention of the legislature should be gathered from the language used by it and it is not permissible to the court to speculate about the legislative intent. If the language of a statute is clear and explicit, effect must be given to it, for in such a case the words best declare the intention of the law-giver. It would not be right to refuse to place on the language of the statute the plain and natural meaning which it must bear on the ground that it produces a consequences which could not have been intended by the legislature. It is only from the language of the statute that the intention of the legislature must be gathered, for the legislature means no more and no less than what it says. It is not permissible to the court to speculate as to what the legislature must have intended and then to twist or bend the language of the statute to make it accord with the presumed intention of the legislature.

In construing a taxing statute "one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law". If the legislature has failed to clarify its meaning by use of appropriate language, the benefit must go to the taxpayer. Even if there is any doubt as to interpretation, it must be resolved in favour of the subject.

C.9. It be noted that the onus to prove the coverage into the particular entry is always on the revenue. See *Hindustan Ferodo Ltd. v. Collector of Central Excise* reported in 106 STC 214.

C.10. It be further noted that the specific entry in the Schedule to the taxing statute would override the general entry. But, resort has to be had to the residuary entry only when liberal construction of the specific heading cannot cover the goods in question. See *Bradma India Ltd. Vs. The State of Maharashtra* reported in 140 STC 17 (SC).

C.11. Our own High Court in the case of *The Commissioner of Sales Tax Vs. M/s. Food Speciality Ltd.* reported in 97 STC 407 has given the understanding of the common man. The Court says, 'Beverage' means any liquid for drinking other than water.

The applicant therefore submits that the powders sold by the applicant are squarely covered by the clause (g) of Entry No. 107(11) and it be held accordingly.

- **Prayer for Prospective Effect:**

The applicant says that they held bonafide view that their products fall under entry no.107(11)(g) and in case of adverse determination, they are entitled to the protection of their liability prior to 31.03.2013 for the following reasons:

i. Their view was based on the discussion made herein above for classification of the products;  
ii. Even under the VAT period the Hon'ble Commissioner of Sales Tax, Maharashtra State has determined the products having nutritional/non nutritional value as covered by the said entry. He has also not applied the test of general and specific consumption for holding such products as covered by that entry. Kindly see the following Determination orders and our comments thereto:

a) Royal Mfg. Co. Ltd.-DDQ-10/2007/Adm-3/B-792 dt.18.10.2007

Filter Coffee Powder and French Coffee Powder clarified to be covered under entry no.107(11)(g).

b) M/s. Weikfield Products Co.-DDQ-11-2008/Adm-3/16 to 20 dt.24.01.2011

Drinking chocolate Powder used in the preparations like coco, tea, coffee, hot or cold chocolate drink were held to be falling under entry no.107(11)(g). The Commissioner relied on the common understanding of the word 'beverage' which means any liquid for drinking other than water. In his view it is the name applied to drinks.

c) M/s. Pushpam Healthcare Products-DDQ/11-2006/Adm-5/50 dt.23.12.2008

Kindly see the facts recorded by the Commissioner on page No.2 of the Order. Those are follows, 'The applicant has produced the packing of the product. The 'Fact sheet' describes the product as a health drink which is a plant based vegetarian whole food nutritional supplement liquid formula prepared to strict norms.'

On these facts the Commissioner held that,

'In the present case, the product is in the form of a concentrate which has to be diluted with water before it could be consumed. It cannot be taken as it is. Therefore, it is clear that the product by itself is not a 'beverage' but a 'concentrate' from which the drink could be prepared. The 'Mango Fruit drink' is undoubtedly a beverage and due to the absence of alcoholic content in it, can be said to be a non-alcoholic beverage.'

D) Our own High Court has in the case of The Commissioner of Sales Tax Vs. Food Specialities Ltd. reported in 97 STC 407 has given the understanding of the common man. The Court says 'Beverage' as commonly understood, means 'any liquid for drinking other than water'. The Commissioner in the Determination Order of M/s. Weikfield, discussed above, has independently endorsed this understanding of the common man. The applicant had no reason to depart from such understanding.

E) There was no guidance from the Sales Tax Department till the year 2013.

F) Applicant has collected the tax as applicable to the entry No.C-107(11)(g) and not at 12.5%."

During hearing, it was agreed to provide an additional submission. The same states thus-

#### " Additional Submissions

Structure, function and usage of any food product or beverage on the market including our products:

#### 1. MACRONUTRIENTS

All food and beverages are made up of macronutrients. The macronutrients are Proteins, Carbohydrates and Fat. These macronutrients can be in varying ratios and quantities depending upon the composition of the particular food or beverage. These macronutrients contribute to the calorific value of every food on earth in the following ratios-

- 1 gram of protein = 4 calories
- 1 gram of carbohydrates = 4 calories
- 1 gram of fat = 9 calories

1.1. For example, a soft drink will have high Carbohydrates in the form of dextrose and sucrose, with very little Proteins and Fats. A milk based beverage will have medium quantities of protein, high carbohydrates and moderate fat content. A fruit juice will have very high carbohydrates in the form of Fructose with very little proteins and fat.

1.2. These macronutrients are structurally made up of the following-

- Protein are made up of 20 amino acids such as isoleucine, leucine and valine among others.
- Carbohydrates are made up of sugars such as glucose, sucrose and fructose
- Fats are made up of lipid molecules

#### 2. FUNCTIONS OF MACRONUTRIENTS

2.1. All macronutrients have one or more functions in the body.

a. Proteins are vital for formation of new muscle, hair, bones, cellular regeneration and several other physiological processes important to growth and survival.

b. Carbohydrates are the basic energy substrate in the body and are broken down into blood sugar once ingested which is used to produce ATP (the fundamental energy molecule) as well as replenish glycogen in the brain, muscles and liver.

c. Fats are responsible for production of testosterone, hormones, joints lubrication, brain health and several other cardiovascular and neurological functions in the body

#### 3. PURPOSE OF MACRONUTRIENTS

Every macronutrients has a purpose in the body as seen from their functions above. Thus EVERY FOOD OR BEVERAGE can be deduced to HAVE A PURPOSE. Whether or not this purpose is spelt out on the product label is upto the manufacturer of the product, which in turn depends on his target audience. But that does not take away from the fact that EVERY PRODUCT HAS A PURPOSE, whether good or bad.

3.1. Any food or beverage, whether ready to drink or reconstituted in water, would have the above macronutrients in some ratios which would lead to its calorific value.

3.2. The purpose which the food or beverage performs as a result of the above, MAY OR MAY NOT be specified on the product label.

3.3. Some of the products which showcase their product benefits include Bournivita, Horlicks, Protinex,

Farex as well as the impugned products within reasonable label claim regulations. Some of the product which DO NOT specify the product benefits (or may we say conceal their harmful effects in this case) include soft drinks, sugar loaded juices, high fructose corn syrup loaded snacks, chocolates and ice creams.

