

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench**

Service Tax Appeal No. 86337 of 2019

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-564 to 566/2018-19 dated 31.12.2018 passed by the Commissioner of Central Tax (Appeals-I), Pune)

M/s. Fujitsu Consulting India Pvt. Ltd.

Appellant

A-15, MIDC Technology Park,
Talawade, Pune 411 062.

Vs.

Commissioner of CGST & C.E., Pune-I

Respondent

41-A, ICE House, Sassoon Road,
Opp. Wadia College, Pune 411 001.

WITH

Service Tax Appeal No. 86339 of 2019

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-564 to 566/2018-19 dated 31.12.2018 passed by the Commissioner of Central Tax (Appeals-I), Pune)

M/s. Fujitsu Consulting India Pvt. Ltd.

Appellant

A-15, MIDC Technology Park,
Talawade, Pune 411 062.

Vs.

Commissioner of CGST & C.E., Pune-I

Respondent

41-A, ICE House, Sassoon Road,
Opp. Wadia College, Pune 411 001.

AND

Service Tax Appeal No. 86340 of 2019

(Arising out of Order-in-Appeal No. PUN-EXCUS-001-APP-564 to 566/2018-19 dated 31.12.2018 passed by the Commissioner of Central Tax (Appeals-I), Pune)

M/s. Fujitsu Consulting India Pvt. Ltd.

Appellant

A-15, MIDC Technology Park,
Talawade, Pune 411 062.

Vs.

Commissioner of CGST & C.E., Pune-I

Respondent

41-A, ICE House, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

Shri Prashant Patankar, Consultant, for the Appellant

Shri Onil Shivadikar, Assistant Commissioner, Authorised
Representative for the Respondent

CORAM:**HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)****FINAL ORDER NO. A/85158-85160/2022**

Date of Hearing: 23.02.2022

Date of Decision: 23.02.2022

These appeals are directed against order in appeal No PUN-EXCUS-001-APP-564 to 566/2018-19 dated 31.12.2018 of the Commissioner (Appeal-I), Central Tax, Pune. By the impugned order, the Commissioner (Appeals) has held as follows:

"ORDER

The impugned Orders-in-Original are modified as under:-

<i>S No</i>	<i>Appeal No</i>	<i>Order Original Date</i>	<i>in No/</i>	<i>Further Amount of Refund Sanctioned (Rs)</i>	<i>Amount Rejected (Rs)</i>
<i>1</i>	<i>182/ST/Ref/2015</i>	<i>PI/Divn I/Ref/011/18-19 dated 16.04.2018</i>		<i>10,85,114</i>	<i>11,91,730</i>
<i>2</i>	<i>183/ST/Ref/2015</i>	<i>PI/Divn I/Ref/012/18-19 dated 16.04.2018</i>		<i>7,61,334</i>	<i>5,80,733</i>
<i>3</i>	<i>184/ST/Ref/2015</i>	<i>PI/Divn I/Ref/013/18-19 dated 16.04.2018</i>		<i>9,93,376</i>	<i>7,81,200"</i>

2.1 Appellant had filed three refund claims in term of Rule 5 of the CENVAT Credit Rules, 2004. These refund claims were either partly allowed or rejected in toto by the jurisdictional Assistant/ Deputy Commissioners. Against the orders of the jurisdictional Assistant/ Deputy Commissioner, Appellant preferred appeals before the Commissioner (Appeal), which were partly allowed as per the impugned order. The details of the orders of Assistant/ Deputy Commissioner and of Commissioner (Appeal) are as per Table 2.

Table 2

S No	Refund Claim		Order in Original No/Date	Amount Sanctioned 'Rs	Amount Rejected 'Rs
	Date	Period			
1	30.09.2014/ 22.12.2017	Jul 13 to Sept 13	PI/Divn I/Ref/011/18-19 dated 16.04.2018	1,06,24,272	22,76,844
2	29.12.2014/ 20.12.2017	Oct 13 to Dec 13	PI/Divn I/Ref/012/18-19 dated 16.04.2018	1,04,39,451	13,42,067
3	31.03.2015/ 23.12.2016	Jan 14 to mar 14	PI/Divn I/Ref/013/18-19 dated 16.04.2018	1,38,98,999	17,74,576

2.2 Aggrieved by the orders of the Commissioner (Appeals), Appellants have preferred these appeals.

3.1 I have heard Shri Prashant Patankar, Consultant for the appellant and Shri Onil Shivadikar, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellant, learned counsel submits that

- Appellant is registered for providing the services of “Consulting Engineer” and “Business Auxiliary Services”. They are providing services domestically on which they pay the service tax and also provide services overseas for which the claim the benefit of “export of services” as provided by law.
- These refund claims have been filed by them in terms of Rule 5 of the CENVAT Credit Rules, 2004 claiming refund of the accumulated CENVAT Credit attributable to the goods exported.
- When these refund claims were first filed they were rejected by the adjudicating authority holding them to be time barred. However, Commissioner (Appeals) has vide his order in appeal No PUN-EXCUS-001-APP-454 to 456-16-17 dated 22.02.2017 allowed the appeals. Hence

matter in respect of the refund was again taken up before the original authority.

