

AUTHORITY FOR ADVANCE RULINGS
(Central Excise, Customs and Service Tax)
Hotel Samrat, 4th Floor, Kautilya Marg, Chanakyapuri
New Delhi

Present:

Justice V.S. Sirpurkar (Chairman)
Shri S.S.Rana (Member)
Shri R.S.Shukla (Member)

The 12th day of August, 2016

Ruling No. AAR/Cus/ 28 /2016

in

Application No. AAR/44/Cus/27/2013

Name & address of the applicant : M/s Middleby Celfrost Innovations Pvt. Ltd.(formerly known as M/s Middleby Commercial Food Innovations Pvt. Ltd., Gurgaon

Commissioner concerned : Commissioner of Customs(Port-Import), JNCH, Nhava-Sheva

: Commissioner of Customs
Air Cargo Complex, Mumbai

: Commissioner of Customs(ICD)
TKD, New Delhi

: Commissioner of Customs (Import &Genl.), IGI Airport, New Delhi

: Commissioner of Customs (Airport & Air Cargo), Chennai

: Commissioner of Customs,
Queen's Road, Bangalore

: Commissioner of Customs,
(Airport & Administration),Kolkata.

Present for the applicant : Sh. B.L. Narasimhan, Advocate

Present for the Department : Sh. Govind Krishna Dixit
Authorised Representative

RULING

‘Middleby Commercial Food Innovations Pvt. Ltd (hereinafter also referred to as applicant) is a private limited company registered in India under Companies Act, 1956. It is a subsidiary of Middleby Europe SL, Spain. Middleby Europe SL, Spain is engaged in the business of food service equipment and is known worldwide for delivering a range of high quality food service equipment. After extending its reach in various other countries, Middleby Europe has now formed the applicant as its wholly owned subsidiary. It has been set up with the aim to establish commercial refrigeration and food service products in India. Its focus is to provide international range of refrigeration, freezing and foodservice products & solutions for hotels, restaurants, bars, frozen yogurt stores, coffee shops, bakeries, ice cream & beverage, food retail and the healthcare segments. The mode of operation of the applicant’s business will include three stages:

- a) Placement of order: At first, the applicant will place its order on the foreign supplier(s) and will inform the name and the quantity of the products it need.
- b) Importation: Upon placement of the order, the foreign supplier will export the products in pre-packaged form to the Applicant in India.
- c) In the meanwhile the consumers will place their order on the applicant. Once the product reaches the applicant, it will then supply the product to the consumers on the basis of their demand.

In order to start its business activities in India, the applicant now proposes to import refrigeration and food services products such as chest freezers, professional refrigeration products, refrigerated displays, ice machines, upright freezers, cold room, bakery ovens, commercial microwave ovens for baking / grilling, catering products, mini-bars, coffee machines, confectionary showcases, food processors etc. The applicant will not undertake any activity on these imported products but would sell the same to the consumers / customers as such. There are three channels in which the applicant has finalized to sell the products:

- a.) Sales to individual dealers for further sale,

- b.) Sales to industrial consumer such as Pharmaceutical units etc. directly,
- c.) Sales to others.

Applicant submits that the business model of the applicant is such that it will not be known at the time of importation whether the goods to be imported will be sold to industrial consumer, institutional consumer or retail consumer. Further, there is always a possibility that the same may be sold to the retail consumer, in which case; there will be a requirement to affix MRP under the Legal Metrology Act read with Legal Metrology (Packaged Commodities) Rules on such packages of goods to be imported.

2. The question on which advance ruling sought is as follows:-

Whether the applicant is eligible to avail the benefit of exemption from payment of SAD provided under Notification No. 21/2012-Cus.?

3. The thrust of submissions made by Revenue is that the conditions contained in Notification No. 21/2012-Cus dated 17.03.2012 are not satisfied in respect of the goods proposed to be imported by the applicant, therefore, goods cannot be exempted from additional duty of Customs (SAD) levied under Section 3 (5) of the Customs Tariff Act.

4. Notification No. 21/2012-Cus dated 17.03.2012 inter-alia exempts all pre-packaged goods intended for retail sale in relation to which it is required under the provisions of the Legal Metrology Act, 2009 or the rules made there-under or under any other law for the time being in force, to declare on the package thereof the retail sale price (RSP) of such article, from whole of additional duty of Customs (SAD) levied under Section 3 (5) of the Customs Tariff Act, provided importer declares;

- I) The State of destination where goods are intended to be taken immediately after importation, whether for sale or distribution or stock transfer; and
- II) His VAT registration No. or Sales Tax registration No. or Central Sales tax registration No., as the case may be in said State.

5. With regard to the above referred two procedural conditions, applicant submits that he already possesses VAT registration number and State of destination, where goods are intended to be taken immediately after importation, would be declared at the

time of subject import. Thus, procedural conditions would be met. Further, it is noticed from the above exemption Notification that substantive conditions include;

- a) pre-packaged goods
- b) intended for retail sale
- c) to declare on the package, the RSP as required under Legal Metrology Act or rules made there-under or any other law for the time being in force.