#### 4. TIMING AND USAGE OF BEVERAGES

Any food or beverage can and should be timed properly. They MUST be taken within CONTROLLED QUANTITIES and at the appropriate usage occasions. It is upon the individual consuming it and his dietary discipline, that the timing can be adhered to and its consumption quantity controlled-

- 4.1. High protein foods and beverages should be consumed around strenuous activity to replenish, repair and grow muscle tissue by supplying vital amino acids, which are the building blocks of muscle.
- 4.2. High carbohydrate foods and beverages should be consumed before and after strenuous activity such as sports and exercise to replenish and refuel glycogen stores.
- 4.3 Fats should be evenly consumed throughout the day to help in the absorption of proteins and fats as well as have evenly spaced lipid levels in the blood.

These are universal truths and dictated by the very biochemistry of the macronutrients themselves. All foods and beverages must be timed else they will lead to weight gain, obesity, cholesterol or diabetes. These facts MAY OR MAY NOT be spelt out on the label. And people consuming them may or may not be disciplined or knowledgeable enough to know them. People who consume foods and beverages anytime and in any quantity to appease hunger or thirst are spelt for doom in their later years.

#### 5. Labeling of nutritionally superior foods and beverages such as the impugned products

People who have disciplined eating habits usually make healthy food/beverage choices owing to their lifestyle, activity (such as sports & exercise) or weight watchers. The impugned products are appealing to this demographic of the population. It only makes sense to highlight the product benefits (purpose) and give tips on the Product Usage and timing. These it may be noted are universal truths about the contents such as macronutrients and micronutrients within the impugned products.

These facts, whether or not spelt out on the product label do not change the function or purpose of any food or beverage on the shelves today. Here are some other examples of product timing and usage occasions, which are NOT DISPLAYED on various "general purpose" products-

- Tea/Coffee must not be consumed late at night to prevent sleeplessness and should not be taken by those suffering from blood pressure and hypertension- NOT MENTIONED ON LABEL.
- Fruit juices should NOT be consumed by diabetics or by those looking to lose weight- NOT MENTIONED ON LABEL.
- Malted beverages- Bournvita and Horlicks should be consumed in the morning and after sports - NOT MENTIONED ON LABEL.
- Convalescing/lactating beverages- Protinex and B-Protein should be consumed by a mother in the morning and around feed timings to boost amino acid levels in the blood- NOT MENTIONED ON LABEL.
- Glucon-D and other dextrose beverages should be taken before and after sports and SHOULD BE AVOIDED by diabetics and those looking to lose weight - NOT MENTIONED ON LABEL.

Are any of the above universal facts mentioned on the product labels? NO. Would mentioning these truths re-categorize the above products from beverage to non beverages? NO.

#### 6. From the above arguments, it is easy to see that our products can be

- 6.1. Consumed by One and all because of their universal appeal and since they are free of hormones and pharmaceuticals. They are beneficial for various classes of people for their wide variety of health benefits which are attributable to nutritionally superior food and beverages.
- 6.2. Can be consumed by housewives, sportsmen, older adults and fitness enthusiasts
- 6.3. They are sold in delicious flavors which is befitting of a beverage
- 6.4. They do not need to be cycled and can be taken continuously
- 6.5. They do not need to be combined with any other product and can be reconstituted into a delicious beverage by simply reconstituting with water or milk

6.6 Our products fulfill the definition of a beverage as laid out by the Bombay High Court in the case of Parle Exports Vs. Excise (1987 27 ELT 349) since our products are highly appreciated for their pleasant taste AND the substances they contain AND for their effects. "

The applicants' had placed a request for a re-hearing in the matter. Accordingly, the same was held on dt.24.06.2014. During the course of the hearing, the applicants' sought to explain the additional submission and a further written submission dt.23.06.2014 was tendered, as well. The said submission states thus -

1. " We held bonafide view that our products fall under Entry no. C-1077(11)(g) of the MVAT Act 2002. Most importantly and of significance we feel is the fact that all classifications and tax rates were followed after procuring **LEGAL OPINIONS BY imminent lawyers/practitioners, LATE MR.B.C.JOSHI and MR.A.B.GHANEKAR** (Copies Enclosed). This was further followed up by a comprehensive DDQ to ensure that we are in total compliance with the law.
2. We draw your attention to the order passed by the Commissioner dated 29<sup>th</sup> Aug 2009 under DDQ No.11/2008/Adm-3/38/B-2 in the case of Chihueda Marketing, where the Hon. Commissioner has granted prospective effect on similar issue of clarification.
3. in the case of Ms Alembic Chemical Works Co Ltd, the Commissioner vide DDQ Order dt.08-May-1996 held PROTINULES to be a powder from which non-alcoholic beverages are prepared (this Order was overturned by the Tribunal ONLY on technical grounds of non-compliance without going into the merits of the case)
4. The general trend in the industry was that all manufacturers/importers/traders of dietary supplements (To the best of our knowledge) were charging 4% & 5% except Applied Nutrition Sciences (who's DDQ was taken up before ours). There was no guidance from the department till the year 2013 regarding classification.
5. There were various favorable judgements passed for products having nutritional/non-nutritional value by the Hon. Commissioner himself, the Tribunal and the Bombay High Court as cited in our appeal and subsequent papers filed before you. Some of these a.e-
  - a) Royal Mfg. Co. Ltd.-DDQ-10/2007/Adm-3/B-792 dt.18.10.2007
  - b) M/s. Weikfield Products Co.-DDQ-11-2008/Adm-3/16 to 20 dt.24.01.2011
  - c) M/s. Pushpam Healthcare Products-DDQ/11-2006/Adm-5/50 dt.23.12.2008
  - d) The Commissioner of Sales Tax vs. Food Specialities Ltd. reported in 97 STC 407
6. Our view was also based on principles of liberal interpretation of entries as directed by numerous judgements of the Bombay High Court and Supreme Court as cited in our appeal.
  - a) K.P. Verghese v. Income Tax Officer reported in 1982 1 SCR 629
  - b) The Commissioner of Sales Tax Vs. Lala Lajpatrai Hotel reported in 35 STC 368
  - c) Dr. Baliram Waman Hiray v. Mr. Justice B. Lentin & Another reported in 72 STC 384
  - d) Merind Limited Vs. The State of Maharashtra reported in 136 STC 462
  - e) Polestar Electronics Pvt. Ltd. Vs. The Additional Commissioner of Sales Tax, Maharashtra State reported in 41 STC 409
  - f) Bradma India Ltd. Vs. The State of Maharashtra reported in 140 STC 17 (SC)
7. Our intentions were honest and clear which also reflected in our Sales Tax returns filed periodically and payments made diligently with the department.

