

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH - COURT NO. – I

Single Member Bench

Excise Appeal No. 30166 of 2024

(Arising out of **Order-in-Original** No.TTD-EXCUS-000-COM-28/2023-24, dated 09.11.2023
passed by Commissioner of Central Tax, Tirupati)

M/s JSW Cement Ltd.,
212, Survey No. 208, 209, 206,
Bilkalagudur Village,
Gadivemula, Kurnool,
Andhra Pradesh – 518 508.

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APPELLANT

VERSUS

**Commissioner of Central Tax
Tirupati – GST**

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RESPONDENT

No. 9/86, West Church Complex,
Amaravathi Nagar, MR Palli Road,
Thirupathi, Chittoor,
Andhra Pradesh – 517 502.

APPEARANCE:

Shri M.S. Nagaraja, Advocate for the Appellant.

Shri V. Srikanth Rao, Authorised Representatives for the Respondent.

CORAM: HON'BLE Mr. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30100/2025

Date of Hearing:27.02.2025
Date of Decision:28.03.2025

M/s JSW Cement Ltd., (hereinafter referred to as appellant) have come in appeal against the Order-in-Original No.TTD-EXCUS-000-COM-28/2023-24 dated 09.11.2023 passed by Commissioner of Central Tax, Tirupati. The issue involved in this appeal is whether they are entitled for Cenvat Credit on the Goods Transport Service (GTS) or otherwise.

2. The brief fact of the case is that based on certain verification by the Department, wherein, it was noticed that price declared on invoice was inclusive of loading and transportation charges as also the clarification from the appellant that their sale is on FOR basis, the Department examined the taxability of Cenvat Credit taken in respect of Goods Transport Service.

Department relied on the fact that the factory gate is required to be treated as the place of removal and therefore service tax paid on GTA service for outward transportation of cement from the factory or from the depot upto the premises of buyers were not eligible for taking Cenvat Credit.

3. On adjudication, out of total demand of Rs. 3,12,71,088/-, Adjudicating Authority dropped the demand of Cenvat Credit of Rs. 3,09,26,860/- and only confirmed demand of Cenvat Credit of Rs. 3,44,228/- along with interest and equal amount of penalty, under Rule 14(1)(ii) of Cenvat Credit Rules (CCR) 2004 read with Section 11A(10) of Central Excise Act, 1994 (CEA). The ground for dis-allowing credit of Rs. 3,44,228/- on outward transportation was that the assessee had not produced relevant documents to show that sale from Depot/ C & F agent to customer's premises was on FOR destination basis. It was also observed by the Adjudicating Authority that the documents produced by the appellant related to the clearance of final products from the factory to the buyers premises and not ex-depot. This order dated 30.01.2019 was appealed against before this Tribunal, which vide its Final Order No. A/31063/2019 dated 14.11.2019 remanded the matter back to the Adjudicating Authority to pass a fresh order considering the judgment of Hon'ble Apex Court in the case of Ultratech Cement [2018 GSTL 337 (SC)] and following the principle of natural justice.

4. In the Denovo proceeding, the Adjudicating Authority vide impugned order dated 09.11.2023 and has again confirmed the demand of Cenvat of Rs. 3,44,228/- on the ground that the appellant have failed to submit any documentary evidence except stating that sale of goods was on FOR basis irrespective of whether cleared from the factory or depot and that the

