

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

Appeal Nos. E/00693-00695/2010

Sl. No.	Appeal No.	Appellant	Respondent
1.	E/00693/2010	M/s. Malladi Drugs & Pharmaceuticals Ltd.	Commissioner of Central Excise, Chennai-III Commissionerate
2.	E/00694 & 00695/2010	M/s. Catazyme India Ltd.	Commissioner of Central Excise, Chennai-III Commissionerate
(Arising out of Order-in-Appeal No.86 to 88/2010 (M-III) dated 02.08.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)			

Appearance: -

Shri K.V. Subramaniyan, Advocate
for the Appellants

Shri R. Subramanyian, AC (AR)
for the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : 18.07.2018

Date of Pronouncement: 31.07.2018

Final Order Nos. **42169-42171/ 2018**

Per Bench,

The facts of the case are that M/s. Catazyme India Ltd. (herein after referred to as CIL) are situated within the premises of M/s. Malladi Drugs & Pharmaceuticals Ltd. (herein after referred to as

MDPL). On verification of accounts, it emerged that CIL were manufacturing Colloidal Platinum Catalyst (CPC) from platinum and regenerated platinum catalyst from spent platinum catalyst, which were cleared to MDPL for being used as catalyst for manufacture of bulk drugs. It further appeared that while obtaining a license, MDPL filed a ground plan declaring a portion used by CIL as their R&D section. It also emerged that CIL have not taken out any license and had also not intimated the department regarding their activities. It was revealed that MDPL purchased pure platinum and supplied the same to CIL for use in the manufacture of CPC. CIL is also engaged in regenerating used platinum catalyst supplied to them by MDPL. Accordingly, show cause notices were issued to CIL inter alia, proposing recovery of duty liability in respect of regenerated catalyst and also in respect of CPC manufactured from pure platinum along with interest thereon. The show cause notices also proposed imposition of penalties under various provisions of law on CIL and MDPL. In adjudication, the original authorities confirmed the demand of duty as proposed in the show cause notices and also imposed penalty under Rule 173Q of erstwhile Central Excise Rules, 1944 on CIL and under Rule 209A ibid on MDPL. The appeals filed by both CIL and MDPL were upheld by

Commissioner (Appeals) vide impugned order dated 2.8.2010.

Hence the appellants are now before this forum.

2. When the matter came up for hearing, on behalf of the appellants, Ld. Counsel Shri K.V. Subramaniyan made various oral and written submissions, which can be broadly summarized as under:-

2.1 CIL was only a job worker entrusted with the activity as per agreement entered into with MDPL. Ld. Counsel took us to pages 105 and 106 of the typed set to highlight the write-ups on the catalyst regeneration as submitted to the Superintendent of Central Excise, Ld. Counsel contends that these two write-ups by MDPL and CIL were not disputed by the lower authorities.

2.2 As per the write up, the spent colloidal platinum is supplied by MDPL for regeneration and activation; that the spent colloidal is regenerated by series of chemical acid treatments. That the catalyst is boiled in hydrochloric acid and subsequently with nitric acid and thereafter mixed with chemicals like hydrazine hydrate, gum accasia, sodium carbonate etc. to make it activated colloidal platinum catalyst. That whenever MDPL gives fresh platinum, it is added to such treatment stage.

2.3 Hence no separate process has been done to convert platinum into CPC. CPC is nothing but platinum, does not have any different chemical properties and is not distinct from the platinum metal.

2.4 Admittedly, the catalyst is only platinum and not colloidal platinum since the latter is only a dispersion of platinum metal in a liquid medium and no chemical change or an emergence of new product or different product. Hence there is no manufacture on colloidal platinum from platinum and hence no liability for duty demand arises according to section 2(f) of the Central Excise Act.

2.5 The process of recovery of platinum from the spent catalyst and then rebuilding a catalyst is not a process of manufacture since the identity of goods is not changed. He relies on the decision of the Tribunal in the case of *Reliance Industries Ltd. Vs. CC, Mumbai – 1998 (79) ECR 93 (Tribunal)*. The platinum is a catalyst in the manufacture of “Pseudo Ephedrine Hydrochloride” which was done by MDPL.