In view of the above, in case of any adverse determination, we feel we have a valid and justified case and pray for a Prospective Order. Lastly, we request that all our points covered above may be taken without prejudice to our rights in the case. "

#### 04. OBSERVATIONS

I have gone through the facts of the case. The entry for consideration before me is schedule entry C-107(11)(g) of the MVAT Act,2002. The entry reads thus - 'Powders, tablets, cubes, crystals and other solids or liquids from which non-alcoholic beverages and soups are prepared'. In the determination proceedings in the case of M/s Applied Nutrition Sciences (DDQ-11-2010/Adm-3/48/B-3 dt.02.07.2013), I had an occasion to deal with the many claims laid in

respect of the aforesaid entry. In the present proceedings too, the applicants' have made extensive arguments. To examine the appropriateness of these arguments with regard to the entry in question, it becomes necessary for me to understand these products. It can be seen from the 16 products as enlisted on page 1 that some products are common in the case of both the applicants' with only a difference in the flavours in which they are sold. In effect, I have to look at only the products enlisted hereinbelow. The applicants' have provided the labels of the products. I would reproduce some noticeable points thus :

Product	Details/Directions
100 per cent Whey Gold	<ul style="list-style-type: none"> <li>By using WPI as the primary ingredient along with premium ultra-filtered whey protein concentrate (WPC), we're able to pack 24 grams of muscle-building protein into every serving.</li> <li>..... and a lot less of the fat, cholesterol, lactose and other stuff that you can do without.</li> <li>Bringing a shaker cup with you to the gym is the best way to get a dose of protein immediately after your workout.</li> <li>By adding fresh or frozen fruits, peanut butter, flaxseed oil, coconut and other ingredients, you can make an even more delicious shake.</li> <li>You can make Gold Standard 100% Whey™ an even better post workout product by adding supplements like creatine, glutamine, BCAA and concentrated carbohydrate powders.</li> <li>....increase the protein content of cookies, brownies, etc. by adding a scoop or two to your baked good recipes.</li> <li>For the best results consume your daily protein allotment over several small meals spread evenly throughout the day.</li> <li>Use this product as a food supplement only. Do not use for weight reduction.</li> <li>Intended for healthy adults over the age of 18.</li> </ul>
Platinum Hydro Whey	<ul style="list-style-type: none"> <li>Platinum Hydrowhey® is the most advanced whey protein we've ever developed. In a word: Excellence. By hydrolyzing whey protein isolates to break larger proteins down into smaller pieces, these ultra-pure whey isolates are able to get into your system rapidly, enabling your muscles to start recovering from heavy training.</li> <li>By adding dietary supplements including creatine, BCAA and carbohydrate powders you can make Platinum Hydrowhey an even better recovery product.</li> <li>Use faster-acting Platinum Hydrowhey during the day and more slowly digested Gold Standard 100% Casein at night for around the clock amino acid coverage.</li> <li>For best results consume your daily protein allotment over several meals spread evenly throughout the day.</li> <li>Intended for healthy adults over the age of 18.</li> <li>Use this product as a food supplement only. Do not use for weight reduction.</li> </ul>
Serious Mass	<ul style="list-style-type: none"> <li>Described thus : Weight Gain Supplement.</li> <li>The Bigger Picture of Weight Gainers - Serious weight gain requires serious calories. However, those who need the extra calories most, often have the toughest time consuming enough of them. For many aspiring to be bigger, highly-active metabolisms, weaker appetites, on-the-run lifestyles make consuming sufficient calories through whole foods alone a real challenge. With Serious Mass, you've got nothing to lose and lots to gain. We've consolidated over 1,250 calories, 50 grams of protein, 250-plus grams of carbohydrates, and 25 vitamins &amp; minerals with added glutamine and creatine into every serving. It's time to stop thinking small; get serious - Serious Mass.</li> <li>Supercharge your Serious Mass by adding one or more of these foods to your shake - chocolate chips, peanut butter, almonds, peanuts, ice cream, whole milk, coconut, flaxseed oil, oat bran, banana, honey, molasses.</li> <li>50 grams of protein from a combination of faster and slower digesting sources including Whey, Casein, and Egg.</li> <li>250-plus grams of carbohydrates to support fueling of intense workouts and aid in the replenishment of glycogen stores - with no added sugar.</li> <li>New users may find it beneficial to begin with 1/2 of a serving daily for the first week and then gradually increase to 1 or more full servings several times a day.</li> <li>Serious Mass is a substantial weight-gain supplement that can be used to feed serious calorie needs</li> </ul>

	<p>in a variety of different ways.</p> <ul style="list-style-type: none"> <li>• Between Meals: Drink ½-1 serving of Serious Mass between meals to maintain positive nitrogen balance and support high-calorie diet. Post-Workout: Begin drinking ½-1 serving of Serious Mass 30-45 minutes following exercise to support maximum recovery. Before Bed: Drink ½-1 serving of Serious Mass about 45-60 minutes before bed to provide nutrients to recovering muscle, throughout the night.</li> <li>• Note: For best results use Serious Mass combined with intense weight training (3-5 times per week) and a sensible whole foods diet. Also, keep in mind that sufficient recovery between workouts impacts your ability to gain lean mass. Allowing at least 48 hours between workouts involving the same body parts is recommended.</li> <li>• Caution: Keep out of reach of children. Do not take this product if you are pregnant or nursing a baby. Check with a qualified healthcare professional before using this product if you are under 18 years of age or if you have any known or suspected medical condition(s) including Diabetes or Hypoglycemia, and/or you are taking any prescription or OTC medication(s).</li> </ul>
PRO Complex Gainer	<ul style="list-style-type: none"> <li>• Described thus : Pro Complex™ Gainer -High-Protein Lean Gainer.</li> <li>• The Bigger Picture of Lean Gainers -Don't judge a gainer based solely upon its calories per serving. Because when it comes to gaining lean mass, not all calories are created equally. Unlike typical weight-gain formulas that are loaded with simple sugars and fat, Pro-Complex™ Gainer derives a much higher percentage of its calories from protein-7 premium protein sources to be exact. By also supplying complex carbohydrates, dietary fiber, medium chain triglycerides (MCTs), digesting enzymes, vitamins, essential minerals, and great taste as well, we've created the ideal lean gainer. Pro-Complex™ Gainer was made with quality, not quantity, in mind. Because we understand that you want to get big, not fat.</li> <li>• Pro-Complex™ Gainer is comprised of high biological value proteins, which means they are easily digested and absorbed so they provide a full complement of amino acids to support the rebuilding process. Each serving of Pro-Complex™ Gainer provides a 60gram dose of premium muscle-building protein made from 7 unique sources.</li> <li>• Carbohydrates and lipids (fats and oils) provide sustained energy that help prevent proteins from being burned off as fuel.</li> <li>• To gain just one extra pound, you need to consume approximately 3,500 calories-above and beyond what you normally consume through foods, beverages, and supplements. Pro-Complex™ Gainer provides over 600 calories per serving. By adding just one serving to your daily routine, you can begin to experience an increase in lean mass within the first week.</li> <li>• Pro-Complex Gainer is a superior formula that can be used to support high-calorie needs in a variety of ways.</li> <li>• Between Meals: Drink 1-2 servings of Pro-Complex™ Gainer between meals to maintain positive nitrogen balance and support a high-calorie diet. Post-Workout: Begin drinking one serving of Pro-Complex™ Gainer 30-60 minutes following exercise to support maximum recovery. Before Bed: Drink one serving of Pro-Complex™ Gainer about 45-60 minutes before bed to provide nutrients to recovering muscle throughout the night.</li> <li>• NOTE: For best results use Pro-Complex™ Gainer combined with intense weight training (3-5 times per week) and a sensible diet. Also, keep in mind that sufficient recovery between workouts impacts your ability to gain lean mass. Allowing at least 48 hours between workouts involving the same body parts is recommended.</li> <li>• As a general rule, consume approximately 1 gram of protein per pound of body weight per day, spread over 5-7 meals and/or supplements.</li> <li>• Keep out of reach of children. Diabetics and Hypoglycemics, should only use this product under the advice of a qualified licensed physician or dietician.</li> </ul>
True Mass	<ul style="list-style-type: none"> <li>• Described thus: True-Mass - An ultra premium mass gainer. Nutrition-Performance-Weight Management-Recovery. Calorie replacement drink mix.</li> <li>• Stack with Nitrix® 2.0, N.O.-Xplode™ 2.0, CellMass® 2.0 and Syntha-6™ for maximum physique and performance impact.</li> <li>• Designed for: Any individual who needs a calorie and nutrient-dense alternative or addition to regular foods to assist with gaining muscle mass.</li> <li>• Drink 1 serving daily, or as needed to satisfy your protein or mass-gaining requirements.</li> <li>• Note: Before consuming True-Mass® seek advice from a physician if you are unaware of your current health condition, have any pre-existing medical condition, taking any medication, planning any medical procedure, contemplating pregnancy, pregnant or nursing. Reduce or discontinue use if any adverse reactions occur such as but not limited to gastrointestinal discomfort.</li> </ul>

