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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
EXCISE APPEAL BRANCH

Appeal No. E/1355/2010 - EX[DB] Date **24/01/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi

To :
M/S NAV BHARAT IMPEX.
C-24, LAWRENCE ROAD, INDUSTRIAL AREA, DELHI-110035.

M/S NAV BHARAT IMPEX, Appellant

Vs

C.C.E. DELHI I Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/46/ 2012 EX[DB]** dated 16-1-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. DELHI I
C.R. BUILDING, I.P. ESTATE, NEW DELHI 110002

2. Adv. / Consult
MR.DSK LEGAL, ATTORNEY & SOLICITORS
21 UGF.ANTARIKSH BHAWAN,KASTURBA GANDHI MARG, N DELHI.

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1. 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

Appeal No.E/1355/2010

Arising out of: OIO No.04/D-1/2010, dt.03.03.2010

Passed by: Commissioner of Central Excise & Customs, Delhi-I

For approval and signature:
Dr. C. Satapathy, Hon'ble Member (Technical)
Mr.M.V. Ravindran, Hon'ble Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their Lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Departmental authorities?	Yes

Appellant:
M/s Nav Bharat Impex

Respondent:
CCE Delhi

Represented by:
Shri Rupendra Singh, Adv.: for Assessee.
Shri B.K. Singh, Jt.CDR: for the Revenue.

CORAM:
DR. C. SATAPATHY, HON'BLE MEMBER (TECHNICAL)
MR.M.V. RAVINDRAN, HON'BLE MEMBER (JUDICIAL)

Date of Hearing/Decision:21.07.11

FINAL ORDER No. A/46/2012-EX (BR), dt.21.07.2011

Per: M.V. Ravindran:

This appeal is directed against OIO No.04/D-1/2010, dt.03.03.2010.

2. The relevant facts that arise for consideration are that the appellants herein are manufacturer of Menthol Crystals (BP/USP Grade), Menthol Powder and Peppermint Oil classifiable under Chapter Heading/Sub-heading No.2906.10 and 3301.10 and after 8 digit code, tariff was introduced and classified them under appropriate heading. The appellant was availing CENVAT Credit facility as provided under CENVAT Credit Rules, 2004 in respect of main input viz.De-Mentholised Oil and Menthol Flakes. It appeared to the lower authorities that Menthol Crystals (BP/USP) which covered under Chapter Heading 3303.9021 was fully exempted by Notification No.04/2008-CE, dt.1.3.08 issued under Section 5A of Central Excise Act, 1944 from payment of Central Excise duty. It also appeared that the manufacturing process of final product indicates that the Menthol Crystals (BP/USP Grade) is the main final product manufactured out of raw materials and hence CENVAT Credit in balance as on 31.3.08 needs to be reversed by the assessee as per the provisions of Rule 11 of CENVAT Credit Rules, 2004. Coming to such a conclusion, Show Cause Notice was issued to the appellant directing to show cause as to why action should not be taken for confirmation of demand of CENVAT Credit lying in balance as on that date. The assessee contested Show Cause Notice on the various grounds. The adjudicating authority did not agree with the contentions raised by the assessee and confirmed

the demands raised, directed them to pay interest on the demand confirmed and also imposed penalty on them. Hence this appeal.

3. The ld.Counsel appearing on behalf of the appellant would submit that the appellants are engaged in manufacture of Menthol Crystals (BP/USP Grade), Peppermint Oil, Menthone, Terpenes etc. It is his submission that though Menthol Crystals (BP/USP Grade) have been exempted from payment of duty by Notification No.04/2008-CE, dt.1.3.08, the other final products are dutiable products are attracting Excise duty and they are discharging applicable Excise duty. After taking us through the process of manufacture, it is his submission that the exempted product as a dutiable product arises due to an integrated and intermingled inter-connected process. It is his submission that common raw material i.e. Menthol Flakes and De-Mentholised Oil are used and after various processes such as filtration, crystalisation and centrifusion, at the stage of centrifusion, intermingle products arises out of which one is centrifused crystal and other is uncrystalised solution. He would submit that centrifused crystal is further used to manufacture Menthol Crystal and uncrystalised solution is subjected to further process to recover dutiable final product such as Peppermint Oil, Menthone, Terpenes etc. It is his submission that common manufacturing process is admitted fact and outcome of two different final products is also admitted by both sides. It is his submission that during the relevant period, the appellant was following the provisions of Rule 6(3) of CENVAT Credit Rules, 2004 and was paying 10% of the value of the exempted final product at the time of clearance from the factory. It is his submission that if this is accepted,