- Refund claims have been denied/ modified by the authorities below for the reason that
 - The certain amount of the credit which was claimed as refund was not admissible.
 - In respect of the certain amounts included in the export turnover they were not able to produce the Foreign Exchange Inward Remittance Certificates as required.
- Objective of Rule 5 is to refund the accumulated input credits so that exports are zero rated as per Circular No 120/01/2010 dated 19/01/2010.
- Further Rule 5 is not the mechanism for disputing the credit for which no proceedings have been initiated in terms of Rule 14 of the CENVAT Credit Rules, 2004 as have been held in following decisions:
 - Qualcomm India Pvt Ltd [2020 (43) GSTL 402 (T-Hyd)]
 - ADP Pvt Ltd [2020 (40) GSTL 349 (T-Hyd)]
 - 3D PLM Software Solutions Ltd. [2018 (13) GSTL 325 (T)]
- In respect of the invoices against which the credit was denied were produced by them before the Commissioner Appeal who refused to consider them, which is contrary to the decision of tribunal in case of Woco Motherson Advanced Rubber Tech Ltd. [2012 (28) STR 463 (T-Ahmd)]
- Substantive benefits admissible to them could not have been denied to them for some procedural lapses in non production of the FIRC before the original authority. Tribunal in case of Amnet Systems Pvt Ltd [2018-TIOL-2072-CESTAT-MAD] has held otherwise. Further they are having all the FIRC now and they can establish their Export Turnover by producing the same in fact they had produced the same before Commissioner (Appeals) who have refused to entertain the same as the same were not produced by them before the original authority.

3.3 Arguing for revenue, learned authorized representative reiterates the findings recorded in the impugned order.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Appellants have filed these refund claims under Rule 5 of the CENVAT Credit Rules, 2004. The rule 5 as amended at the relevant time and the Notification No 27/2012-CE (NT) as it was then is reproduced below:

5. Refund of CENVAT Credit. –

(1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:

Refund
amount

=

(Export turnover of goods+
Export turnover of services)

Total turnover

x

Net
CENVAT
credit

Where,-

- (A) Refund amount means the maximum refund that is admissible;
- (B) Net CENVAT credit means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;
- (C) Export turnover of goods means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;
- (D) Export turnover of services means the value of the export service calculated in the following manner, namely:-

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been

received in advance in any period prior to the relevant period – advances received for export services for which the provision of service has not been completed during the relevant period;

(E) Total turnover means sum total of the value of –

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of subrule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

(2) This rule shall apply to exports made on or after the 1st April, 2012:

Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement:

Provided further that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Services Rules, 2005 in respect of such tax.

Explanation 1.- For the purposes of this rule,-

{1) "export service" means a service which is provided as per the provisions of Export of Services Rules, 2005, whether the payment is received or not;

(2) "relevant period" means the period for which the claim is filed.

Explanation 2.-For the purposes of this rule, the value of services, shall be determined in the same manner as the value for the purposes of sub-rule (3) and (3A) of rule 6 is determined.

4.3 The refund claims as filed by Appellant have been modified mainly for the reason that

- certain CENVAT Credit which is sought to be encashed by way of refund claim was not admissible or was disputed;
- they have not been able to justify the 'export turnover' as claimed by them for the entire amount by production of FIRC for the relevant period.

4.4 From the reading of Rule 5 as reproduced above it is providing for the refund of the accumulated CENVAT Credit in the books of account against the goods exported under Bond or letter of undertaking and the services exported. The basic principle which is being provided by the said Rule, is as per the avowed policy of the Government to reduce the prices of export so that they are internationally competitive. It is also imperative to note that no country will like to export the taxes leviable locally along with the goods and services exported. To accomplish this Government has provided for various schemes to zero rate the goods and services exported.

4.5 On the issue of establishing the export turnover and production of FIRC, I find that Chennai Bench has in the case of Amnet Systems Pvt Ltd [2018-TIOL-2072-CESTAT-MAD] has held as follows:

"7. Refund in respect of Issues 2, 3 and 4, as shown in the Table, has been rejected for the reason that the appellant has not been able to produce the FIRCs. However, the Id. consultant submitted that he would be able to correlate the remittances with the invoices. Production of FIRCs being a procedural requirement and if the appellant is able to establish the receipt of foreign exchange with the invoices, we are of the view that the appellant cannot be denied substantive benefit of refund. For the limited purpose of verification of these remittances with the invoices, we remand the matter to the adjudicating authority.