	<ul style="list-style-type: none"> <li>True-Mass is only intended to be consumed by healthy adults 18 years of age and older. Keep out of reach of children and pets.</li> </ul>
Syntha-6	<ul style="list-style-type: none"> <li>Described thus: An ultra-premium lean muscle protein powder. Nutrition-Lean muscle- Recovery-Weight Management.</li> <li>Stack with NITRIX® 2.0, N.O.-XPLODE™ 2.0 and CELLMASS® 2.0 for maximum physique and performance impact.</li> <li>Designed for: Any individual who wants an ultra-premium protein powder to help them reach their nutritional and physique goals.</li> <li>Note: Before consuming Syntha-6™ seek advice from a physician if you are unaware of your current health condition, have any pre-existing medical condition, taking any medication, planning any medical procedure, contemplating pregnancy, pregnant or nursing. Reduce or discontinue use if any adverse reactions occur such as but not limited to gastrointestinal discomfort.</li> <li>SYNTHA-6 is only intended to be consumed by healthy adults 18 years of age and older. Keep out of reach of children and pets.</li> </ul>
Jumbo	<ul style="list-style-type: none"> <li>Declaration. 5 Types of Creatines – Especially for hardgainers.</li> <li>Directions : To maximize results, consume at least one full serving a day depending on your body mass and activity level. Jumbo can be sipped throughout the day, or taken around training (before/during/after).</li> <li>It's been shown that people tend to overestimate the actual nutrient consumption when trying to gain muscle and brawn. In other words, they eat less than they think and they need for steady and significant progress! Everybody seeks the magic bullet while ignoring the fact that nothing is more powerful than the consistent consumption of proper amount of total calories, energizing carbs and muscle building protein. Couple this with the fact that many athletes don't invest time in the proven method of keeping a food log and the best practical solution left for most may be to rely on the daily use of a JUMBO type shake that can readily help to take in enough nutrients to progress.</li> <li>Jumbo is designed with whey protein. Dietary protein are the source of nitrogen and indispensable amino acids which the body requires for tissue growth and maintenance therefore. Jumbo contributes to the growth and maintenance of muscle mass*.</li> <li>The "Jumbo" extra-ingredient matrix provides a good dose of our proprietary 'CREA-BOMB' multi-component creatine matrix! At least a 3 g daily dose of creatine is scientifically proven to increase performance in successive burst or short-term high intensity exercise like weight training and interval cardio*.</li> <li>In the 'Support complex' you'll find Magnesium in a dose that contributes to normal protein synthesis, to a reduction of tiredness and fatigue, to normal functioning of the nervous system (neurotransmission and muscle contraction involving heart muscle), to normal energy-yielding metabolism, to the maintenance of normal bones and teeth, and has a role in the process of cell division*.</li> <li>Caution: As with all exercise and nutritional programs, please consult your physician first. Keep out of the reach of children! Use this product as a food supplement only.</li> <li>Important Warning: This product contains an absorption modifier that could affect your medications – consult your physician before use!</li> </ul> <p>[*These statements have been scientifically proven and authorized by the European Food Safety Authority.]</p>
Jumbo Professional	<ul style="list-style-type: none"> <li>6 types of creatines – Especially for more athletic body types!</li> <li>Directions: To maximize results, consume at least one full serving a day depending on your body mass and activity level. Jumbo can be sipped throughout the day or taken around training (before/during/after).</li> <li>Jumbo means BIG! JUMBO means STRONG! The original JUMBO was developed to help those with very fast metabolisms (skinny 'hardgainer'), or people with extreme energy demands due to their activity levels. The popularity of JUMBO – stemming from its quality and results – warranted that we develop a specific formula for the more normal and athletic metabolisms and for the demands of typical bodybuilding training. And the second member of the JUMBO family was born!</li> <li>...This obviously means that the carbohydrate and caloric yield of the formula is lower, because it's unnecessary to take in higher amounts for those people that fall under the specific body and activity type we had in mind when designing the product.</li> <li>Jumbo Professional is designed with Whey Protein, Dietary proteins are the source of nitrogen and indispensable amino acids which the body requires for tissue growth and maintenance Therefore, the Jumbo Professional contributes to the growth and maintenance of muscle mass*.</li> </ul>

	<ul style="list-style-type: none"> <li>At least a 3 g daily dose of Creatine is scientifically proven to increase performance in successive bust of short-term high intensity exercise like weight training and interval cardio.</li> <li>In the 'Micronutrient Support Complex', you'll find Magnesium and Vitamin C in amounts that contributes to normal protein synthesis, to a reduction of tiredness and fatigue, to normal functioning of the nervous system (neurotransmission and muscle contraction involving heart muscle), to the normal function of the immune system, to normal energy-yielding metabolism, to electrolyte balance, to normal collagen formulation for the normal function of cartilage and blood vessels, to the protection of cells from oxidative stress, to the maintenance of normal bones and teeth, and have a role in the process of cell division*.</li> <li>Caution: As with all exercise and nutritional programs, please consult your physician first. Keep out of reach of children. Use this product as a food supplement only.</li> <li>Important warning: This product contains an absorption modifier that could affect your medications - consult your physician before use!</li> </ul> <p>[*These statements have been scientifically proven and authorized by the European Food Safety Authority.]</p>
Zero Carb Isobest	<ul style="list-style-type: none"> <li>Isobest can be used with any meal to boost its protein content or by itself in special circumstances (dieting, before and during training, before bed, etc.).</li> <li>Caution: As with all exercise and nutritional programs, consult your physician first. Keep out of the reach of children! Use this product as a food supplement only. This is not a meal replacement product, use only as food supplement.</li> <li>Dietary protein contributes to the growth and maintenance of muscle mass and to the maintenance of normal bones.</li> <li>Caution: As with all exercise and nutritional programs, please consult your physician first. Please keep out of the reach of children!</li> <li>Additionally ISOBEST has zero fat and zero carbohydrates meaning that it has no sugars or cholesterol either.</li> </ul>
100% Whey Protein Professional	<ul style="list-style-type: none"> <li>Best time to use is after a workout.</li> <li>Use this product in conjunction with food as part of a healthy, balanced diet, not as a substitute for such.</li> <li>Dietary proteins are the source of nitrogen and indispensable amino acids, which the body requires for tissue growth and maintenance. Therefore 100% Whey Protein Professional contributes to the growth and maintenance of muscle mass, and also to the maintenance of normal bones*.</li> </ul> <p>[*These statements have been scientifically proven and authorized by the European Food Safety Authority.]</p> <ul style="list-style-type: none"> <li>Caution: As with all exercise and nutritional programs, please consult your physician first. Keep out of the reach of children! Use this product as a food supplement only.</li> <li>In respect of one of the ingredients - Coloring (camoisine" blue), it is mentioned thus - May have an adverse effect on activity and attention in children.</li> </ul>

