CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench

Court - I

Appeal No. E/1396/2010

(Arising out of Order-in-Appeal No.40/2010 (H-IV) CE dated 29.03.2010 passed by CCCE & ST (Appeals-II), Hyderabad)

Vivimed Labs Ltd ….. Appellant(s)

Vs.

CCCE & ST, Hyderabad - IV ….. Respondent(s)

Appearance

None for the Appellant.

Shri P.S. Reddy, Asst. Commissioner/AR for the Respondent.

Coram:

HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)

HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 25.09.2018
Date of Decision: 25.09.2018

FINAL ORDER No. A/31256/2018

[Order per: P.V. Subba Rao.]

1. This appeal has been filed against the Order-in-Appeal No. 40/2010 (H-IV) CE dated 29.03.2010.

2. The facts of the case in brief are that the appellant is a manufacturer of pharmaceutical products and clears the same on payment of duty. They also manufacture some products as physician samples which are not sold but given free to the doctors. They have been paying duty on physician's samples on cost construction basis, taking the value as 115% of the cost of production on the ground that there is no sale. A show cause notice was issued to them on 14.07.2009 demanding duty as per the price of similar products sold in the market i.e., under Rule 4 of the Central Excise Valuation Rules for the period January 2005 to July 2008. It was also proposed to impose penalty under Sec.11AC and demand interest under Sec.11AB. Further it was proposed to impose penalty under Rule 25 of Central Excise

Rules. After following due process, the original authority confirmed the demands and interest and imposed penalties as proposed in the show cause notice. Aggrieved, the appellant filed an appeal with the first appellate authority who dismissed the appeal and upheld the Order-in-Original. Hence, this appeal.

3. None appeared for the appellant despite notice. We heard the departmental representative and perused the records. The facts of the case are not in dispute that the appellant manufactured physician samples and cleared them on payment of duty on cost construction basis taking 115% of the cost of production of the goods under Rule 11 of Central Excise Valuation Rules read with Rule 8 thereof. Products which were sold by the appellant were chargeable to duty with reference to the retail sale price with respect to Central Excise Rules, 1944. The short question to be considered is whether the medicines which are cleared as physician samples are the same as the goods which were sold into the market or they should be considered as a different class of products and charged to duty accordingly. If they are treated as a different class of products, they cannot be charged duty on the basis of sale price because there is no transaction value and the samples are free. On the other hand, if goods are treated same as the ones which are sold in the market, although packet size may be different, then the price has to be paid in terms of Rule 4 of Central Excise Valuation Rules i.e., at the price which the similar goods were sold in the market. In their appeal the appellant brings to our notice that when the Board had different views at different points of time on the matter. In CBEC Circular No. 643/34/2002-C.Ex dated 01.07.2002 at S.No.13 it has been clarified by the Board that valuation of free samples should be done as per Rule 11 of Central Excise Valuation Rules read with Rule 8. It further clarifies that "In other words the

assessable value should be 115% of the cost of production or manufacture of the goods." In the year 2005, CBEC issued Circular No. 813/10/2005-C.Ex dated 25.04.2005 which at S.No.13 clarified that samples which are distributed free should be valued as per Rule 4 of Central Excise Valuation Rules, 2000. Further in the case of Indian Drugs Manufacturer's Association [2008 (222) ELT 22 (Bombay)], the Hon'ble High Court of Bombay held that physician samples are no different from the samples which are sold as they are similar or identical to each other and have the same quality or character and hence should be valued accordingly. Similarly, in the case of Cadila Pharmaceuticals Ltd [2008 (232) ELT 245 (Tri-LB)], it has been held by the majority members that physician samples are no different from other goods sold except for difference in quantity or packing and hence, Rule 8 of Central Excise Valuation Rules does not apply and Rule 4 applies read with Sec.4 and Sec. 4A of the Central Excise Act.

4. In view of the position now settled that the physician samples should be valued at the same rate at which similar goods are sold in the market even if the packing size is different, we cannot find any infirmity on merits in the impugned order. The demand is therefore sustainable on merits. As far as the question of limitation is concerned, it is evident from the two circulars issued by the Board, that there was sufficient confusion and even the Board was of the opinion initially that the valuation has to be done on cost construction basis. In such scenario, the assessee cannot be faulted for following such a practice even if it is incorrect as per the subsequent directions of the Board and the judicial pronouncements. There was a reasonable cause for the appellant to mistakenly value the goods on cost construction basis instead on the basis of comparable price under Rule 4. In view of this we find the extended period of limitation cannot be invoked in

this case and the demand for the extended period does not survive. As we have found that malafide cannot be attributed to the appellant, we also are of the firm view that the penalties need to be set aside. In conclusion, the demand for duty within the normal period along with interest is upheld. The demand for extended period is set aside and the penalties are set aside.

5. The appeal is disposed of as herein above.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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