03.Questions galore on Rule 6

(G. Natarajan, Advocate, Swamy Associates)

The intention behind the move to rewrite Rule 6 of the Cenvat Credit Rules, 2004, to make it more user friendly, more liberal and more clear is laudable. But unfortunately, the rule in its amended form is capable of fomenting more confusions than its erstwhile version. Considering the complex nature of the very purpose of this rule, it becomes all the more important to be extra cautious while attempting any improvement in it.

First the positives.

- It has now been made very clear that the rigours of proportionate reversal will apply only for "common credits" and not for the entire credit, which is quite logical. This issue was one of the major cause of litigation under the erstwhile rule and Kudos for making the intentions very clear.
- Earlier, for any delay in making final adjustments by 30th June of the next financial year would incur interest @ 24 % per annum, which has now been aligned with the general interest rate of 15 %.

But the flipside of the new rule and the interpretative quagmire behind it is mind boggling. Let us see one by one.

i) The terms "exempted goods" and "exempted services" are defined in Rule 2 and no cenvat credit could be allowed for the inputs and input services used for manufacture of such exempted goods and provision of exempted services. "Non excisable goods" have been recently added in the ambit of "exempted goods" recently (Notification 6/2015 CE NT DT. 01.03.2015) by adding an Explanation under Rule 6 (1). The same explanation is continued in the new rule also as Explanation 1 under Rule 6 (1). This opportunity of introducing a new rule could have been used to incorporate "non excisable goods" also in the definition of "exempted goods" under Rule 2 (d) itself, rather than having a separate Explanation.

ii) Similarly, it is proposed to consider "non service" as an "exempted service" by adding Explanation 3 to this effect under Rule 6 (1). Rather, this could have been done by amending the definition of "exempted service" itself under Rule 2 (e) to bring more clarity and simplicity.

iii) An activity, which is not a service as defined in Section 65 B (44) of the Finance Act, 1994 would be considered as an "exempted service" and no credit would be entitled for the same. For example, the definition of "service" under the said section, excludes "deemed sale" as per Article 366 (29A) of the Constitution. For example, once the value of service in a works contract is fixed at 40 %, the remaining 60 % of the value represents the deemed sale involved in the said works contract, which is now an exempted service. Does it mean that cenvat credit entitlement would henceforth be limited to 40 % for service providers providing works contracts (relating to original work)? Explanation 4

under Rule 6 (1) also suggests so. Rather, it would have been better to equate such deemed sale to trading, where only the margin in trading is considered as the value of exempted service. If the intention is obviously to restrict the credit entitlement in such case to 40 % alone, then it defies logic why for trading only the margin is considered as the value of exempted service. Uniform treatment for sale (trading) and deemed sale is required.

iv) The term "exempted goods" wherever used in the Rule has a suffix "cleared upto the place of removal" which gives an impression as if when such exempted goods are cleared beyond the place of removal or to the extent of their removal beyond the place of removal, they would not be considered as exempted goods. The said suffix is not at all warranted considering the intention of not allowing any cenvat credit for exempted goods. This suffix would create lot of interpretative hurdles.

v) In Rule 6 (3), two classes of persons have been identified for whom the provisions of this rule would apply, viz., (a) a manufacturer manufacturing both exempted goods and non exempted goods and a service provider providing exempted and non exempted service. Does it mean that the rule would not apply to a person who manufacturers non exempted goods and providing exempted service (Eg. Manufacturer of dutiable goods who also indulges in trading" or a person providing a non exempted service and manufacturing exempted goods? Certainly the intention is not so. But the rule lays down so.

vi) Under the first option of paying 6 % of the value of exempted goods, or 7 % of the value of exempted service, a cap is being introduced that the said amount payable shall not exceed "the total credit available in the account of the assessee at the end of the period to which the payment relates". The intention behind this provision is also explained in TRU's letter in the following words.

(iv) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit.

Let us take an example. If the credit balance as on 30.04.2016 is Rs.5,00,000 with a manufacturer and he has cleared exempted goods involving a value of Rs.1,00,00,000 lakhs during April 2006. If he had opted for the first option under sub rule (3) he is required to pay Rs.6,00,000. But as per the provisions he is required to pay only Rs.5,00,000, which was the balance of credit as on 30.04.2016. So far so good. But what if he chooses to pay the duty for the month of April 2016 itself on 30.04.2016 by debiting this Rs. 5,00,000 from the cenvat credit account and brings the balance of cenvat credit

on 30.04.2016 to NIL and thereby he is not required to pay any amount under Rule 6 (3)'s first option?

Notorious, though it may be, the rule did not prohibit it.

vii) As per the existing provisions, cenvat credit in respect of inputs and input services used exclusively for the manufacture of exempted goods or for provision of exempted services, cannot at all be taken at the first place {Explanation II under Rule 6 (3)}. But under the new provisions, it is envisaged that such credit also could be taken at the first place and reversed thereafter, though the option of not at all taking such credit, though not explicitly provided in the rule, is still applicable. This would only add further to the complications.

viii) Sub Rule (3AA) is intended to avoid forcing an assessee to the first option if he has followed neither of the options. The said sub rule and the intention behind the said sub rule, as per the TRU's letter are reproduced below.

(3AA) Where a manufacturer or a provider of output service has failed to exercise the option under sub-rule (3) **and** follow the procedure provided under sub-rule (3A), the Central Excise Officer competent to adjudicate a case based on amount of CENVAT credit involved, may allow such manufacturer or provider of output service to follow the procedure and pay the amount referred to in clause (ii) of sub-rule (3), calculated for each of the months, mutatis mutandis in terms of clause (c) of sub-rule (3A), with interest calculated at the rate of fifteen per cent. per annum from the due date for payment of amount for each of the month, till the date of payment thereof.

(vi) A new sub-rule (3AA) is being inserted to provide that a manufacturer or a provider of output service who has failed to follow the procedure of giving prior intimation, may be allowed by a Central Excise officer, competent to adjudicate such case, to follow the procedure and pay the amount prescribed subject to payment of interest calculated at the rate of fifteen per cent. per annum.

But the use of the conjunction (highlighted above) in the sub rule is capable of creating confusion and it should have been "or".

Known devil is better than unknown angel.

(The author is an advocate practicing in the field of indirect taxation, based at Chennai and can be contacted at nuts@swamyassociates.com)