FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 14/09/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70814/2016-EX[DB] dated 13/06/2016

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	E/1509/2007	INDO ASIAN FUSEGEAR LTD. A-39, PHASE-11, EXTENSION, NOIDA-201305
		Name and Address of Respondent
2		C.C.E. NOIDA C-56/42, Sector-62, Noida-201307

Copy To

3 Advocate(s) / Consultant(s): SH V.L.KUMARAN,ADV
5, JANGPURA EXTENSION
LINK ROAD, NEW DELHI

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070
12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38
13 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082
14 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

15 C.D.R. 16 Office Copy 17 Guard File

Asstt. Registrar

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH: ALLAHABAD

DIVISION BENCH

Appeal No. E/1509/2007-EX(DB)

Dated of Hearing/decision: 13/6/2016

[Arising out of Order-in-Appeal No. 16/CE/APPL/NOIDA/07 dated 20.03.2007 passed by Commissioner (Appeals) Customs & Central Excise NOIDA]

1.	Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	Yes
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

Indo Asian Fusegear Ltd. Appellant

Vs.

CCE, NOIDA Respondent

Appearance:
Present for the Appellant: Shri Atul Gupta, Advocate
Present for the Respondent: Shri Kamal Puggal (Assistant Commissioner) A.R.

Coram: Hon'ble Shri Anil Choudhary, Member (Judicial)
Hon'ble Shri Anil G. Shakkarwar, Member (Technical)

Final Order No. 70811/2016

Per: Anil Choudhary

The appellant a manufacturer of Compact Fluorescent Lamps (C.F.L.) is in appeal against Order-in-Original and Order-in-Appeal whereby it has been held that on bulk sale by them wherein each C.F.L. was marked with MRP, will be liable to be valued for duty under Section 4 of the Central Excise Act, 1944, instead of Section 4A.

2. During the period 01.4.2001 to 31.8.2004 the appellants sold, in some cases, CFL in bulk to Govt. Departments namely (a) Assistant Garisson Engineer, (b) Central Department of Stores Bamaroli (c) BHEL, and (d) Western Refrigeration (O.E. Manufacturer) and valued the same on MRP basis under Section 4A of the Act and paid the duty on the abated value of MRP. Revenue was of the views that in these cases goods were not sold to ultimate customers in retail but consumed either by them (bulk) or utilised for the manufacturing of other articles. It appeared that MRP based assessment under section 4A(1) of the Act shall not be applicable to such clearances, not being retail sale. Notice was issued invoking the extended period on 3/5/06. The appellant appeared and contested the show cause notice and the same was adjudicated vide Order-in-Original dated 26/9/06 confirming the proposed demand of Rs.2,83,970/- with Education Cess and further penalty of equal amount was imposed under Section 11 AC of the Act. Being aggrieved the appellant preferred appeal before ld. Commissioner (Appeals) on the ground that as per Rule 3 of the Standards of Weight and Measures (packaged Commodities) Rules, 1977, (PC Rules for short) the requirement for application of the PC Rules is that the package should be "intended for retail sale" and there is no requirement that the goods should be actually sold in retail. In this case the package of goods in question, indicates that the same is intended for retail sale and, therefore, as per Rule 3 of the PC Rules also, the goods in question squarely fall within

the ambit of the expression 'Retail sale' attracting the provisions of the Standards of Weight and Measures Act, 1976 and the P.C. Rules made there under. It was also pleaded that the contract rate realised by the appellant is variably less than the MRP affixed on the goods and therefore the finding that price printed on the goods in question does not constitute sole consideration for the sale is presumptuous, erroneous and perverse and therefore not tenable. Ld Commissioner (Appeals) was pleased to dismiss the appeal observing that the contention of the appellant that the contract price realised by them is less than the MRP affixed is not based on facts. The contract price show at Sl.No. 1 of Annexure 'Á' to show cause notice is Rs.15,245/- while MRP is Rs.12,390/- only. Thus it is clear that the aforesaid claim of the appellant is not correct. Thus it is evident that MRP is not the sole consideration in this case.

