CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
OLD RED BUILDING, 38,M.G.Marg,CIVIL LINES, ALLAHABAD

Dated: 17/5/2016

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/ 70208-70209/2016 DB dated 12/1/2016

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
	E/3009/2012 E/58566/2013	CONTINENTAL MILKOSE INDIA LTD P.O-KULESRA NOIDA DADRI ROAD GAUTAM BUDH NAGAR UP

Name and Address of Respondent	CCE, NOIDA C-56/42, SECTOR-62 NOIDA

Other Appellants and Respondents as per Annexure

Copy To

3Advocate(s) / Consultant(s

SH PUNEET BANSAL,ADV
B-3/58, 3RD FLOOR
SAFDARJUNG ENCLAVE
N DELHI-29

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 C.D.R. 15 Office Copy 16 Guard File.
17.M.S KNOWLEDGE PROCESSING PVT LTD(TAMMANAGEMENTINDIDA.COM)

Asstt. Registrar
Regional Bench, Allahabad

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

Ex. Appeal Nos.3009/12 & 58566/13

Arising out of OIA Nos.153/CE/APPL/Noida dated 18.06.2012 passed by Commr. (Appeals) of Customs & Central Excise, Noida & OIO No. NOI-EXCUS/000/COM/065/2012-13 dated 31.03.2013 passed by Commr.of Customs & Central Excise & Service Tax, Noida.

For approval and signature:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H. K. THAKUR, MEMBER (TECHNICAL)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
3. Whether His Lordship wishes to see the fair copy of the Order? : Seen
4. Whether Order is to be circulated to the Departmental Authorities? : Yes

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M/s Continental Milkose India Ltd.

...APPELLANT(S)

VERSUS

Commr. of Central Excise, C.Ex. & S.Tax, Noida

RESPONDENT (S)

APPEARANCE

Shri Puneet Bansal & Shri Prateek Jain, both Advocates for the Appellant (s)
Shri Rajeev Ranjan, Joint.Commr. (D.R.) for the Department

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. H. K. THAKUR, MEMBER (TECHNICAL)

DATE OF HEARING & PRONOUNCEMENT : 12. 01. 2016

Final ORDER NO. 70208-70209/2016

सीमा शुल्क उत्पाद एवं सेवा कर अपीलीय अधिकरण
CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL

Per Mr. Anil Choudhary :

In Ex.Appeal No.3009/12, the appellant is in appeal for the period May 2007 to September 2010 against the order passed by the Commissioner (Appeals), Customs and Central Excise, Noida dated 18/6/12, whereas in Ex.Appeal No.58566/13, the appellant is in appeal against order passed by the Commissioner of Central Excise, Noida dated 31/3/2013 for the period October, 2011 to March, 2012.

2. The brief facts are that the appellant is a manufacturer of malted milk food, malted food and malt extract powder etc. falling under chapter heading 190190 of the schedule to CET Act, 1985. The appellant cleared their products in the packing of 500 gm which are further packed in the containers of 12 Kg.,11 Kg., 6 Kg. & 4 Kg. et cetera. The goods have been cleared by ascertaining assessable value as per Section 4 of the Act for the bulk supplies made to Defence, Govt. of India. Part of the goods manufactured bearing MRP were stock transferred to their Guwahati office and the duty was assessed under section 4A of the Act after allowing abatement on the MRP as eligble. It appeared to revenue that the goods supplied in bulk to Defence, Govt. of India, wherein no MRP is mentioned on the packages are also assessable under the provisions of Section 4A of the Act, instead of Section 4 as done by the appellants in view of Notification No. 2/2006-CE (NT) and Notification No.14/2008-CE (NT) as amended and Notification No.49/2008-CE (NT) as amended, the goods described by the appellant, aren't liable to be assessed on the basis of MRP under Section 4A of the Act for bulk sale to Defence. In pursuance

to enquiry made by revenue, the appellant stated that during the period, they manufactured malted food classifying under heading 190190. Since the goods were sold in bulk quantity and not to retail, they were not affixing MRP on such goods. They were selling the goods to one party only and the goods sold by the appellants were packed in 6 KG packs which were further bulk packed in cartoon box. Accordingly, the provisions of Notification No.2/2006 are not attracted in their case. As it appeared to revenue that the goods sold in bulk are also assessable under Section 4A of the Act, show cause notices were issued demanding duty short paid, requiring the appellant to show cause as to why not the goods be assessed under Section 4A of the Act and the duty allegedly short paid be not demanded along with interest and further penalty was proposed under Rule 25 of Central Excise Rules, 2002, read with section 11 AC of the Act. The appellant contested the show cause notice by filing reply. It was stated that although the goods manufactured by them, aren't specified in the Notification No.2/2006- CE but liable to assessment under Section 4 (as only when all the conditions are attracted in respect of goods cleared). The goods were manufactured to be supplied to Defence as per the contract for supply on wholesale basis under DGS & D rate contract dated 9/12/2005. As in the course of inspection by DGS & D, the goods were rejected and the appellant did not supply the same to Defence during some part of the impugned period. In such circumstances, the appellant could not locate a buyer, who accepted to buy the rejected goods on as is where is basis and accordingly, sold in bulk itself, assessing the duty under Section 4 of the Central Excise

