Waste & Scrap Vs Rule 6

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1.0 Apropos to CBEC's Circular No. 1027/15/2016 DT. 25.04.2016, wherein the Board has, in reverence to the decisions of higher judiciary withdrew its earlier Circulars, wherein it was clarified that bagasse, dross and such other waste, residue or refuse emerging during the manufacturing of other goods, would be excisable goods.
So far so good.

2.0 But the circular goes on to add that though such waste, residue or refuse would not be excisable goods and hence would not attract duty of excise, since non excisable goods are also considered as "exempted goods" for the purpose of Rule 6 of the Cenvat Credit Rules, 2004, after the addition of an Explanation under Rule 6 (1), with effect from 01.03.2015, the provisions of the said Rule 6 would apply for such waste, residue or refuse.
Is this view correct?

3.0 The provisions of Rule 6 of CCR 2004 would come into play if any "exempted goods" are manufactured by a manufacturer. The term "exempted goods" is defined in Rule 2 (d) of the said Rules, as, "exempted goods" means excisable goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty [and] goods in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 or under entries at serial numbers 67 and 128 of Notification No. 12/2012-C.E., dated the 17th March, 2012 is availed.

3.1 As the definition of "exempted goods" refer to "excisable goods" the definition of the term "excisable goods" under Section 2 (d) of the Central Excise Act, 1944, which reads as "excisable goods" means goods specified in the first schedule and the second schedule to the Central Excise Tariff Act, 1985 as being subjected to a duty of excise and includes salt.

3.2 If any non excisable goods are manufactured by a manufacturer, there would be no obligation on the said manufacturer, as the said non excisable goods, could not be covered in the definition of "exempted goods".
This view also finds support from the following.
CBEC Circular No.345/61/97 Dt. 23.10.1997
CCE VS Kesar Enterprises - 2001 (130) ELT 93.

3.3 The CBEC has considered the need to remedy this anomaly and it is relevant to refer to Instruction No.17/1/2012 Dt. 23.12.2013, which is reproduced below.

Cenvat credit - Reversal of wrongful availment of credit used in manufacture or production of non - excisable goods - Clarifications

Instruction F. No. 17/1/2012-CX.1, dated 23-12-2013

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Amendment of rule 6 of the CCR, 2004 - Regarding.

1. Attention is invited to the issue of reversal of wrongful availment of credit used in manufacture or production of non-excisable goods. The issue has been under litigation for a while. During a manufacturing process two kinds of goods may come into existence - excisable and non-excisable. Excisable goods can further be divided into two categories - exempted and non-exempted.

2. Provisions of rule 6 of the CCR, 2004 deals with reversal of credit when a manufacturer manufactures both excisable & dutiable products and excisable & exempted products. Similarly a service provider may provide both or taxable and exempted services to which provisions of rule 6 apply. Rule 6 provides machinery provision for quantification of credit needed to be reversed on inputs and input services used in manufacture of exempted goods or in supply of exempted services. However, there is a crucial difference in rule 6 on reversal of credit by a manufacturer vis-a-vis a service provider.

3. Exempted services have been defined such that the services on which no service tax is payable are also considered as exempted service. Thus credit of inputs or input services used in supply of non-taxable services are also required to be reversed under rule 6. However, for a manufacturer such provision does not exist in rule 6. Any raw material,

consumables or services which are used in manufacture of non-excisable goods would not attract provisions of rule 6 as the definition of exempted goods would not cover non-excisable goods. Thus rule 6 seems to have no applicability for reversal or recovery of credit on raw material, consumables and input services used for production or manufacture of non-excisable goods.

4. Further the definition of inputs or input services in rule 3 is such that for raw materials & consumables to be considered as inputs or for services to be considered input services, it needs to be used in manufacture of "Final Products". Final Products in turn have been so defined that they are excisable goods. Thus any raw material consumable or services used for manufacture of non-excisable goods do not qualify to be called inputs or input services and accordingly duty paid on them are not eligible to be availed as CENVAT Credit. It can, however be argued that there is no machinery provision in the Cenvat Credit Rules, 2004 to quantify the input or input services credit used in production of non-excisable goods if a manufacturer manufactures/produces both excisable and non-excisable goods, as rule 6 does not apply in such case. One possible way to address the situation would be to amend the definition of exempted goods in the CCR, 2004 such that non-excisable goods would be deemed to be exempted goods. Then the rigour of rule 6 would apply for reversal of CENVAT credit on raw material, consumables and services consumed in production of non-excisable goods.

5. In this regard kindly forward your views on the following

(i) Whether the amendment suggested above in the definition of exempted goods would enable reversal of credit used in the manufacture of non-excisable goods without any difficulty,

(ii) If there would be difficulties in implementing such an amended rule, please elaborate,

(iii) Number of Show Cause Notices issued and amount of Cenvat credit demanded to be reversed for use in manufacture of non-excisable goods in last three years (2011-12, 2012-13 and 2013-14 upto November, 2013),

(iv) Any other suggestion in this regard.