3. Being aggrieved the appellant is before this Tribunal. The ld. Counsel urges that the ld. Commissioner have committed mistake of fact and thus the impugned order is vitiated. He takes us to the relevant Annexure 'A' to the show cause notice dated 8.5.2006, in the paper book from which it is evident that the sale price under contract is Rs.15,345/- for 175 units of CFL and the same is assessed under section 4A, after abatement, at Rs.12,390/-. The ld. Counsel further urges that it is admitted fact that CFL bulbs are required to be affixed with MRP and accordingly Central Excise duty is required to be paid under section 4A of the Act. It is also an admitted fact that the bulbs cleared by them were marked with MRP before clearance from the factory. It is further urged that it is not the concern of the appellant as to what the buyer would do after purchase of the CFL from them. It is

further admitted fact that neither the MRP mentioned on the retail packs had been crossed out, nor the packs were labelled as 'meant for industrial/institutional use only'. Under such circumstances the ld. Counsel urges that the facts are squarely covered in their favour by the ruling of the Honourable Apex Court in the case of **CCE versus Liberty Shoes Limited - 2015 (326) E.L.T. 422 (S.C.)** wherein under the similar facts and circumstances Liberty Shoes Ltd. had sold shoes to institutional buyers in bulk on contractual price and the shoes were also marked with the MRP and they had paid duty under section 4A after availing abatement, the Apex Court held as follows:-

> "34. There is one more substantial reason supporting the appellant. Shri Ravinder Narain invited our attention to Rule 34 in Chapter V of the SWM (PC) Rules which provides for exemptions. We have quoted Rule 34 earlier. The Rule has now been amended. However, under the unamended Rule there is a specific declaration that the SWM (PC) Rules shall not apply to any "package" containing a commodity if the marking on the package unambiguously indicates that it has been specially packed for the exclusive use of any industry as a raw material or for the purpose of "servicing any industry, mine or quarry". Learned counsel points out that the "package" which is sold by the assessee mentions that it is specially packed for the exclusive use of the catering industry.

35. Learned counsel further argues that such "package" was for the purposes of "servicing the hotel industry or catering industry" as the case may be. Learned counsel is undoubtedly right when he seeks to rely on Rule 34 which provides for exemption of the "packages" which are specially packed for the exclusive use of any industry for the purposes of "servicing that industry". Shri Subba Rao supported the view expressed by the Tribunal that the words "servicing any industry" could not cover the present case and he further suggested that ice cream cannot be a "raw material" for any industry. He is undoubtedly right that ice cream cannot be termed as "raw material" for any industry. However, the words "or for the purposes of servicing any industry" are broad enough to include the transaction in question i.e., the sale of a pack of ice cream to the hotel industry. Hotel does not manufacture the ice cream and is dependent entirely upon the sale of ice cream to it by the assessee for ultimately catering the commodity in the package i.e., ice cream to the ultimate consumer. In our view this can be squarely covered in the term "servicing any industry". The word "service" is a noun of the verb "to serve". This Court in *Coal Mines Provident Fund Commr.* v. *Ramesh Chander Jha* in a different context, observed as under : (SCC p.592, para 7)

"7. The word 'service' in Section 2(17)(h) must necessarily mean something more than being merely subject to the order of the Government or control of the Government. *To serve means 'to perform function; do what is required for'.*"

Aur

4. The ld. Counsel further states that no case of suppression or contumacious conduct is made out against them and as such the extended period of limitation is also not invocable.

5. The learnedly A.R. for Revenue relies on the impugned order. Further relying on the findings in the orders of the Court below he emphasises that the goods have been purchased by institutional buyers in bulk, the provisions of the packaged commodities rules for marking the same with MRP is not required and accordingly the appellant was required to pay duty under Section 4 as is held by the Courts below.

6. Having considered the rival contentions we find that the issue is no longer res Integra, as held by the Honourable Supreme Court in the case of Liberty Shoes Ltd (supra) and accordingly we hold that there being no dispute that CFL was an item specified under Section 4A of the Act (which is covered under the Packaged Commodities Rules) and further MRP was affixed on the products supplied, as such the same would not exempted under Rule 34 of the Rules, read with the provisions of Section 4A of the Central Excise Act, 1944. Further we find that the finding of ld. Commissioner (Appeals is based on mistake of fact, the impugned order is fit to be set aside. Further we hold that under the facts and circumstances no case of contumacious conduct or suppression is made out and as such extended period of limitation is not available to Revenue. We allowed the

appeal and set aside the impugned order with consequential benefits to the appellant.

(Dictated and pronounced in the open Court)

-Sd-
(ANIL G. SHAKKARWAR)
MEMBER (TECHNICAL)

-Sd-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(K. Gupta)

प्रमाणित प्रति / Certified True Copy

16/10

सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
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