It is not denied that the impugned products are powders from which liquid drinks are prepared. However, the claim made by the applicant is that the drinks made from these powders are 'beverages'. A beverage is normally consumed for its act of refreshing. Its consumption is not loaded with a significant thought process about the benefits that could be derived therefrom. There are no expectations about calculated and cycled benefits to be derived from intake thereof. The only intention, as can be commonly gathered, and with approval from one and all, is an urge to satiate, a need to refresh. It would be apt to say that the common understanding in this regard is that *beverages are appreciated for their taste than for their nutritional value*. In the determination order in the case of M/s. Applied Nutrition Sciences (No.DDQ-11-2010/Adm-3/48/B-3 dt.02.07.2013), while discussing various case laws, I have elaborately deliberated upon the meaning of the word 'beverages' for the purposes of the very entry under consideration in the present proceedings. I have observed therein that - *A beverage normally acts*

as a stimulant. The urge to consume a beverage is normally to relax, be energized. A 'beverage' as understood commonly is never consumed with a specific motive ..... There is an urge to just enjoy the drink and feel satiated. There is no prior planning or an agenda to obtain any specific benefit. I maintain my stand as taken therein.

When we look at the drinks made from the present products, it would not take long to infer that such drinks could by no means be said to fall under the word 'beverages' as understood for the purposes of the impugned entry. A common person would not ask for such products if he desires to satiate his urge to feel refreshed neither could these be offered to guests. Though, the impugned products are available for sale over the counter, the functionality and characteristics of the impugned products herein are such that only a knowledgeable person would know his choicest preference and not the common person. Here, the knowledgeable person means a person who is engaged in vigorous work outs, engaged in athletics and one who has specific goals as in weight gain/loss, etc. I observe so with regard to the following features which characterize the impugned products :

1. Beverages are consumed for mere refreshment and are not with and for a purpose. By identifying the purposes for which each of the impugned products are consumed, the products have a restricted consumer base. A beverage doesn't attempt to enter into such differentiation. It covers all the masses. The impugned products have a target audience which would look into the ingredients of the powders and then decide as to which should be consumed to achieve the desired effect. There are no such considerations while consuming a beverage. The present products defy the general understanding thus -
  - Are muscle-building proteins.
  - Enables muscles to start recovering from heavy training.
  - Weight Gain Supplement
  - Serious weight gain requires serious calories. However, those who need the extra calories most, often have the toughest time consuming enough of them. For many aspiring to be bigger, highly-active metabolisms, weaker appetites, on-the-run lifestyles make consuming sufficient calories through whole foods alone a real challenge. With Serious Mass, you've got nothing to lose and lots to gain.
  - 250-plus grams of carbohydrates to support fueling of intense workouts and aid in the replenishment of glycogen stores – with no added sugar.
  - Serious Mass is a substantial weight-gain supplement that can be used to feed serious calorie needs in a variety of different ways.
  - Also, keep in mind that sufficient recovery between workouts impacts your ability to gain lean mass. Allowing at least 48 hours between workouts involving the same body parts is recommended.
  - High-Protein Lean Gainer

- Because we understand that you want to get big, not fat.
- By adding just one serving to your daily routine, you can begin to experience an increase in lean mass within the first week.
- The ideal lean gainer.
- Each serving of Pro-Complex™ Gainer provides a 60gram dose of premium muscle-building protein made from 7 unique sources.
- Carbohydrates and lipids (fats and oils) provide sustained energy that help prevent proteins from being burned off as fuel.
- Also, keep in mind that sufficient recovery between workouts impacts your ability to gain lean mass.
- Performance-Weight Management-Recovery
- Designed for: Any individual who needs a calorie and nutrient-dense alternative or addition to regular foods to assist with gaining muscle mass.
- Drink 1 serving daily, or as needed to satisfy your protein or mass-gaining requirements.
- Lean muscle protein powder
- Designed for: Any individual who wants an ultra-premium protein powder to help them reach their nutritional and physique goals.
- 5 Types of Creatines – Especially for hardgainers.
- Jumbo contributes to the growth and maintenance of muscle mass.
- At least a 3 g daily dose of creatine is scientifically proven to increase performance in successive burst or short-term high intensity exercise like weight training and interval cardio.
- Contributes to normal protein synthesis, to a reduction of tiredness and fatigue, to normal functioning of the nervous system (neurotransmission and muscle contraction involving heart muscle), to normal energy-yielding metabolism, to the maintenance of normal bones and teeth, and has a role in the process of cell division.
- 6 types of creatines – Especially for more athletic body types!
- The original JUMBO was developed to help those with very fast metabolisms (skinny 'hardgained'), or people with extreme energy demands due to their activity levels. The popularity of JUMBO – stemming from its quality and results – warranted that we develop a specific formula for the more normal and athletic metabolisms and for the demands of typical bodybuilding training. And the second member of the JUMBO family was born!
- Jumbo Professional contributes to the growth and maintenance of muscle mass.
- At least a 3 g daily dose of Creatine is scientifically proven to increase performance in successive burst of short-term high intensity exercise like weight training and interval cardio.
- Contributes to normal protein synthesis, to a reduction of tiredness and fatigue, to normal functioning of the nervous system (neurotransmission and muscle contraction involving heart muscle), to the normal function of the immune system, to normal energy-yielding metabolism, to electrolyte balance, to normal collagen formulation for the normal function of cartridge and blood vessels, to the protection of cells from oxidative stress, to the maintenance of normal bones and teeth, and have a role in the process of cell division\*.
- Dietary protein contributes to the growth and maintenance of muscle mass and to the maintenance of normal bones.
- 100% Whey Protein Professional contributes to the growth and maintenance of muscle mass, and also to the maintenance of normal bones\*.