there is no reason for reversing an amount of CENVAT Credit lying in balance as on 31.3.08 when Menthol Crystals were exempted from payment of duty, does not arise. It is his submission that the adjudicating authority has erred in coming to the conclusion that entire raw materials were used for manufacture of exempted final product. It is his submission that in the decision of ***Sharp Menthol India Ltd*** (unreported decision of Hon'ble High Court of Mumbai), it is very clearly held that Menthol Crystals and Peppermint Oil are two different final products and the assessees have rightly followed the provisions of Rule 6 of CENVAT Credit Rules, 2004. He would also rely upon the judgment of Hon'ble Apex Court in the case of ***Commissioner of Sales Tax, Mumbai Vs Bharat Petroleum Corpn. Ltd. 1995 (77) ELT 790 (SC)***, for the proposition that when the byproduct, residual and waste & scrap is arising in the course of manufacture of main product, regularly and continuously and the same being sold in the open market, the intention of the manufacturer to manufacture and sell not only the main product but also the subsidiary product, cannot be considered as erroneous. It is his submission that the process of manufacture of byproduct which arises is a continuous one and is continuously sold in the market. It is his submission that the provisions of Rule 11(3) of CENVAT Credit Rules, 2004 is not at all applicable as the appellants have followed the provisions of Rule 6(3) of CENVAT Credit Rules, 2004. It is his submission that the provisions of Rule 11(3) of CENVAT Credit Rules, 2004 will be applicable to a case where the manufacturer is manufacturing "a final product", which is exempted from payment of duty. It is his submission that the appellant being a manufacturer of more than one final product and discharging duty liability on other final products and only one final product being exempted, Rule 11(3) cannot be made applicable. It is his plea that in the light of the submissions made, the appeal may be allowed.

4. Ld.Jt.CDR appearing on behalf of the Revenue, would submit that the final product which is manufactured was Menthol Crystals (BP/USP) and is manufactured out of the raw material and the other final products like Peppermint oil etc is manufactured only after the process of manufacture of Menthol Crystals. It is his submission that as Menthol Crystals were absolutely exempted, the CENVAT Credit taken on the raw materials to be used in such manufacture and also in process or containing in final product till not cleared as well as such inputs used in-process materials has to be reversed. It is his submission that the process of manufacture as discussed by the adjudicating authority is not disputed by the appellant. It is his submission that in the instant case, the inputs were not directly used in manufacture of byproduct and the same have been used for the manufacture of Menthol Crystals. It is his submission that the appellant's case that they have followed the provisions of Rule 6, were not applicable in this case for the simple reason that there is no evidence to suggest that the appellants were paying duty @ 10% on the exempted goods including the goods which were being exported. He would submit that Rule 11(3) cannot have precedent over the Rule 6 is the argument of the assessee, which is erroneous for the reason that provisions of Rule 11(3) are directly related to Rule 3 of CENVAT Credit Rules, 2004, which necessitates the reversal of credit in respect

of inputs to be used in the manufacture of exempted product. He would submit that after retrospective amendment to Rule 6, if there are different final products, the proportional reversal of credit on inputs used/to be used in the manufacture of Menthol Crystals should be considered. It is his submission that the reliance placed on the decision of Hon'ble High Court of Mumbai in the Writ Petition of ***Sharp Menthol India Ltd*** is totally misplaced. It is his submission that the provision of Rule 11(3) has to be interpreted as to give some meaning to phrase "a final product" and if any final product is exempted, the said rule has to be applied as held by the Hon'ble Apex Court in the case of ***Maruti Suzuki 2009 (24) ELT 641 (SC)*** and ***Gujarat Narmada Fertilizers Co.Ltd. 2009 (240) ELT 661 (SC)***. It is prayed that the appeal filed by the assessee be rejected.