2.6 Burden of proof as to whether the process amount to manufacture lies on the department. However, department has not put any evidence to prove the allegation.

2.7 CIL had agreed by virtue of a contract to be a job worker to do certain activity in the factory premises of MDPL. The status of the

job worker doing certain job work in the premises of another manufacturer cannot be equated to a full scale manufacturer.

2.8 CIL as job worker has undertaken conversion or regeneration only out of raw materials supplied by MDPL and handed over the finished products for use by the latter, for which they have collected labour charges or conversion charges.

2.9 On the issue of penalties, Ld. Counsel submitted that the appellants were under the *bona fide* belief that no manufacturing is involved as CPL was only a platinum particle in desperation and further regeneration is nothing but reprocessing amounting to manufacture.

3. On the other hand, Id. AR Shri R. Subramaniyan supports the impugned order. The process carried out by CIL involves conversion of spent colloidal into activated platinum catalyst. Hence it is a process of regenerating resulting in emergence of a new product. The conversion of platinum supplied by MDPL to CIL is resulting in emergence of new product having a distinct name, character and use and also falls under specific Tariff entry in the Central Excise Tariff namely 2843. The appellants have themselves given two processes of production of the subject goods before the adjudicating authorities and before Commissioner (Appeals).

4. Heard both sides and have gone through the facts.

5.1 From the facts on record, it is clear that the duty liability is being demanded in respect of two processes carried out by the appellant, namely :

(i) **Regeneration of platinum catalyst from spent platinum**

catalyst: The demand for this activity is proposed in Annexure A(1) to the Show Cause Notice for the period 12.06.1987 to 15.03.1989, the duty in dispute being Rs. 3,61,754.34/-

(ii) **Process of making colloidal platinum catalyst from pure**

platinum: The demand on this activity is proposed in Annexure A(2) of the Show Cause Notice for the period 12.06.1987 to 15.03.1989 and 16.03.1989 to 31.12.1989, the disputed duty being Rs. 11,53,302.39/-.

5.2 These disputed issues have been capsulated by the adjudicating authority in para 12 of the order dt. 31.07.2003 as under:

(i) Whether in the facts and circumstances of the case excisable goods viz. colloidal platinum catalyst from platinum and also regenerated platinum catalyst from spent platinum catalyst amounts to manufacture.

(ii) If so, who is the manufacturer of the impugned goods, i.e. M/s.

CIL or M/s. MDPL.

(iii) Whether the extended period under proviso to Section 11A of Central Excise Act, 1944 is invokable to demand duty in the facts and circumstances of the case.

(iv) Whether M/s. MDPL, in whose premises the colloidal platinum catalyst and regenerated platinum catalyst are alleged to be manufactured are liable for any penalty under Rule 209A of the Central Excise Rules, 1944.

5.3 Coming to the **first** issue, we find that the process involves only conversion of spent platinum catalyst into regenerated/activated platinum catalyst. In our opinion, as a catalyst, by its very nature, does not participate in the chemical reaction but only facilitates the same, the spent platinum catalyst will still remain what it was before being used as a catalyst, namely, a platinum catalyst. By implication, regeneration of spent platinum catalyst into reactivated platinum catalyst will not bring about a new product in existence with a different name, character or use. This is the essence of the scope of manufacture, as expounded by the Hon'ble Apex Court in a number of judgments.

a. In the case of *Union of India Vs. Parle Products Pvt. Ltd. - 1994 (74) E.L.T. 492 (S.C.)*, the Hon'ble Apex Court held that the question whether the process involved amounts to manufacture within the meaning of Section 2(f) of the Central Excise and Salt Act, 1944 or not 'turns upon whether as a result of the application of the process a new and commercially distinct article, known to the market as such, emerges at the end.'