Pre-packaged goods

6. Section 2 (l) of the Legal Metrology Act, 2009 (L M Act) defines “pre-packaged commodity” as a commodity which without the purchaser being present is placed in a package of whatever nature, whether sealed or not, so that the product contained therein has a pre-determined quantity. Applicant has stated that they propose to import pre-packaged goods. This issue has not been disputed.

Intended for retail sale

7. Chapter II of Legal Metrology (Packaged Commodities) Rules, 2011 (P C Rules), as the heading suggests, is with respect to “Provisions applicable to packages intended for retail sale”. As per Rule 3 of said Rules, provisions of this Chapter II are not to apply to –

- i) packages of commodities containing quantity of more than 25 kg or 25 litre excluding cement and fertilizer sold in bags up-to 50 kg; and
- ii) packaged commodities meant for industrial consumers or institutional consumers.

8. Since Rule 3(ii) of P C Rules uses the terms industrial consumers or institutional consumers, therefore, definition of “industrial consumer” and “institutional consumer” needs to be examined. Definition of these 2 terms, as given in the P C Rules, 2011 is reproduced as under;

Rule 2. Definitions – In these rules, unless the context otherwise requires –

(bb) “industrial consumer” means the consumer who buys packaged commodities directly from the manufacturer for use by that industry;

(bc) “ institutional consumer” means any institution which hires or avails of the facilities or service in connection with transport, hotels, hospitals or such other service institutions which buy packaged commodities directly from the manufacturer for use by that institution.

9. Revenue has brought to our notice that above referred Rule 2 (bb) and (bc) have been amended vide Notification issued from F. No. WM-9 (86) / 2014 dated 14.05.2015. Amended definition w.e.f 14.05.2015 is as under;

*(bb) “industrial consumer” means the consumer who buys packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that industry **and** the package shall have declaration “not for retail sale” (emphasis supplied).*

*(bc) “ institutional consumer” means the institution who hires or avails of the facilities or services in connection with transport, hotel, hospital or other organization which buy packaged commodities directly from the manufacturer or from an importer or from wholesale dealer for use by that institution, **and** the package shall have declaration “not for retail sale” (emphasis supplied).*

10. It is observed that prior to 14.05.2015, industrial consumer and institutional consumer meant any consumer / institution, who bought packaged commodities directly from the manufacturer for use by that industry or institution, as the case may be. Applicant has also submitted that said PC Rules will not be applicable for industrial / institutional consumer provided packaged goods are bought by them directly from the manufacturer. In the case before us, prior to 14.05.2015, applicant did not buy the goods directly from the manufacturer but from the importer. Therefore, the provisions of Chapter II i.e. relating to packages intended for retail sale are applicable to the applicant. Further, w.e.f. 14.05.2015, Chapter II of PC Rules, 2011 is not to be applicable if packaged commodities are bought directly from the manufacturer or importer or wholesale dealer for use in that industry/institution and the package will be

containing the declaration “not for retail sale”. In short, applicant would not fall under the definition of industrial / institutional consumer, as package will not be containing the declaration “not for retail sale” and thus, Chapter II of said Rules, 2011 regarding provisions applicable to packages intended for retail sale, would apply to subject pre-packaged goods.

Declaration of RSP on packages as required under Legal Metrology act or rules made there-under etc.

11. Applicant submits that the business model of the applicant is such that it will not be known at the time of importation whether the goods to be imported will be sold to industrial consumer, institutional consumer or retail consumer. Further, there is always a possibility that the same may be sold to the retail consumer, in which case; there will be a requirement to affix MRP under the LM Act read with PC rules on such packages of goods to be imported. In this regard, applicant relied on the decision in case of H&R Johnson Ltd vs. Commissioner of Central Excise, Raigad reported at 2014 (306) ELT 645, where appellant was manufacturer of ceramic tiles and cleared the same to institutional, industrial and retail buyers. The packages of all tiles were same and MRP was declared. The Tribunal observed that there is no difference in respect of packages of tiles sold to retail consumers and institutional buyers, having MRP declared on them and no such declaration “not meant for retail sale” etc on them. Tribunal held that supplies made to various institutional buyers are not excluded from the declarations of MRP under the PC Rules. This decision of Tribunal is confirmed by the Hon’ble Supreme Court and reported in 2015 (39) ELT A227. We are in agreement with the views of the Tribunal, which was primarily based on the clarification rendered by the authorities implementing Legal Metrology (Packaged Commodities) Rules, 2011. As the pre-packaged commodities in this case are covered by Chapter II of said Rules i.e. provisions applicable to packages intended for retail sale, the same should also satisfy all conditions regarding declarations to be made on every package, as per Rule 6 including sub-rule (e) regarding declaring the RSP of the package. As pre packaged goods to be imported would have declaration of RSP on them, this condition is also met.

11. In view of the above, it can be concluded that the applicant would be satisfying all the conditions laid down in Notification No. 21/2012-Cus dated 17.03.2012. Thus, we rule as under;

Applicant is eligible to claim the benefit of exemption from payment of SAD under Notification No. 21/2012-Cus on import of pre-packaged goods.

Sd/-

(S.S. Rana)
Member (R)

Sd/-

(V.S. Sirpurkar)
Chairman

Sd/-

(R.S.Shukla)
Member (L)