transaction of the sale was at buyer's premises. Learned Advocate has mainly contended that sale of goods from Depot was also on FOR basis and that the transaction got completed at buyer's premises only and therefore on the similar lines on which the Learned Adjudicating Authority had dropped the demand in respect of clearances ex-factory, this amount is also liable to be set aside. He has relied on certain documents provided which show that sale of cement from Depot was for "door delivery" or for "at site basis" and therefore even in the case of clearance of goods from Depot to place of removal would be at the customer's premises. He is relying on the judgment of CC and CE, Aurangabad Vs Roofit Industries Ltd., [2015 (319) ELT 221 (SC)]. He is also relying on the CBEC Circular No. 1065/4/2018-CX dated 08.06.2018 wherein it was clarified by the Circular that place of removal has to be decided in terms of principle laid down by the Supreme Court in the case of CCE Vs Ispat Industries Ltd., [2015 (324) ELT 670 (SC)]. The Apex Court in that case has upheld the principle laid down in M/s Escorts JCB to the extent that 'place of removal' is to be required to be determined with reference to the 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of manufacture. He further submits that in terms of Rule 2(I) of CCR, the consignor is eligible to avail Cenvat Credit on outward transportation of goods on FOR basis from the factory or Depot upto the premises of the customers where the transaction of sale takes place. He has relied on various judgments including Hindustan Zinc Ltd., Vs CCE, Udaipur [2024 (4) TMI 817 (Tri-Del)], Ultra Tech Cement Ltd., Vs CCE, Kutuch in the Final Order No. A/10373/2019 dated 25.02.2019.

5. By way of additional plea, he is also contesting the invocation of extended period and imposition of penalty. He submits that the show cause

notice dated 02.06.2016 proposed to dis-allow and demand Cenvat Credit availed during the period February, 2013 to March, 2016. While the Adjudicating Authority in the first round has already allowed the credit of Rs. 3,09,26,850/-. Further, the show cause notice has not shown any substantive ground of fraud, collusion, wilful misstatement etc., thereby warranting invocation of extended period. He is also submitting that the Commissioner has noted their submission on the grounds of limitation but had not recorded any findings with respect to the written submission that the ingredients under Section 11(4) was not available. Learned Advocate also submits that the Adjudicating Authority's impugned order cannot have right to concur with the findings of the previous Adjudicating Authority and has to apply her own mind. In fact, he submits that since the Tribunal had already set aside the earlier adjudication order dated 30.01.2019, to the extent of demand of Cenvat Credit confirmed and therefore it was not in existence for the Commissioner to concur with the findings in the non-existent order.

6. On the other hand, Learned AR reiterates the findings given by the Adjudicating Authority in the impugned order as regards taking of the credit as also on the ground of invoking extended period. He also invites attention to the fact that in their Appeal Memorandum, in their grounds of appeal at para 11 and 12, they have clearly admitted that they were engaged in 2 types of sales namely trade and non-trade. While the former represented the sale to dealers, who further traded in cement purchase from appellant, the later category was sale to industrial customers, who uses the cement in their factory etc. It was also pointed out that in the case of non-trade sales, the cement was generally supplied directly from the factory, however, in certain instances to meet the urgent requirement of non-trade customers,

the cement was also supplied from the nearby Depots. It was also pointed in their grounds of appeal that in the case of trade sales, the cement is supplied from the Depots to the dealers in the respective region and the appellants were not taking credit of service tax paid when the goods were supplied from the Depots to the buyer's premises, even though the appellants have stated that during the period August 2013, appellant had taken credit of Rs. 3,44,228/- which related to supply of goods directly to non-trade customers from various Depots. Thus, the appellants have admitted the fact that there were certain sales where credit was not being taken. In view of the same, in the absence of any substantive document, they will not be eligible for taking credit to the extent of Rs. 3,44,228/- as held by the Adjudicating Authority. Further, their reliance on various case laws are not relevant in the sense that here there is no confusion as regards interpretation of law in as much as the appellant themselves have clearly understood the law and followed the same as admitted in the grounds of appeal.

7. Heard both the sides and perused the records.

8. I find that the issue lies within a narrow compass. The issue that needs to be decided is whether in the facts of the case, Cenvat Credit to the extent of Rs. 3,44,228/-, which has been confirmed and demanded from the appellant, is correct or not. It is an admitted fact that in the first round of appeal, the appellant had come only to the extent of denial of credit of Rs. 3,44,228/- before the Tribunal as well as the fact that Department had not gone in appeal against the dropping of the remaining demand. Therefore, the issue which was dealt with and left to the Tribunal was with regard to the admissibility or otherwise of the credit denied by the Adjudicating