6. This issues with the approval of the Member (CX).

3.4 Accordingly, vide Notification 6/2015 CE NT Dt. 01.03.2015 the following Explanations have been inserted in Rule 6(1) of CCR, 2004. Explanation 1. - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory. Explanation 2. - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.".

3.5 It may be observed from the above that even non excisable goods cleared for a consideration would be considered as exempted goods / final products, for the purposes of Rule 6.

4.0 It should now be seen whether the rigours of Rule 6 would apply for various waste, scrap generated during the course of manufacture of the final products, though they are "non-excisable".

4.1 Erstwhile Rule 57 D of the then Central Excise Rules, 1944 may be referred to in this context. RULE 57D. Credit of duty not to be denied or varied in certain circumstances. - (1) Credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that part of the inputs is contained in any waste, refuse, or by-product arising during the manufacture of the final product, whether or not such waste, refuse or by-product is exempt from the whole of the duty of excise leviable thereon or is changeable to nil rate of duty or is not specified as a final product under rule 57A. (2) Credit of specified duty allowed in respect of any inputs shall not be denied or varied on the ground that any intermediate products have come into existence during the course of manufacture of the final product and that such intermediate products are for the time being exempt from the whole of the duty of excise leviable thereon : Provided that such intermediate products are used within the factory of production in the manufacture of final product on which the duty of excise is leviable whether in whole or in part.

4.2 Though such a provision did not exist in the current CCR, 2004, the policy of the Government remained the same, as can be observed from the following. Para 3.7 of Chapter 5 of the Supplementary instructions of the CBEC, is reproduced below. Cenvat Credit is also admissible in respect of the amount of inputs contained in any of the waste, refuse or by product. Similarly, Cenvat is not to be denied if the inputs are used in any intermediate of the final product even if such intermediate is exempt from payment of duty. The basis idea is that Cenvat credit is admissible so long as the inputs are used in or in relation to the manufacture of final products and whether directly or indirectly.

4.3 Further, reference can also be made to the CBEC's letter No. B4/7/2000 TRU DT. 03.04.2000, wherein it is clarified, 5. Some doubts have been raised whether CENVAT credit would be admissible on the part of input that is contained in any waste, refuse or

by-product. In this context it is clarified that CENVAT credit shall be admissible in respect of the amount of inputs contained in any of the aforesaid waste, refuse or by-product. Similarly, CENVAT should not be denied if the inputs are used in any intermediate of the final product even if such intermediate is exempt from payment of duty. The basic idea is that CENVAT credit is admissible so long as the inputs are used in or in relation to the manufacture of final products, and whether directly or indirectly.

5.0 Further, reference can be made to the following decisions also.

5.1 In the case of Rallis India Ltd. VS UOI - 2009 (233) ELT 301 Bom, the Hon'ble High Court of Bombay has held, by relying upon the provisions of Rule 57 D ibid that no credit of duties paid on inputs can be denied, even if part of such input is contained in any waste. In the case of UOI Vs Hindustan Zinc Ltd. - 2014 (303) ELT 321 SC, the Hon'ble Supreme Court has held that credit could not be denied for the inputs contained in exempted by products, by relying on Rule 57 D. In the case of Hariyana Steel and Power VS CCE - 2015 (325) ELT 400 Tri-Bang, the Hon'ble Tribunal has observed that the slag emerging during the manufacture of sponge iron is in the nature of waste / by product and the provisions of Rule 6 of CCR, 2004 are not applicable thereto. In the case of Amaravathi Co-operative Sugar Mills Ltd. VS CCE - 2013 (291) ELT 126 Tri-Chennai, similar view has been taken, after taking note of para 3.7 of Chapter 5 of the CBEC's supplementary instructions.

5.2 Further, reference can be made to the following decisions also.
Sharad SSK Vs CCE - 2015 (321) ELT 468 Tri-Mum.
Haringar Sugar Mills Ltd. Vs CCE - 2014 (310) ELT 775 Tri-Mum.
A.R. Sulphonates Pvt. Ltd. Vs CCE - 2016 - TIOL-835 CESTAT Mum

5.3 The rationale behind not disallowing cenvat credit of the duties on inputs, contained in waste, refuse and by product would equally apply for input services also. Further, though no provision similar to Rule 57 D of the erstwhile Central Excise Rules, 1944 is present in CCR, 2004, the legislative intention of not disallowing credit for the inputs contained in waste, refuse, by product is manifest in CBEC Circular / Supplementary Instructions and also reiterated in various decisions.

6.0 Accordingly, it is felt that despite the Explanation introduced under Rule 6 (1) to make non excisable goods also as exempted goods, the said provision would apply only for final products are which manufactured but are non excisable, and the same cannot be extended to cover non-excisable, waste, refuse and by product. To this extent, the Circular No. 1027/15/2016 DT. 25.04.2016 is not good in law.