CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI.

COURT NO. II

Excise Appeal No.50261 of 2019 (SM)

[Arising out of Order-in-Appeal No.1280(CRM)CE/JDR/2018 dated 19.11.2018 passed by the Commissioner (Appeals), Central Excise and Central Goods & Service Tax, Jodhpur.]

M/s. J.K. Cement Works **Appellant**
Unit : J.K. Cement Ltd.,
Kailash Nagar, Nimbahera,
Chittorgarh,
Rajasthan-312 620.

VERSUS

Commissioner of Central Excise & Service Tax **Respondent**
142-B, Sector-II, Hiran Magari,
Udaipur,
Rajasthan-313 002.

APPEARANCE:

Shri Bipin Garg, Advocate for the appellant.
Shri Ravi Kapoor, Authorised Representative for the respondent.

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50055/2022

DATE OF HEARING/DECISION:04.01.2022

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the cenvat credit on items like M.S. Grating, M.S., Stair Case and LED Street Light, etc. has been rightly rejected and the second issue is regarding the disallowance of proportionate cenvat credit on inputs used for generating power, as part of power is supplied to the residential colonies/staff quarters of the appellant,

and further, the issue is whether the show cause notice is barred by limitation.

3. The appellant is manufacturer of cement engaged in the manufacture of grey cement, which is dutiable. In the course of audit-visit by the Anti Evasion, it appeared to the officers that the appellant has wrongly availed cenvat credit as capital goods on M.S. Grating, Stair Case and LED Street Light totalling Rs.21,80,258/-. It further appears that the appellant was required to reverse proportionate amount of Rs.4,31,419/- on input/ input services used for generating power in the captive power plant. As regards the proportionate cenvat credit in respect of raw material/inputs/input services used in generation of power, supplied to residential colony, situated adjacent to the factory, the dispute relates to the period March, 2013 to December, 2015. In the course of investigation, statement of Sr. Accounts Manager was recorded on 11.02.2016, wherein he initially agreed that there may be error in taking credit and reversed cenvat credit of Rs.21,49,113/- vide Entry dated 11.02.2016 and further stated that remaining wrongly availed cenvat credit of Rs.31,145/- shall be deposited shortly. The balance amount was also reversed on 15.02.2016.

4. Subsequently, a show cause notice dated 28.02.2018 was issued invoking the extended period of limitation proposing demand of aforementioned amount with further proposal to appropriate the amount already reversed/deposited and further, penalty was also proposed.

5. The appellant contested the show cause notice and in reply, it was urged that the three items in dispute have been admittedly used in the factory, and if cenvat credit is objected to as 'capital goods', the same are allowable as 'inputs' as defined in Rule 2 (k) of CCR, 2004. The appellant relied upon the Board's Circular No.943/4/2011-CX dated 29.04.2011,

wherein the Board clarified the issue of allowability of inputs, etc. in the factory of production. The question framed in para-3 of the Circular is – How is the "no relationship whatsoever with the manufacture of a final product" to be determined? Clarification – Credit of all the goods used in the factory is allowed except in so far as it is specifically denied. The expression "no relationship whatsoever with the manufacture of a final product" must be interpreted and applied strictly and not loosely. The question does not include any goods used in or in relation to the manufacture of final products, whether directly or indirectly and whether contained in the final product or not. Only credit of goods used in the factory but having no relationship with the manufacture of final product is not allowed, e.g. goods such as furniture and stationery used in the office within the factory are the goods used in the factory and are used in relation to the manufacturing business and hence, the credit on the same is allowed.

6. On this alternative plea taken by the appellant, the Adjudicating Authority observed that such issue is not involved in the show cause notice and, therefore, the plea of allowability as inputs is not sustainable. The Commissioner (Appeals) has been pleased to uphold the disallowance observing that the appellant had agreed with the Department's contention and accordingly, reversed the same, but now, they have put forward a new plea – alternatively credit may be allowed as inputs. Further, observing that such alternative plea is outside the purview of the show cause notice.

7. Having considered the rival contentions on this issue, I find that the Court Below has totally mis-conceived the issue, and there is failure to exercise the jurisdiction vested in them. A point of law or an alternative plea can be taken, at any stage, and the Adjudicating Authority or Appellate Authority is bound to decide the same.

8. Having considered the admitted facts on this issue that the items in dispute have been used in the factory of production, I hold that the cenvat credit is allowable on these items under dispute as inputs, as defined in Rule 2 (k) of CCR, 2004.

9. So far the issue of disallowance of proportionate credit on inputs and input services used in the captive power plant is concerned, ld. Counsel points out that the captive power plant is used for generating power for production and supply to the residential colony, which is situated adjacent to the factory, has been coming for the last two years and the same was never objected to by the Revenue. He points out to the 4 Audit Reports during the period of dispute, copies of the same have been produced before the Tribunal. The first report is dated 27.02.2014 and the audit was undertaken during Jan.2014. The second report is dated 11.03.2015 and the Audit was undertaken from 22nd to 24.12.2014. The third report is dated 4.5.2016 and the audit was undertaken during 26th to 27.02.2016 and the fourth report is dated 14.06.2017 and the audit was undertaken during 4th to 6th May, 2017. In all these reports, the issue of proportionate disallowance for power supply from captive generation to the staff quarters was not raised. In spite of the fact that in the Audit report dated 4.5.2016 by way of objection no.5, expenses on the security services relating to the residential colony was taken, and the cenvat credit was proposed to be denied.

10. In this view of the matter, ld. Counsel states that this issue has been raised by way of change of opinion and as such, there being no suppression or malafide on the part of the appellant/assessee, accordingly, I hold that extended period of limitation is not invokable.

11. Ld. Authorised Representative for the respondent/Department relies upon the impugned order and the observations of the Court below.

12. Having considered the rival contentions sofar the issue is concerned, I hold that cenvat credit is allowable and accordingly, disallowance of Rs.21,80,258/- is set aside. Sor far the disallowance of Rs.4,31,419/- is concerned, the proportionate disallowance of cenvat credit on input and input services for power supply to the residential colony is also set aside and the same is held to be barred by limitation and the penalty also stands set aside.

13. Accordingly, the appeal is allowed. The appellant is entitled to consequential benefits in accordance with law.

[order dictated & pronounced in open court]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.