Authority. Matter was remanded back to Adjudicating Authority with certain directions. The Adjudicating Authority took into account the observations and direction and allowed them to produce the documents and on going through those documents he was not satisfied that it provided the ex-depot sale was on FOR basis. It is not in dispute in this present appeal that wherever the sale has been on FOR basis, as evidenced from record, the credits have allowed and it has not been disputed by the Department any further. However, in the case of Rs. 3,44,228/-, the appellant could not produce sufficient documents to satisfy the Adjudicating Authority that the ex-depot sales were also in the nature of FOR or that they were essentially FOR sale. The documents being cited as evidence before this Bench to prove that sales were on FOR basis pertains to the month of April as pointed by the Learned AR and that also is not very categorical as to whether the sale was on FOR basis or otherwise. There is no other corroborative evidence that it is on FOR basis.

9. As regards various other observations of the Adjudicating Authority, I find that the Adjudicating Authority has gone through various case laws as well as evidence adduced by the appellant at para 22 and observed that the documents furnished by the assessee related to the clearance of final products directly through the factory to the buyers premises and that they have not produced any documents / information evidencing (i) the sale from Depot/Premises of Consignment Agent to the customer's premises was on FOR destination basis, (ii) transfer of property at buyer's premises and (iii) inclusion of the freight charges in the assessable value and payment of Excise duty on the said freight charges. Therefore, essentially, the Adjudicating Authority has held that the Assessee had clearly failed to determine place of removal with reference to the points of sale and therefore

the credit taken at outward freight on transportation of finished goods were clearly beyond the place of removal in relation to sale ex-depot. Therefore, to that extent, I do not find any infirmity in the order of the Adjudicating Authority confirming the demand of Rs. 3,44,228/- in the remand proceeding.

10. As regards the invocation of extended period, she has merely concurred with the findings of the earlier Adjudicating Authority and held the same as legal and proper and also upheld the order of the Adjudicating Authority imposing penalty under Section 11AC of Central Excise Act, 1944 read with Rule 15(2) of Cenvat Credit Rules, 2004.

11. I find that when the matter was remanded, it was remanded only to the extent of the appeal preferred by the appellant to the Tribunal. Therefore, it is not correct to say that the Original Adjudicating Order dated 30.01.2019 was not in existence to the extent of other issues also and therefore, she could not have concurred with that. However, I find that she has not adequately and effectively dealt with this aspect afresh on her own as Adjudicating Authority in denovo proceedings. Therefore, the contention of the appellant for non invocation of extended period should have been examined independently instead of merely concurring with the earlier Adjudication order. Further, I also find that show cause notice has not adduced any substantive ground to invoke the ingredients required for invoking the extended period. Moreover, the entire issue is as regards the determination of point of sale or place of removal etc., which were having different interpretations during the material time in terms of various judgments including the judgment in the case of Larson & Toubro, Ispat Industries Ltd., and Roofit Industries Ltd., etc. Even the Board also had

some doubt in the light of various judgments of Hon'ble Supreme Court on this issue and therefore they issued certain guidelines/clarification in terms of Circulars cited by the Learned Advocate, which also supports that extended period should not be invoked. Learned AR's submission that this will be applicable only in respect of new show cause notice is not correct in as much as the background of that said circular itself shows that there were certain interpretational issues as regards place of removal. Moreover, I find that Department had never filed any appeal against dropping of substantive portion of demand. Therefore, in the overall facts of the case, I do not consider that there was any scope for invoking extended period.

12. Therefore, in the facts of the case, I find that while on merit the demand is sustainable in the impugned order as the appellant have clearly failed to bring on record the evidence substantiating that sales were on FOR basis even in the case of ex-depot, however, I find, as far as invocation of extended period is concerned, that it is not sustainable for the reasons discussed, supra. Therefore, while on merit it is upheld, but on limitation, the demand is not sustained. Since, the entire demand is barred by limitation, the appeal to the extent of setting aside the demand and penalty by Adjudicating Authority is set aside on this count itself.

13. Appeal allowed.

(Order Pronounced in open court on 28.03.2025)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)