2. Beverages are not consumed for their content but for the satisfaction therefrom. One may exhibit preference to flavours but certainly there would not be considerations as to carbs or sugar or cholesterol. Additionally, one has to appreciate that consideration as to the contents would not be an issue when consuming a beverage as it is always consumed in moderation, restricted to a smaller portion and not in sizeable portions as would be the case when consuming a meal. It is then that we look into the contents with regard to abstaining from consumption of certain items as would aggravate physical ills as in a diabetic, irrespective of his like, would exercise caution to consuming items with large portions of sugar. To put it straight, I would say that health consciousness would not be a factor behind consuming a beverage. The present products do not fit the bill for reasons thus -

- Contain less of the fat, cholesterol, lactose and other stuff that you can do without.
- Best dose of protein immediately after your workout in the gym.
- Additionally ISOBEST has zero fat and zero carbohydrates meaning that it has no sugars or cholesterol either.

3. Could there be instructions as to the intake of beverages as in spaced out consumption or defining the times of consumption? Definitely, a 'NO'. The impugned products present a different picture thus -

- For the best results consume your daily protein allotment over several small meals spread evenly throughout the day.
- Allowing at least 48 hours between workouts involving the same body parts is recommended.
- As a general rule, consume approximately 1 gram of protein per pound of body weight per day, spread over 5-7 meals and/or supplements.
- To maximize results, consume at least one full serving a day depending on your body mass and activity level.
- Jumbo can be sipped throughout the day, or taken around training (before/during/after).

4. Consumption of a beverage can never be intended to be complemented with the consumption of some other product or doing of some activity. I see that the impugned products suggest some combinations of products and activities to complement the promised outcomes. These characteristics cannot be attributed to what beverages are known for.

- Use faster-acting Platinum Hydrowhey during the day and more slowly digested Gold Standard 100% Casein at night for around the clock amino acid coverage.
- Stack with Nitrix® 2.0, N.O.-Xplode™ 2.0, CellMass® 2.0 and Syntha-6™ for maximum physique and performance impact.
- Note: For best results use Serious Mass combined with intense weight training (3-5 times per week) and a sensible whole foods diet.

- NOTE: For best results use Pro-Complex™ Gainer combined with intense weight training (3-5 times per week) and a sensible diet.
- Allowing at least 48 hours between workouts involving the same body parts is recommended.
- Stack with NITRIX® 2.0, N.O.-XPLODE™ 2.0 and CELLMASS® 2.0 for maximum physique and performance impact.

5. A beverage is consumed to satisfy one's need to refresh. There cannot be any fixed pattern of consumption (as in before and after meals) and adherence to any pattern is never a consideration when consuming a beverage.

- Between Meals: Drink  $\frac{1}{2}$ -1 serving of Serious Mass between meals to maintain positive nitrogen balance and support high-calorie diet.
- Post-Workout: Begin drinking  $\frac{1}{2}$ -1 serving of Serious Mass 30-45 minutes following exercise to support maximum recovery.
- Before Bed: Drink  $\frac{1}{2}$ -1 serving of Serious Mass about 45-60 minutes before bed to provide nutrients to recovering muscle, throughout the night.
- Between Meals: Drink 1-2 servings of Pro-Complex™ Gainer between meals to maintain positive nitrogen balance and support a high-calorie diet.
- Post-Workout: Begin drinking one serving of Pro-Complex™ Gainer 30-60 minutes following exercise to support maximum recovery.
- Before Bed: Drink one serving of Pro-Complex™ Gainer about 45-60 minutes before bed to provide nutrients to recovering muscle throughout the night.
- To maximize results, consume at least one full serving a day depending on your body mass and activity level. Jumbo can be sipped throughout the day or taken around training (before/during/after).
- Isobest can be used with any meal to boost its protein content or by itself in special circumstances (dieting, before and during training, before bed, etc.).

6. Apart from mere refreshment, beverage consumption cannot be for any purpose such as nourishment or achieving some physical goals. The use of different terminology as in 'food' and 'beverages' should explain the point that what is expected of a food would not be the same as that from a beverage. Beverages are never meant to serve as food supplements. The sole reason for consuming a beverage is to be refreshed and feel relaxed.

- Use this product as a food supplement only.
- This is not a meal replacement product, use only as food supplement.
- Use this product in conjunction with food as part of a healthy, balanced diet, not as a substitute for such.
- To gain just one extra pound, you need to consume approximately 3,500 calories-above and beyond what you normally consume through foods, beverages, and supplements. Pro-Complex™ Gainer provides over 600 calories per serving. By adding just one serving to your daily routine, you can begin to experience an increase in lean mass within the first week.

7. Normally beverages do not have any restrictions as to age of consumption or diseases in which case the consumption should be avoided. These are rarely known to cause adverse effects. As a general rule excessive consumption of any food or beverage is bound to harm the body/digestion system. However, one of the impugned products, even if taken in the measure recommended, poses a warning in respect of one of its ingredients that says "*may have adverse effect on activity and attention in children*". However, the drinks made from the impugned products fail to fall under the category of 'beverages' for reasons thus -

- *Caution: Keep out of reach of children.*
- *Do not take this product if you are pregnant or nursing a baby.*
- *Check with a qualified healthcare professional before using this product if you are under 18 years of age or if you have any known or suspected medical condition(s) including Diabetes or Hypoglycemia, and/or you are taking any prescription or OTC medication(s).*
- *Diabetics and Hypoglycemics, should only use this product under the advice of a qualified licensed physician or dietician.*
- *Note: Before consuming True-Mass® seek advice from a physician if you are unaware of your current health condition, have any pre-existing medical condition, taking any medication, planning any medical procedure, contemplating pregnancy, pregnant or nursing. Reduce or discontinue use if any adverse reactions occur such as but not limited to gastrointestinal discomfort.*
- *True-Mass is only intended to be consumed by healthy adults 18 years of age and older. Keep out of reach of children and pets.*
- *Note: Before consuming Syntha-6™ seek advice from a physician if you are unaware of your current health condition, have any pre-existing medical condition, taking any medication, planning any medical procedure, contemplating pregnancy, pregnant or nursing. Reduce or discontinue use if any adverse reactions occur such as but not limited to gastrointestinal discomfort.*
- *SYNTHA-6 is only intended to be consumed by healthy adults 18 years of age and older. Keep out of reach of children and pets.*
- *Important Warning: This product contains an absorption modifier that could affect your medications – consult your physician before use.*
- *Caution: As with all exercise and nutritional programs, please consult your physician first. Keep out of reach of children. Use this product as a food supplement only.*
- *In respect of one of the ingredients – Coloring (carmoisine" blue), it is mentioned thus –*  
*May have an adverse effect on activity and attention in children.*

8. Normal beverages could not be perceived to be had with the stuff as follows -

- *Can be made more delicious by adding fresh or frozen fruits, peanut butter, flaxseed oil, coconut and other ingredients,*
- *Can be made an even better post workout product by adding supplements like creatine, glutamine, BCAA and concentrated carbohydrate powders.*
- *Increase the protein content of cookies, brownies, etc. by adding a scoop or two to baked good recipes.*

- *Supercharge your Serious Mass by adding one or more of these foods to your shake - chocolate chips, peanut butter, almonds, peanuts, ice cream, whole milk, coconut, flaxseed oil, oat bran, banana, honey, molasses.*

9. There is no such thing as a new or old user of a beverage. There could be addiction to a particular beverage like tea or coffee. However, in no case does one find instructions for increasing the intake of any beverage by adjusting the initial dose and its gradual increase at a later stage. The present products offer thus -

- *New users may find it beneficial to begin with 1/2 of a serving daily for the first week and then gradually increase to 1 or more full servings several times a day.*

In consideration of all above, I have to remark that the claim of the applicants' about the impugned products being powders from which beverages are prepared is based on inherently wrong premises and lacks in merits.