b. In *Cipla Ltd. Vs. Commissioner of Central Excise, Bangalore - 2008 (225) E.L.T. 403 (S.C.)* the Hon'ble Supreme Court held as under :

"11. Since marketability is an essential ingredient to hold that a product is dutiable or exigible, it was for the Revenue to prove that the product was marketable or was capable of being marketed. Manufacturing activity, by itself, does not prove the marketability. The product produced must be a distinct commodity known in the common parlance to the commercial community for the purpose of buying and selling. Since there is no evidence of either buying or selling in the present case, it cannot be held that the product in question was marketable or was capable of being marketed. Mere transfer of BMS by the appellant from its factory at Bangalore to its own unit at Patalganga for manufacture of final product does not show that the product was either marketed or was marketable."

c. In *Shyam Oil Cake Ltd. Vs. Collector of Central Excise, Jaipur 2004 (174) E.L.T. 145 (S.C.)*, the Hon'ble Apex Court inter alia took a similar view.

d. In *Commissioner of Central Excise Vs. Osna Chemical Pvt. Ltd.* - 2012 (276) E.L.T. 162 (S.C.), the Hon'ble Apex Court held as under :

"19. We may now examine whether the process in question, otherwise amounts to manufacture under the expansive Section 2(f) of the Act. It is trite to state that "manufacture" can be said to have taken place only when there is transformation of raw materials into a new and different article having a different identity, characteristic and use. It is well settled that mere improvement in quality does not amount to manufacture. It is only when the change or a series of changes take the commodity to a point where commercially it can no longer be regarded as the original commodity but is instead recognized as a new and distinct article that manufacture can be said to have taken place. In this behalf the following observations by the Constitution Bench of this Court in Tungabhadra Industries (supra) are quite apposite :

"In our opinion, the learned Judges of the High Court laid an undue emphasis on the addition by way of the absorption of the hydrogen atoms in the process of hardening and on the consequent inter-molecular changes in the oil. The addition of the hydrogen atoms was effected in order to saturate a portion of the oleic and linoleic constituents of the oil and render the oil more stable thus improving its quality and utility. But neither mere absorption of other matter, nor inter-molecular changes necessarily affect the identity of a substance as ordinarily understood..... The change here is both additive and inter-molecular, but yet it could hardly be said that rancid groundnut oil is not groundnut oil. It would undoubtedly be very bad groundnut oil but still it would be groundnut oil and if so it does not seem to accord with logic that when the quality of the oil is improved in that its resistance to the natural processes of deterioration through oxidation is increased, it should be held not to be oil."

(Emphasis supplied by us)

20. In Delhi Cloth & General Mills Co. Ltd. (supra), yet another Constitution Bench, exploring the concept of manufacture echoed the following views :

“14The word ‘manufacture’ used as a verb is generally understood to mean as “bringing into existence a new substance” and does not mean merely “to produce some change in a substance”, however minor in consequence the change may be. This distinction is well brought about in a passage thus quoted in Permanent Edition of Words and Phrases, Vol. 26, from an American judgment. The passage runs thus :-

“Manufacture implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use.”

(Emphasis supplied by us)

21. *In S.R. Tissues Pvt. Ltd. (supra), the issue for consideration was whether the process of unwinding, cutting and slitting to sizes of jumbo rolls into toilet rolls, napkins and facial tissue papers amounted to manufacture. While holding that the said process did not amount to manufacture this Court inter alia, held as under :*

“12.....However, the end-use of the tissue paper in the jumbo rolls and the end-use of the toilet rolls, the table napkins and the facial tissues remains the same, namely, for household or sanitary use. The predominant test in such a case is whether the characteristics of the tissue paper in the jumbo roll enumerated above is different from the characteristics of the tissue paper in the form of table napkin, toilet roll and facial tissue. In the present case, the Tribunal was right in holding that the characteristics of the tissue paper in the jumbo roll are not different from the characteristics of the tissue paper, after slitting and cutting, in the table napkins, in the toilet rolls and in the facial tissues.”