5. We have considered the submissions made at length by both sides and perused the records.

6. The undisputed fact in this case is that the appellant was manufacturing Menthol Crystals (BP/USP Grade), Menthol Powder and Peppermint Oil, Menthone, Terpenes etc. From 1.4.08, the appellant's claim is that they have paid an amount equivalent to 8% or 10% of the value of the exempted product i.e. Menthol Crystals (BP/USP Grade), when removed from factory premises. Till 1.4.08, the appellant was discharging the Central Excise duty liability on all the products manufactured by them. From 1.4.08, Menthol Crystals (BP/USP Grade) was exempted from payment of duty vide Notification No.04/2008-CE, dt.1.3.08. It is also undisputed that the appellant

was manufacturing the above said products by using Menthol Flakes and De-mentholised Oil as main ingredients/inputs, on which the Central Excise duty is paid by the manufacturer and the appellant had taken the CENVAT Credit of such duty paid on the inputs as per the provisions of CENVAT Credit Rules, 2004.

7. On this factual matrix, we have to decide the issue involved in this case which is whether the appellant is required to reverse the CENVAT Credit lying in balance as on 31.3.08 in the CENVAT account for the reason that product Menthol Crystals (BP/USP Grade) was exempted from payment of duty.

8. As has been reproduced by us, it is undisputed that upto 31.3.08, all the products of the appellant were liable to duty. If that be so, the CENVAT Credit taken on the Central Excise duty paid on Menthol Flakes and De-Mentholised Oil till 31.03.08, was correct as all the products were declared as final products and Central Excise duty was discharged on such products.

9. In this background, we have to appreciate the process of manufacture, which is recorded by the adjudicating authority in Para 17 & 18 of his Order-in-Original. We may reproduce the same below:

> *"17. I hereby examine process. I find that as per the records of the case and submissions made by the noticee, the process of manufacture of the products manufactured by the noticee is that the noticee receives input menthol flakes (containing menthol contents 83% approx) falling under Chapter Heading 29061100 and Dementholised oil (DMO) containing menthol content 38.4% approx falling under Chapter Heading 33012590 in 180 kg. Drums. Both the inputs are heated, to convert them into liquid and are blended*

in big tanks in 85% and 15% ratio respectively or as per congealing requirement. The solution of both the inputs is repeatedly filtered to remove unwanted impurities insoluble material and filtered solution is thereafter loaded in cans in the crystallization chambers. Before putting the prepared solution in crystallization chambers the crystals (small pieces taken out during the sieving of menthol crystals) are added to improve the percentage purity. In crystallization chambers, the temperature is controlled from + 320°C to -10°C and the seeding with catalyst is done on the third day of the commencement of crystallization process. The solution containing menthol contents above 99% takes 15-25 days to set converted into crystals and the same is removed from the chambers in brick form. These bricks are manually broken in small pieces are centrifuged with the help of centrifuging machine to remove the un-crystallised solution which is called residue. The centrifuged crystals are further broken/separated manually to get menthol crystals and these menthol crystals are dried. The dried menthol crystals are graded as per their size and packed in 25 kg. drum as per buyer's requirement. The residue obtained during the process of centrifusion is called mother liquor and is recycled to extract the menthol contents which could not have been extracted during the process. From the detailed flow chart of manufacturing process of Menthol Crystal, it is noticed that at the stage of centrifuging in Centrifuging machine, two intermediate products arises - one is centrifuged crystal and other is uncrystallised solution. While centrifuged crystal are further used to manufacture menthol crystal, the uncrystalised solution is subjected to fractional distillation to recover bye-products, namely namely, Peppermint Oil, Menthone Oil, Terpenes etc. From the above process of manufactrure submitted by the noticee, it is clear that up to the stage of centrifuging in Centrifuging machine when two intermediate products arises i.e "Centrifuged Crystal" and other is "un-crystallised solution" and "Centrifuged Crystals: are further used to manufacture Menthol Crystal, BP/USP, various inputs such as menthol flakes (containing menthol contents 83% approx) falling under Chapter Heading 29061100 and De-mentholised oil (DMO) containing menthol content 38.4% approx falling under Chapter Heading 33012590 are exclusively used to manufacture the