Having seen thus, I would now refer to the arguments put forth as also the many case laws cited by the applicant :

a. The applicant has cited the case law of the Hon. Bombay High Court in M/s. Food Specialties Ltd. (cited supra) as well as the Determination Order in the case of M/s. Pushpam Healthcare Products (cited supra). In my determination order in the case of M/s Applied Nutrition Sciences (cited supra), I have myself referred to the observations from the same. As regards reliance on the decision in M/s. Alembic Chemical Works Co. Ltd.(cited supra), I have to say that the said decision has been discussed and distinguished by me in M/s Applied Nutrition Sciences (cited supra). I would reproduce the relevant portion therefrom thus -

*"To lay claim on the impugned products being beverages, reliance has been placed on the common determination order in the case of M/s. FDC Limited, M/s. Anand Synthocem Ltd. & M/s. Alembic Chemical Works Co. Ltd.(cited supra). However, reliance on the same is misplaced as this order has been set aside by the Hon. Maharashtra Sales Tax Tribunal in Appeal No.97 of 1996 decided on dt.31.10.2003 (29 MTJ 1). The facts of the case were such that a Determination Order No.DDQ-1193/Adm-5/190/B-8 dt.19.4.1994 was passed in the case of M/s. Alembic Chemical Works Co. Ltd. wherein the product 'Protinules' in powder form was held as covered by the then entry C-II-27 for foodstuff and food provision under the Bombay Sales Tax Act,1959. Later on applications for determination were filed by two applicants' namely M/s. FDC Limited & M/s. Anand Synthocem Ltd., in respect of their products Simyl MCT (special infant food - advised for nutrition in diarrhea and lactose intolerance in infants) and Gefrich (nutritional supplement for milk proteins for growth and nourishment) respectively. A prima-facie conclusion was formed that these products are in powder form from which non-alcoholic beverages can be prepared and therefore would be covered by the then entry C-II 47(3) which covered such powders. However, it was noticed that 'protinules' in powder form was held as 'foodstuff' covered by the then entry C-II-27. It was, therefore, decided to review the earlier determination. Hence, M/s. Alembic Chemical Works Co. Ltd. was also called for a hearing on the issue of reconsideration of the schedule entry applicable to the product. Accordingly, by the order dt.8.5.96, all the three aforementioned products were held as 'powders from which non-*

alcoholic beverages are prepared by adding any potable liquid'. While holding so, the amendments to the aforementioned 2 entries were discussed. W.e.f 1.4.89, the entry C-II-27 excluded items covered by entry CII-47, thereby foodstuff in powder form from which non-alcoholic beverages could be prepared stood excluded from CII-27. There was yet another amendment w.e.f 1.4.89 whereby the words 'Soft drinks powders' as appearing in the entry C-II-47 (iii) [Soft drinks powders, tablets and crystals from which non-alcoholic beverages are prepared] were substituted for the word 'Powders'. By the amendment to entry CII-47(iii) [renumbered as C-II-47(3) from 1.5.1992], the said entry covered all types of powders with or without food ingredient, from which beverages can be prepared. As the entry CII-27 excluded items of entry CII-47, all beverages with or without food substances stood excluded from entry CII-27. It was observed that since the entry CII-47 prior to 1.4.89 covered only 'soft drink powders', the product 'protinules' cannot be held as a 'beverage' covered by the said entry. Being aggrieved by the order dt.8.5.96, M/s. Alembic Chemical Works Co. Ltd. preferred an appeal before the Tribunal and the Tribunal in its order dt.31.10.2003 set aside the determination order of 1996 for want of following of procedure of obtaining permission of review from the State Government. The Tribunal did not go into the merits of the case. The review proceedings were initiated but the same were later on dropped in view of the decision of the Hon. Supreme Court in Collector of Central Excise vs. Parle Exports Pvt. Ltd. (75 STC 105) whereby it was held that non-alcoholic beverages are not understood as food products or food preparations in India. The Hon. Tribunal having set aside the determination of 1996, the position of 'protinules' being 'foodstuff' holds good today and therefore reliance on the determination of 1996 is misplaced. It is seen that the packing of these products refers to the products as 'Dietary Supplement'. However, it is also mentioned that - 'Products are not for medicinal or therapeutic use'. It is further mentioned that - 'Products are not intended to diagnose, treat, cure or prevent any disease'. Hence, no claim is made as regards the entry for 'drugs'. The applicant has also not made any claim as regards coverage under the entry for 'foodstuffs and food provisions'. Further as has been observed by the apex court in S. Samuel, M.D., Harrisons Malayalam And Another v. Union of India And Others(134 STC 610), to be classified as 'food', a substance should possess the quality to maintain life and its growth. The present products do not possess such quality and therefore, it can be understood as to why no claim of the impugned products being 'foodstuffs and food provisions' is made by the applicant."

- b. With regard to the case laws, I have to observe that the facts in those judgments and as found in the present case are not the same. In the present case, having regard to the characteristic features of these products, it would not have required much academic knowledge to infer that the impugned products are not the powders from which the beverages that we normally consume are made. Even the applicant is aware when he says thus - "*Those are not special or specific goal oriented products although weight loss/gain, fat loss et cetera may be the incidental benefits.*"
- c. The ratio in Merind Limited (cited supra) cannot be applied to the facts of the instant case as at no point of time were the drinks made from products of the nature as in the present proceedings were held to be 'beverages'.
- d. The argument as regards the grouping of the entries in the entry C-107(11) does not make a point. However, I agree with the argument that *the powders, tablets etc. mentioned in entry no. 107(11)(g) would, therefore, take into their coverage all kinds of goods from which the beverage can be prepared irrespective of the class of consumers.* But, in the instant case, I have elaborately discussed above that the impugned powders do not form beverages

but make drinks addressing specific physical issues. The impugned products not being powders from which 'beverages' are prepared, they would not merit inclusion in the aforesaid entry.

e. 'Coffee' is a beverage and therefore, reliance on the clarification of coffee powder is misplaced. Reliance on the determination orders in M/s. Weikfield Products (cited supra) and M/s. Pushpam Healthcare Products (cited supra) would not be useful as the products in the present proceedings are not the same as the ones therein. The products in both the aforesaid determinations were not such as being unsuitable for any particular class of consumers. In fact in the determination in M/s. Pushpam Healthcare Products (cited supra), the product was claimed as being suitable for all ages. The point I seek to make is that these determinations were in respect of products which were beverages or powders from which beverages could be made and not the same as the ones in the present proceedings which cater to a target audience with a view to obtain a specific goal and the drinks made from them are not the beverages as are commonly understood.

f. The applicant has argued that "*every food or beverage can be deduced to have a purpose, whether or not this purpose is spelt out on the product label is upto the manufacturer of the product, which in turn depends on his target audience. but that does not take away from the fact that every product has a purpose, whether good or bad.*" With regard to this argument, I have to observe that admittedly, every food or beverage has a purpose. We have seen above that the impugned products come with a cautionary warning as to the consumption not being for certain categories of persons. Consumption of a beverage is not subject to a caution about getting medical advice as a pre-condition for the one intending to consume it. Whereas the products under determination have an open warning to the effect that the medical advice be taken before consuming. Thus, the impugned products are put to some or the other kind of restriction as to the class of persons consuming the same.