Act, on the transaction value. The appellant further relies on the ruling of Honourable Supreme Court in the case of Jayanti Food processing Private Ltd. Vs. CCE, Rajasthan : 2007 (215) ELT 327, it was held that after the introduction of Section 4A, the nature of sale was lost in the sense that valuation did not depend upon the factor whether it was a wholesale or sale in bulk or a retail sale. The whole section covered the goods which were packaged and sold as such with the rider that such package had to have a retail sale price thereupon under the provisions of the Standard Weight and Measurement Act, 1976 and Rules made thereunder. The view from a plain language of the Section, whether the goods are excisable and packaged and further such packages are required to mention the MRP thereon under the SWM Act and Rules made thereunder or under any other law and further such goods as specified by the Central Government by Notification, then the valuation of such goods would be on the basis of the retail sale price of such goods. Further, the goods in question, were sold in whole sale package and not meant for retail sale, in 4 kg./9 kg./6 kg. which were further bulk packed in cartoon boxes without having affixed the MRP on such packing. It was further clarified that the goods were in any case not saleable in the same packaging and as such, the sale could only be in bulk and the clearances made by them were assessable under Section 4 of the Act. Accordingly, the appellant paid the duty. The expression "retail sale" is defined under Rule 2 (q) and for the relevant period, the definition of retail sale, in relation to the commodity was that, the sale distribution or delivery of such commodity through retail sale agencies or other instrumentality to an individual or a group of individuals or any other consumer. Further, the retail pack was defined to mean a package containing any commodity which is produced, distributed, displayed, delivered or stored, through retail sale agency etc. for sale et cetera for consumption by an individual ". Further retail sale price was defined under Rule 2 (r) as to mean the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on packages, there shall be printed on the package the words "maximum retail price". It was further stated that under Rule 3 of the said Rules, the provisions of MRP did not apply to package commodities meant for industrial consumers or institutional consumers. Under the explanation to the rule "institutional consumer" means those consumers who buy a package commodity directly from the manufacturer for use in service industry like transportation including railways, airways, hotels or any other similar service industries.

3. The SCN was adjudicated and the demands were confirmed with interest and further equal amount of penalty was imposed under the provisions of Rule 25 read with Section 11 AC of the Act. In Ex.Appeal No.58566/13, the order was passed by the Commissioner and the appellant is before this Tribunal. In Ex.Appeal No. 3009/12, the order-in-original was passed by the Asstt.Commissioner and thereafter, being aggrieved, the appellant had preferred appeal before ld. Commissioner (Appeals) who was pleased to uphold the impugned order directing the adjudicating authority to recalculate the duty

leviability after allowing the rebate of 20% of the MRP and also confirmed the penalty.

4. The ld. Counsel for the appellant states that the issue is no longer res-integra and stands settled in the appellant's own case for the period October 2010 to July 2011. The Commissioner (Appeals) has decided the issue in their favour vide Order-in-Appeal No.NOI/Excus/000/APPL/172-173/13 dated 14/8/13 and the same is accepted by the revenue. Similarly for the period August, 2011 to September 2011, the matter has been decided in favour of the appellant by Commissioner (Appeals) by the Order-in-Appeal No. NOI/Excus/000/APPL/191/13-14 dated 29/9/13 and the same has been accepted by the Revenue as informed to the appellant, in response to the query made from the Revenue. The ld. Counsel further states that for the period April,2012 to October,2013 the Commissioner of Central Excise Noida – II, vide order-in-original dated 31/12/15, have also held in favour of the appellant accepting the review status of the order-in-appeal and thereby dropped the show cause notice.

5. The ld.A.R. for revenue relies on the impugned order.

6. Having considered the rival contentions, we find that the issue is no longer res-integra, as the revenue have accepted that in case of bulk sale made by the appellant, without affixing MRP to the institutional customers and sale of rejected lot to other customer on as is where is basis the provisions of Standards of Weight & Measurements Act, 1976 or the Legal Metrology (Packaged

Commodities) Rules, 2011, are not applicable and accordingly, the appellants have rightly assessed the duty under the provisions of Section 4 of the Act in case of clearance to institutional consumer in bulk sale packages not meant for retail sale. In this view of the matter, the appeals are allowed and the impugned orders are set aside. The appellant will be entitled to consequential benefits in accordance with law.

(Pronounced in the open Court)

Sd/-

(H.K.THAKUR)
MEMBER (TECHNICAL)

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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