8. The fifth issue to be addressed is the rejection of refund for non-production of FIRCs. The Id. consultant has submitted that the appellant would be able to furnish the FIRCs if given a further chance. This issue also is remanded to the adjudicating

authority to process the refund claim after giving opportunity to the appellant to furnish the FIRC.”

In view of the fact that the issue has already been decided as above by the Chennai Bench, I am of the opinion that matter to this extent needs to be reconsidered by the original authority in remand proceedings.

4.6 Now coming to the second issue for modification of the refund claims filed by the Appellant. Rule 3 of the CENVAT Credit Scheme provides for the availment and utilization of the various duties and taxes paid by the manufacturer of goods and provider of output services. Rule 4 provides for the conditions to be followed by the person availing the credit. Rule 5 provides for the Refund of accumulated CENVAT Credit on the goods and services exported, and so on. Rule 14 of the said rules provide as follows:

RULE 14. Recovery of CENVAT credit wrongly taken or erroneously refunded. —

(1) (i) Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the Finance Act, 1994 (32 of 1994), as the case may be, shall apply mutatis mutandis for effecting such recoveries;

(ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries.

4.7 From the reading of the provisions of Rule 14 it is quite evident that if for a moment it is accepted that certain credit were wrongly or erroneously taken by the appellant contrary to the provisions contained in Rule 3 and 4 of the said Rules, then the same could have been denied by following the procedure as laid down in Rule 14. The so availed erroneous credit cannot be the subject matter of proceedings of Refund in terms of Rule 5

of the CENVAT Credit Rules, 2004. In these cases even if the refund claim is denied on the ground as stated by the impugned order then the same will be credited back to the CENVAT Account of the appellants and if possible appellant can utilize the same for payment of goods/ services cleared by them subsequently. Admittedly and undisputedly no proceedings for denial of any CENVAT Credit as claimed by the appellants, for encashment of which they have filed these refund claims have been initiated by the revenue.

4.8 Without denying the CENVAT Credit taken/availed by the appellant in their book of accounts during the relevant period (quarter) by way of initiating proceedings against the appellant in terms of Rule 14, revenue could not have altered the quantum of "Net CENVAT Credit" availed during the said quarter, and deny the encashment of that amount of the CENVAT Credit which is due as per the Rule 5. It is now well settled principle of law that where a statute provides for a thing to be done in a particular manner, then it has to be done in that manner, and in no other manner.

4.9 In the case of Chandra Kishore Jha vs. Mahavir Prasad, [1999 (8) SCC 266](para 12), a three Judges bench Hon'ble Supreme Court has referred the said principle as follows

"It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage : Nazir Ahmad v. King Emperor, 63 Indian Appeals 372=AIR 1936 PC 253; Rao Shiv Bahadur Singh & Anr. V. State of Vindhya Pradesh, 1954 SCR 1098 = AIR 1954 SC 322. State of Utter Pradesh v. Singhan Singh & Ors., AIR 1964 SC 358 = (1964) 1 SCWR 57]"

4.10 Hon'ble Apex Court has similarly in case of Dhananjaya Reddy vs. State of Karnataka, [(2001) 4 SCC 9](para 22), stated the said principle as follows:

"Relying upon Nazir Ahmad's case and applying the principles laid down in Taylor v. Taylor [(1876) 1 Ch.D 426] this Court in Singhara Singh's case (supra) held:

"The rule adopted in Taylor v. Taylor [(1876) 1 Ch.D 426] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."

4.11 In the case of Hussein Ghadially v. State of Gujarat [(2014) 8 SCC 425]

"19. Thirdly, because if the Statute provides for a thing to be done in a particular manner, then it must be done in that manner alone. All other modes or methods of doing that thing must be deemed to have been prohibited. That proposition of law first was stated in Taylor v. Taylor (1876) 1 Ch. D426 and adopted later by the Judicial Committee in Nazir Ahmed v. King Emperor AIR 1936 PC 253 and by this Court in a series of judgments including those in Rao Shiv Bahadur Singh & Anr. v. State of Vindhya Pradesh AIR 1954 SC 322, State of Uttar Pradesh v. Singhara Singh and Ors. AIR 1964 SC 358, Chandra Kishore Jha v. Mahavir Prasad & Ors. 1999 (8) SCC 266, Dhananjaya Reddy v. State of Karnataka 2001 (4) SCC 9 and Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd. 2008 (4) SCC 755. The principle stated in the above decisions applies to the cases at hand not because there is any specific procedure that is prescribed by the Statute for grant of approval but because if the approval could be granted by anyone in the police hierarchy the provision specifying the authority for grant of such approval might as well not have been enacted."