Menthol Crystals BP/USP which are exempted from the payment of duty w.e.f 10.3.2008 vide Notification No.04/2008-C.E. dated 01.03.2008 issued under Section 5A of Central Excise Act, 1944 and the other dutiable products such as Peppermint Oil, Menthone and Terpenes are obtained at a later stage from the residual "uncrystalised solution" through a separate and independent process . Therefore, it can be safely concluded that the inputs on which Cenvat Credit had been taken were exclusively used in the exempted goods i.e Menthol Crystal, BP/USP and the dutiable products i.e Peppermint Oil, Menthone and Terpenes were manufactured afterwards through a separate process where they are obtained from the residual un-crystallised solution by subjecting the same to fractional distillation to recover bye-products, namely, Peppermint oil , Menthone and Terpenes etc.

18. The noticee have further contended that regular and continuous production of Peppermint oil would establish that the noticee intended to treat peppermint oil as a final product and department is duly collecting Excise duty in respect of the Peppermint oil and it cannot be treated as an unintended product but ought to be treated as their manufactured product. I find that here in the instant case, the question under consideration is not of collection and excisability of the bye-product but the question here is whether the exempted goods are produced independently and dutiable products in question were obtained through an independent process or not and that is the crucial factor for deciding the issue of wrong availment of Cenvat Credit on the inputs used in the manufacture of exempted products i.e. Menthol Crystals exclusively. I find that there is no dispute that some of the products were excisable and dutiable but the question raised by the department was that the said dutiable products were not produced independently through a separate process of manufacture and were only un-intended bye-products obtained from the residual material left after the manufacture of exempted goods. In view of the process of manufacture discussed in the Para 17 , it is very much clear that inputs were exclusively used in the manufacture of Menthol Crystals, BP/USP which were exempted from the payment of duty w.e.f 10.3.2008 and the plea of the noticee that some of their products were dutiable, does not alter the factual position that exempted goods i.e. Menthol Crystals, BP/USP were manufactured exclusively and independently from the *inputs on which the noticee had wrongly taken the Cenvat Credit by terming them as the common inputs for both exempted and dutiable goods and by mis-declaring a common process of manufacture for all products"*

10. It can be seen from the above reproduced process of manufacture, upto the stage of centrifusion of the materials in the centrifuse machine, 2 intermediate products arises, one is in crystal form and another is uncrystalised solution. That is to say that till this stage of process, the inputs were used by the appellant for manufacturing of all the products and it is seen that the appellant manufactured Peppermint Oil, Menthol Powder, Menthone, Terpenes etc., from uncrystalised solution by process which will amount to manufacture of those products.

11. On this background, the provisions of Rule 6 needs to be read.

" Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-

(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2). ***Provided*** *that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely:-

(i) the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six percent. of value of the exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specifiedin sub-rule (3A).

