IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.06.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR
W.P.No.9570 of 2019
and W.M.P.Nos.10187 and 10188 of 2019

M/s.CareNow Medical Private Limited
Rep. By its Managing Director & the
authorised Representative T.Rajkumar
3/272-5, Neelambur Road
Muthugounder Pudhur
Coimbatore- 641 406.
.. Petitioner

vs.

The Commissioner of GST & Central Excise
6/7, ATD Street
Race Course Road
Coimbatore - 641 018.
.. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records leading to issuance of Show Cause Notice No.1/2018 Commr. Dated 02/11/2018 on the file of the Respondent and quash the same and to pass such other orders as the Hon'ble Court may deem fit and appropriate in the facts and circumstances of the case and thus render justice.

For Petitioner : Mr.J.V.Niranjan for
M/s.J.V.Niranjan Associates
For Respondent : Mr.K.S.Ramasamy,
Central Government Standing Counsel

ORDER

Mr.J.V.Niranjan, learned counsel of M/s.J.V.Niranjan Associates [Law Firm], is before this Court on behalf of the sole writ petitioner. Mr.K.Ramaswamy, learned Central Government Standing Counsel is before this Court on behalf of the lone respondent.

2. A perusal of the earlier proceedings of this Court dated 29.03.2019 and 22.04.2019 made by my predecessor learned Judge reveals that this Writ Petition has not been admitted, but notice has been accepted by the Standing Counsel on behalf of the respondent at the admission stage itself.

3. Today, this matter is listed under the caption 'FOR EXTENSION OF INTERIM ORDERS' and the lone respondent has filed a counter affidavit dated 15.04.2019.

4. With the consent of learned counsel on both sides, the main writ petition itself is taken up, heard out and disposed of.

5. The entire matter turns on a very narrow compass.

6. The petitioner manufactures goods which are known as 'Eco Bath Wipes'. It is submitted that this is essentially a hospital product, which is used for patients, who have difficulty in going through regular bathing exercise. Be that as it may, the central theme of the controversy is classification of this product under the Central Excise Act, 1944, ('CE Act' for brevity)

7. To be precise, the central controversy is whether the aforesaid product i.e., Eco Bath Wipes has to be classified under CETH 34029091- 'washing preparations (including auxiliary washing preparations) and cleaning preparations, having a basis of soap or other organic surface active agents' or under CETH33073090-'Other bath preparations - others'.

8. In the aforesaid backdrop, there is no dispute that a test report was obtained from samples drawn and this test report dated 20.01.2016 (obtained by the respondent) was served on the writ petitioner. Pursuant to the aforesaid test report, Joint Director of Central Excise Department had written to the jurisdictional Superintendent on 07.11.2016.

9. Considering the narrow scope of the writ petition, the details of the test report are not being adverted to with particulars and elaboration. Suffice to say that writ petitioner, who was given a copy of the test report, assailed the same vide a communication dated 08.02.2017 bearing Reference No.CARENOW/075/2016-2017. To be noted, this communication is addressed to the Superintendent of

Central Excise.

10. Vide aforesaid communication dated 08.02.2017, writ petitioner had obtained test report from various sources, had collected the same, annexed the same to 08.02.2017 communication and had requested the Central Excise Department to cause the product to be tested again. In other words, writ petitioner sought retest of the same.

11. When matters stood as above, without a retest being conducted, respondent issued a 'Show Cause Notice' ('SCN' for brevity) dated 02.11.2018 bearing Reference No.C.No.V/30/15/10/2018-CEX Adin. (hereinafter 'impugned SCN' for the sake of brevity).

12. Assailing the impugned SCN, instant writ petition has been filed.

13. The pivotal and sheet anchor submission of the writ petitioner in assailing the impugned SCN is that, the same has been issued without conducting retest. To buttress this submission, learned counsel for writ petitioner relied on certain extracts from the Basic Excise Manual. Most relevant part of the manual that has been relied on is contained in paragraph 8, which is captioned 'Procedure for testing and re-testing of samples drawn by the Department'. Within paragraph 8 what is of utmost relevance for disposal of the instant writ petition is sub-paragraph 8.8 and the same reads as follows:

> 8.8 Whenever the assesssee is dissatisfied with the test carried out by Chemical Examiner he can apply to Deputy/Assistant Commissioner of Central Excise concerned for re-test within 90 days from the date on which the test result was communicated to him after payment of the prescribed fees. The prescribed fee for re-testing of the samples in the laboratories of Central Board of Excise and Customs have been prescribed in Appendix A of the Central Manual of Chemical laboratories in the Custom Houses containing procedure, rules and regulations by Directorate of Publication, Customs and Central Excise, New Delhi 1983 as under, which is reproduced below:
>
> "Schedule of fees for testing and re-testing sample in the laboratories of the Central Board of Excise & Customs

	SCHEDULE I FEE Rs.50/- PER SAMPLE			
1	Dangerous Petroleum for Certificate G. The Petroleum Rules, 1937			
	SCHEDULE II FEE Rs.60/- PER SAMPLE			
1	Asphalt		11	Miscellaneous (qualitative)
2	Chemicals drugs other than prohibited drugs; tests for B.P. Standards etc. (qualitative)		12	Opium (qualitative)
3	Cocaine		13	Press cake of baggasse(Sugar percent)
4	Denatured Spirit (qualitative) per sample.		14	Paper (Fibre Count)
5	Dyes(qualitative)		15	Potable spirits for obscuration
6	Gauging		16	Sackings and Hessians
7	Gold and Silver articles (qualitative)		17	Spent dye (for salt content)

14. In response to the above ground on which challenge to the impugned SCN is directed, learned Central Government Standing Counsel adverting to the counter affidavit submitted that Basic Excise Manual is only a guideline with regard to the procedure and the writ petitioner cannot insist that it should be mandatorily followed. This question is left open in the light of the trajectory, which the instant writ petition took today. The trajectory is set out infra.

15. In the hearing today it was pointed out that in paragraph 3 of the aforesaid counter affidavit of the respondent, it has been averred that the writ petitioner was not able to offer any comments to the aforesaid test report. However, there is a clear reference to the aforesaid letter written by the writ petitioner dated 08.02.2017, where the writ petitioner has sought for retest.

16. Learned Central Government Standing Counsel submits that the impugned SCN being a show cause notice it will not cause any harm to the writ petitioner, if the writ

petitioner is called upon to meet the same on merits.

17. This submission of Central Government Standing Counsel is prima facie acceptable. More so, in the light of leading cases in this regard rendered by the Hon'ble Supreme Court, particularly Union of India and another Vs. Kunisetty Satyanarayana reported in (2006) 12 SCC 28 and Union of India and another Vs. Vicco Laboratories reported in (2007) 13 SCC 270.

18. Hon'ble Supreme Court in the aforesaid case laws as well as a long line of authorities in this regard, had set out the parameters and determinants which will govern cases, where SCNs are challenged. To be noted, Vicco Laboratories is a case which pertains to classification of the product therein.

19. Therefore, in the aforesaid scenario, learned Central Government Standing Counsel very fairly submits that a retest shall be conducted, but the same has to be by way of an application to the Deputy/Assistant Commissioner of Central Excise as contained in paragraph 8.8 of the manual, i.e., Basic Excise Manual, which has been extracted and reproduced supra.

20. It is also submitted that the request for retest which has been made by the writ petitioner vide the aforesaid letter dated 08.02.2017, which has been sent to the jurisdictional Superintendent will be forwarded to the jurisdictional Assistant Commissioner of Central Excise and a retest will be conducted. Writ petitioner also, on instructions, undertakes to pay the prescribed fee forthwith. Besides paying prescribed fee all other attendant requirements which are necessary for retest shall be adhered to by the writ petitioner.

21. A copy of the retest report will be furnished to the writ petitioner, as expeditiously as possible and the writ petitioner shall thereafter send his reply to the impugned SCN.

22. The aforesaid exercise of retest shall be completed as mentioned supra as expeditiously as possible , but in any event within two months from the date of receipt of a copy of this order. The same shall be served on the writ petitioner within three (3) weeks there from and the writ petitioner shall send his reply to the impugned SCN within 30 days from the date of service of the retest report.

23. To be noted, retest has to be done in accordance with the Basic Excise Manual which has been relied on. Thereafter, respondent shall take a decision on the impugned SCN within 30 days from the date of receipt of reply to the show cause notice (as per calendar drawn up supra) in accordance with law.

Writ petition is disposed of on above terms. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

vsm

To
The Commissioner of GST & Central Excise
6/7, ATD Street
Race Course Road
Coimbatore - 641 018.

+1cc to Mr.K.S.Ramasamy , Advocate SR.No. 45224

W.P.No.9570 of 2019
and W.M.P.Nos.10187 and 10188 of 2019

VSN II (CO)
A.SK(08/07/2019)