Further, the impugned products can be consumed round the year with the obvious reason being to achieve the desired goals. These are admittedly targeted to be consumed by a certain class of population and who are they? The labels admit them to be the people who are into heavy work-outs, athletes, people who wish to be muscular/lean. The people with certain intense physical activity only are recommended to consume the impugned products. Although, it doesn't bar people with sedentary lifestyle to consume the drinks made from these impugned products, but the purposes and goals to be achieved are self-speaking.

The impugned products do not make beverages but drinks sought to achieve purposes which are spelt out and a restricted section would be the ones who would be preferring to opt for these products. Beverages, as are commonly known, are consumed by one and all and certainly not with specific motives as in weight gain or loss, controlling, rather scheduling of nutrient intake, etc. Therefore, the argument of the applicant doesn't drive home a valid point.

g. The applicant has stated that *Madras High Court has held "Horlicks" as a Beverage (7955L 421)*. I have seen the case of State Of Tamil Nadu V. Wander Limited. (Tax Case (Revision) No. 1145 Of 1987). H. M. M. Limited V. Deputy Commercial Tax Officer, Chengalpattu Assessment Circle. (Writ Petition No. 6318 Of 1990). F. D. C. Limited V. State Of Tamil Nadu And Others. (Writ Petitions Nos. 9079, 11204 & 13828 of 1990). This case has been reported in 79 STC 421. Therefore, it appears that the citation given by the applicant is incorrect. However, I have to observe that the applicant has sought to mention an incorrect ratio, too. I have gone through the facts of the said case. The entry under consideration therein was 'Milk foods excluding milk but including milk powder' and the Hon. Court was faced with the issue of - *whether Horlicks is a milk food or not*. Accordingly, it was held as a 'milk food'. In view thereof, reliance on this case law does not survive. Also important is the fact that the products in the present proceedings are different in content than "Horlicks". Therefore, ratio applied to the said product cannot be made applicable to the impugned products.

Having dealt with the arguments, I would conclude to observe that the case laws and decisions cited by the applicant in support of his case are not relevant to the facts at hand. The import of the word 'beverages' being clear, there were no interpretation issues in the case at hand. In view thereof, reliance on the decisions dealing with interpretation would not be useful. Therefore, I refrain from discussing the ratios as laid down in these judgments and applicability thereof to the facts in the instant case.

In view of the detailed deliberations held hereinabove, I have to hold that the impugned products would not get covered by the schedule entry C-107(11)(g) of the MVAT Act,2002. There is no other specific entry which could be held as being applicable to the impugned products. In view thereof, the products find placed in the residuary schedule entry E-1, thereby liable to tax @12.5%.

## 05. PROSPECTIVE EFFECT

The applicants' have prayed for prospective effect in case their contention as regards the

products being powders from which 'beverages' are made is not acceptable. A request for prospective effect is to be ascertained with regard to the facts and the circumstances of the case. In the present case, the impugned products are by no means 'powders from which beverages can be prepared'. The applicants' are also aware of the same. This is evident when the applicant admits that - *"Those are not special or specific goal oriented products although weight loss/gain, fat loss et cetera may be the incidental benefits."*. There was no case of mis-guidance as no clarification was issued out to the applicants'. Also, the applicants' have wrongly placed reliance on cases and orders in respect of products which were beverages. This act of the applicants' is not in appreciation of the provisions in the correct perspective. Reliance on the case of Chheda Marketing (cited supra) in support of the plea for prospective effect, I have to say that the facts, products and entries appearing therein are not in the least similar to the issue in the present proceedings. By no measure, the ratio therein can be said to be applicable to the facts of the present case. In the instant case, there was no misclassification or clarification communicated earlier. I have discussed earlier that the impugned products do not make beverages in respect of which determination orders or case laws are pointed by the applicant. In view thereof, I do not find any merits in the request of the applicants' for prospective effect.

06. Having deliberated thus, it is determined that -

### ORDER

(under section-56(1)(e) and section-56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11/2009/Adm-3/28/B- 3  
No.DDQ-11/2014/Adm-6/06

Mumbai, dt. 18/07/2014

1. The products put forth for determination, as reproduced in the Table below, are not '*Powders from which non-alcoholic beverages are prepared*'. They would be covered by the schedule entry E-1 of the Maharashtra Value Added Tax Act, 2002, thereby taxable @12.5%.

M/s. Neulife Nutrition Systems	INE/1922/10-11/LCL dt.15.03.2011	1) 100% Whey Gold (French Vanilla 2Lbs and Mocha Capuccino 1 Lbs) 2) Platinum Hydrowhey (Turbo Chocolate 3.5 Lbs) 3) Serious Mass (Straw 12 Lbs)
	INE/1629/10-11/LCL dt.31.01.2011	1) PRO Complex GAINER (Choc 10.16 Lbs and Straw 10.16 Lbs) 2) True Mass (Chocolate 5 Lbs)
	INE/1517/10-11/LCL dt.15.01.2011	1) Syntha 6 (Chocolate 5 Lbs)

M/s. Neulife Nutrition Systems Pvt. Ltd.	INE/LCL/12-13/1884 dt.13.03.2013	1) 100% Whey Gold (Straw 2.07 Lbs, Cookie & Cream 2.073 Lbs, Choco Mint 2.073 Lbs, Straw 5.174 Lbs and Vanilla Ice Cream 5 Lbs) 2) Syntha 6 (Chocolate 5 Lbs)
	INE/LCL/12-13/1863 dt.12.03.2013	1) Serious Mass (Choc 6 Lbs) 2) Platinum Hydrowhey (Chocolate 3.5 lbs)
	INE/LCL/12-13/1698 dt.13.02.2013	1) True Mass (Chocolate 5.75 Lbs and Strawberry 5.75 Lbs)
	INE/LCL/12-13/1263 dt.14.12.2012	1) PRO Complex GAINER (Choc 5 Lbs)
	INE/LCL/12-13/1212 dt.12.12.2012	1) Jumbo (chocolate 10lbs, 6.4lbs Chocolate 2860g and 10lbs Strawberry 4400g) 2) Jumbo Professional (chocolate 7.15lbs) 3) Zero Carb Isobest (Capuccino 2lbs and Vanilla Veryberry 2lbs) 4) 100% Whey Protein Professional (5.2lbs Straw White Chocolate)

2. For reasons as discussed in the body of the order, the request for prospective effect placed by both the applicants' is rejected.



(DR. NITIN KAKEER)

COMMISSIONER OF SALES TAX,  
MAHARASHTRA STATE, MUMBAI