(Emphasis supplied by us)

22. *In Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers, [1980 \(6\) E.L.T. 343](#) (S.C.), a three Judge Bench of this Court, while deciding whether conversion of pineapple fruit into pineapple slices for sale in sealed cans amounted to manufacture, observed as follows :-*

“4.....Commonly, manufacture is the end result of one or more processes through which the original commodity is made to pass. The nature and extent of processing may vary from one case to another, and indeed there may be several stages of processing and perhaps a different

kind of processing at each stage. With each process suffered, the original commodity experiences a change. But it is only when the change, or a series of changes, take the commodity to the point where commercially it can no longer be regarded as the original commodity but instead is recognized as a new and distinct article that a manufacture can be said to take place. Where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another. Although it has undergone a degree of processing, it must be regarded as still retaining its original identity.

(Emphasis supplied by us)”

5.4 Applying the test of manufacture as consistently interpreted by the Hon’ble Apex Court, we find that the process of conversion of spent platinum catalyst into regenerated platinum catalyst cannot be considered as a process resulting in emergence of a new product having a different name, character or use. This being so, that part of the impugned order upholding the demand of Rs. 3,61,754.34/- in respect of such regenerated catalyst (Annexure A(1) of Show Cause Notice) cannot sustain and therefore, is **set aside**. So ordered.

6.1 The **second** dispute involves conversion of pure platinum to colloidal platinum catalyst. The Ld. Advocate for appellants has been at pains to emphasize that no new product emerges and that the process is only that of job work. We are not able to appreciate these propositions. In the first place, even as per the copy of the agreement in pages 1.7 onwards of the paper book, in para 1.1 it is

laid down that MDPL shall supply to CIL 'the required quantity of metallic platinum for conversion into colloidal platinum catalyst'. In para 2.5 it is reiterated that CIL shall convert the metallic platinum supplied by MDPL into active colloidal platinum catalyst. That the appellants were carrying out these two separate activities, is admitted by them in the reply dated 04.05.1991 to the Show Cause Notice in page 6 of which it is submitted that they were involved in activity relating to "conversion of platinum metal into colloidal platinum catalyst" and "regeneration of the catalyst out of the spent catalyst" in para 11 thereof.

6.2 Applying the same yardsticks laid down by the Hon'ble Apex Court in the judgment cited *supra*, it is found that the appellants have converted metallic platinum into colloidal platinum for which there is a separate entry in Chapter Heading 28.4300 as "colloidal precious metals" of the Central Excise Tariff Act. It is but obvious that the metallic platinum by itself cannot be used for the purpose, as desired by MDPL, for which obviously only colloidal platinum will do the job as the catalyst of choice. The name, character and use of the raw material (metallic platinum) thus, changes by its emergence into colloidal platinum. In the event, the process is

definitely one amounting to manufacture for the purpose of Section 2(f) of the Act.

6.3 We also take note that the appellant has given different processes of manufacture of the subject goods before the Original Adjudicating Authority and before the lower appellate authority as the fact which has been highlighted in the impugned order.

6.4 In the event, the duty demand of Rs. 11,53,302.39/-, with interest, on the process of converting platinum into colloidal platinum catalyst proposed in Annexure A(2) of the Show Cause Notice, confirmed by the Original Authority and upheld by the Commissioner (Appeals) **does not call for any interference.**

7. Penalties imposed on CIL and MDPL are set aside since the disputes revolve around interpretations on whether the processes concerned amount to manufacturing or otherwise.

8. To sum up :

(i) Part of the impugned order upholding the demand of Rs.

3,61,754.34/- in respect of regenerating of catalyst is set aside.

(ii) Demand of Rs. 11,53,302.39/- with interest, on the process of converting platinum into colloidal platinum catalyst is not interfered with.

(iii) Penalties imposed on M/s. Catazyme India Ltd. and M/s.

Malladi Drugs & Pharmaceuticals Ltd. are set aside.

9. The appeals are disposed of in the above terms.

(Pronounced in open court on 31.07.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

Sdd/Rex