***Explanation I.-** If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.*

***Explanation II.-**For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.*

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:-

(a)

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely:-

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month,-

(i) the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional)= (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted servicesprovided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

© the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely:-

(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus *the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;*

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P, where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and P denotes total CENVAT credit taken on input services during the financial year;

(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition © and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;

(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent. Per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) where the amount determined as per condition © is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely:-

(i) details of CENVAT credit attributable to exempted goods and exempted services, month wise, for the whole financial year, determined provisionally as per condition (b),

(ii) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition ©,

(iii) amount short paid determined as per condition (d), along with the date of payment of the amount short-paid,

(iv) interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

(v) credit taken on account of excess payment, if any, determined as per condition (f);

(h) where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no taxable service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four per cent. per annum from the due date till the date of payment. ***Explanation I.*** *- "Value" for the purpose of sub-rules (3) and (3A) shall have the same meaning assigned to it under section 67 of the Finance Act, 1994 read with rules made thereunder or, as the case may be, the value determined under section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.* ***Explanation II.-****The amount mentioned in sub-rules (3) and (3A), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.* ***Explanation III.-*** *If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (3) or as the case may be sub-rule (3A), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.*

(4) No CENVAT credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted

based upon the value or quantity of clearances made in a financial year.

(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services.

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either-

(i) cleared to a unit in a special economic zone; or to a developer of a special economic zone for their authorized operations ; or

(ii) cleared to a hundred per cent. export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G. S R. 602 (E), dated the 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or.

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied,—

(a) against International Competitive Bidding; or

(b) to a power project from which power supply has been tied up through tariff based competitive bidding; or

(c) to a power project awarded to a developer through tariff based competitive bidding

in terms of notification No. 6/2006-Central Excise, dated the 1st March, 2006."

12. We are concerned with the provisions of Rule 6(1) on which the Revenue is relying upon to direct the appellant to reverse the CENVAT Credit lying in balance as on 31.3.08, while the appellant is relying upon Rule 6(3), vice which he has reversed an amount of 8% -10% on the finished goods, which were exempted when cleared.

13. We find that the adjudicating authority in Para 18, had categorically come to the conclusion that the some of the products like Peppermint Oil, etc were excisable and dutiable. The only question that has been incorrectly construed by adjudicating authority is that according to him, the Menthol Crystals (BP/USP Grade) is the main product and other products were not produced independently, through a separate process of manufacture and were only unintended byproducts obtained from residual material left after the manufacture of exempted goods. In our considered view, this is an incorrect proposition in law. We find that the provisions of Rule 6(2) specifically says that whenever a manufacturer of goods who manufactures the final product which are chargeable to duty as well as exempted, ~~goods~~, a should maintain separate accounts for receipt, consumption, and inventory of input. In provisions of Rule 6(3), it is clearly indicated that if manufacturer is not able to maintain such account, he can clear the exempted goods by paying amount equivalent to 8% or 10% of the value of the goods. The entire provisions of Rule 6, if read together, would indicate that there has to be an exempted final product and there has to be dutiable final product. In our view, provisions of Rule 6(2) and Rule 6(3) read together will cover the case

of the assessee inasmuch as the appellant has claimed that they have reversed an amount as indicated in the provisions of Rule 6(3) of CENVAT Credit Rules, 2004.

14. As regards Revenue's claim that provisions of Rule 6(1)of CENVAT Credit Rules, 2004, will apply, we find that the said provision very clearly talks about the manufacture of exempted goods and there is no mention or indication that such exempted goods should be only considered as main product and the byproduct if any, cannot be a final product. The provisions of Rule 6 of CENVAT Credit Rules, 2004 clearly indicate that there has to be manufacturing of products which are dutiable and exempted for application of this Rule 6 of CENVAT Credit Rules, 2004, and there is no dispute in this case that products of the appellant were covered under this Rule.

15. In our considered view, the judgment of Hon'ble Supreme Court in the case of ***Bharat Petroleum Corpn.*** (supra), would cover the issue in favour of the assessee.

16. Accordingly, we hold that the impugned order is incorrect and unsustainable and needs to be set aside and we do so.

17. The impugned order is set aside and the appeal is allowed with consequential relief to the appellant.

(Operative portion of the order pronounced on conclusion of the hearing in Open Court)

(Dr. C. Satapathy)
Member (Technical)

(M.V. Ravindran)
Member (Judicial)

cbb