4.12 In case of Qualcomm India Pvt Ltd [2020 (43) GSTL 402 (T-Hyd)], Hyderabad bench has expressed same view stating as follows:

"6. *Rule 3 of the Cenvat Credit Rules, 2004 is the enabling provision, which entitles a manufacturer of excisable goods and the provider of output service to take Cenvat credit of the duties and taxes paid on the inputs and the input services, with the objective of utilisation of the same for payment of Excise duty on the products and service tax on the output services. In case of*

exportation of output service, there is no question of utilisation of Cenvat credit available in the books of accounts. Thus, Rule 5 ibid provides for refund of accumulated Cenvat credit, subject to compliance of the procedures/guidelines laid down under the notifications issued thereunder. We find that the refund benefit was denied to the assessee-appellant on the sole ground that there was no nexus between the input services and the output service exported by the appellant. Further, in Revenue's appeal, it has been contended that certain disputed services are not conforming to the definition of input service provided under Rule 2(l) ibid. Insofar as taking of irregular Cenvat credit is concerned, Rule 14 ibid clearly mandates that in case of irregular availment of credit or its utilisation, such credit can be recovered from the assessee and for effecting the recoveries, the provisions of Section 11A of the Central Excise Act, 1944/Section 73 of the Finance Act, 1994 shall apply mutatis mutandis. It is an admitted fact on record that the department has not invoked the provisions of Rule 14 ibid for effecting recovery of the alleged irregular Cenvat credit availed by the assessee-appellant. Thus, under such circumstances, it can be said that taking of Cenvat credit on the disputed services by the appellant is in conformity with the Cenvat statute. Rule 5 ibid nowhere specifies that Cenvat credit can be denied on the ground of irregular availment or utilisation of the same. Thus, in absence of specific provisions contained in the statute, denial of the refund benefit provided under Rule 5 ibid, in our considered opinion, cannot stand for judicial scrutiny. Since the department has not specifically alleged regarding actual exportation of services by the assessee-appellant and use/utilization of disputed services for such activities, benefit of refund should be available in terms of the unambiguous provisions contained in Rule 5 ibid, subject only to adherence of the formula laid down thereunder. The Learned Advocate appearing for the assessee-appellant submitted that it should be entitled for the benefit of interest for non-consideration of the refund application within the stipulated time-frame prescribed under the statute. However, on perusal of the case records, more specifically the grounds of appeal annexed to the appeal memorandum, we find that the assessee-appellant has not raised any plea on the issue of payment of

interest therein. Since such issue is not arising out of the appeal proceedings before the Tribunal, it will not be appropriate to consider such plea at this juncture for a decision as emphasized by the Learned Advocate for the appellant.”

4.13 In case of ADF Pvt Ltd [2020 (40) GSTL 349 (T-Hyd)], again Hyderabad bench, has observed as follows:

6. *We have considered the arguments of the Learned AR and perused the records. It is a well settled principle that availment of Cenvat credit, its utilisation and its refund are different aspects dealt with under CCR, 2004. Rule 5 of Cenvat Credit Rules, 2004 provides for refund of Cenvat credit in respect of goods/services exported out of India. Nowhere in this Rule 5, is there a provision to determine whether availment of Cenvat credit in the first place is correct or otherwise. There is a separate provision for recovery of irregularly availed Cenvat credit under Rule 14 of Cenvat Credit Rules, 2004. There are also provisions for recovery of interest as well as imposition of penalties if any Cenvat credit is irregularly availed. Therefore, we agree with the appellant that the rejection of refund of Cenvat credit partly on the ground that the input services are not eligible for Cenvat credit at all is not correct in law. In view of the above, we find that the rejection of refund claim on this ground is not correct and needs to be set aside.”*

4.14 In view of the discussions as above I do not find any merits in the impugned order to effect that appellants were required to establish their claim to the CENVAT Credit availed by them, in a proceedings of refund under Rule 5. In case revenue claims certain credits are inadmissible, it would be appropriate to deny the credit by way of proceedings under Rule 14 of CENVAT Credit Rules, 2004.

5.1 In result, the appeals are partly allowed and the matters remanded back to the original authority for redetermination of admissibility of the refunds as per observations made in paras 4.1 to 4.14 above.

5.2 Since the issue is substantially old, the authority should finalize the refunds in remand proceedings within three months from the date of receipt of this order.

5.3 Appellant should fully cooperate with the authority and produce all the documents called for in time.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

tvu