

Compensation Cess not to be set off from Clean Energy Cess

UOI vs. Mohit Minerals (SC)

Presented by: BT ASSOCIATES



Advisory



Litigation



Compliance

Background

The Constitution (One Hundred and First Amendment) Act, 2016 introduced the Goods and Services Tax which enabled the Parliament to levy a cess popularly known as the Goods and services tax (compensation to states) Act, 2017. Such cess was levied for a period of five years to compensate the States for the loss of revenue on account of introduction of GST. The levy of GST subsumed many of the indirect taxes and cesses, one amongst it being the levy of *clean energy cess*.

Issue Involved

The levy of compensation cess impacted, Mohit Minerals Pvt. Ltd.(hereinafter referred to as a ‘petitioner’)a trader of imported coal. The petitioner imported coal from Indonesia, South Africa and also purchased coal from Indian mines.The petitioner had stock of coal on 30.06.2017 on which it had already incurred clean energy cess to the tune of Rs.400 per ton, however with the inception of Goods and Services tax (compensation to states) Act, 2017 the impugned legislation was again levying and collecting cess @ Rs.400 per ton which amounted to double taxation at the same rate and on the same stock. As leviability of Compensation Cess was within the legislative competency, the petitioner challenged such cess by pleading to set off of the same with the clean energy cess paid at the time of import.

Writ filed in Delhi High Court

A writ petition was filed before the Delhi High Court declaring that Goods and Services tax (compensation to states) Act, 2017 lacks legislative competency and is unconstitutional. That the impugned legislation is illegal and unconstitutional, that the Notifications No. 1/2017 & 2/2017-Compensation Cess (Rate) dated 28.06.2017 are illegal and unconstitutional. It was also alleged that under Article 279A of Constitution of India there is no power to levy such cess.

Interim Order of the Delhi High Court:

The court questioned the legislative competence of the parliament to enact the impugned Act of Goods and Services tax (compensation to states) Act, 2017. It was observed that cess was levied on the same taxable event as that provided for levy of CGST and IGST Act. Italso observed that as the petitioner has already paid clean energy cess on the stocks of coal the petitioner should not be asked to make any further payment. ***However, on stock of coal on which no clean energy cess was paid any payment made in terms of the impugned act shall be decided in the final order of the Hon’ble Delhi High Court. Moreover, it was also stated that the petitioner would be entitled to a refund of clean energy cess paid under the Act.***

In another writ petition, it was alleged that the Goods and Service Tax is repugnant to and transgress the mandate of the constitution. The Taxation Laws (Amendment) Act, 2017 repealed various enactments including clean energy cess. It was stated that no power rested with the Parliament to levy cess for providing compensation to the states for loss of revenue arising on account of implementation of GST for a period of 5 years. It was stated that on the very same transaction there could not be two levies i.e. clean energy cess and compensation cess. However, the learned attorney on behalf of the revenue contended that cess is nothing but a special kind of tax. It was held that if the legislature is competent to levy the main tax i.e. GST then the power to levy cess flows from the same power to levy tax itself. It was also stated that the clean energy cess was levied and collected for the purpose of financing and promoting clean energy

initiatives unlike the GST cess which was introduced to provide compensation to states and also stated that the High Court had committed an error in prima facie holding that credit of clean energy cess should be allowed to be utilized for paying GST Compensation Cess.

The matter was subsequently admitted in the Hon'ble Supreme Court.

Hon'ble Supreme Court's Judgement

The Hon'ble Supreme Court from the submissions of the learned counsel admitted the following issues in relation to the writ petitions submitted:

1. Whether the Compensation to States Act, 2017 is beyond the legislative competence of Parliament?
2. Whether Compensation to States Act, 2017 violates Constitution (One Hundred and First Amendment) Act, 2016 and is against the objective of Constitution (One Hundred and First Amendment) Act, 2016?
3. Whether the Compensation to States Act, 2017 is a colourable legislation?
4. Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law?
5. Whether on the basis of Clean Energy Cess paid by the petitioner till 30th June, 2017, the petitioner is entitled for set off in payment of Compensation to States Cess?

Let us examine what Hon'ble Apex Court have hold against each of above questions:

Issue No.1: The petitioner had challenged the legislative competence of Parliament to enact Compensation to States Act, 2017. On the aforesaid allegation of the petitioner, the court bought out the various powers of the Parliament which is stated hereunder:

- The Hon'ble Supreme Court had referred to **Article 248** enumerating the residuary powers of the legislation which gives power to the parliament to make laws in relation to matters not enumerated in the concurrent list or state list.
- The Hon'ble Supreme Court also bought out the meaning of cess by giving reference to Black's law dictionary tenth edition as "an assessment of tax". Moreover, various judicial pronouncements concluded that cess is tax levied for some special purpose or some special administrative expense.
- It was also mentioned that Article 270 of the constitution both before it existed prior to constitution (one hundred and first amendment) Act, 2016 and subsequent to constitution (one hundred and first amendment) uses the expression "any cess levied for specific purposes under any law made by parliament." Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016 expressly empowers the parliament to make laws on the recommendation of the GST Council to provide compensation to the state for revenue loss. **Therefore it was concluded that Compensation to states Act, 2017 is not beyond the legislative competence of the parliament.**

Issue No.02: The petitioner has alleged that the Compensation to States Act, 2017 violates constitution and it is against the objective of Constitution (One Hundred and First Amendment) Act, 2016.

The Hon'ble Supreme Court gave reference to Article 246A which gives power to make law with respect to goods and services tax. When there is express power to make law regarding goods and service tax then how such power shall not include power to levy cess on goods and service tax. There is no restriction of

any kind in the Article for not levying of cess. The Hon'ble Court also admits that Constitution (One Hundred and First Amendment) Act, 2016 was passed which subsumed various indirect taxes, surcharges, cesses but did not provide for not levying of cess.

Further the preamble specifies that the Compensation to States Act, 2017 provides for compensation to state for loss of revenue arising on account of implementation of GST under the provisions of Constitution (One Hundred and First Amendment) Act, 2016. **Hence, the Compensation to States Act, 2017 does not violate the Constitution (One Hundred and First Amendment) Act, 2016.**

Issue No.03: Petitioner also claims that the Compensation to States Act, 2017 is a colourable legislation (*The doctrine of colourable legislation refers to the question of competency of the legislature while enacting a provision of law e.g. Legislature of a federal state is accountable to its people and the legislation has different power which is vested upon it by the constitution*).

The Hon'ble Supreme Court stated that Constitution (One Hundred and First Amendment) Act, 2016 clearly provides that centre will provide compensation to states for the loss on the implementation of the Compensation to States Act, 2017, and the Act has been passed to fulfill the Constitution (One Hundred and First Amendment) Act, 2016 objective. Hence, it was specifically stated that there is no substance in the submission of the petitioner that Compensation to States Act, 2017 is a colourable legislation.

Issue No.04 – The petitioner also mentioned a question about whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law.

The Hon'ble Supreme Court observed that in such a situation it is a well settled principle that two taxes which are distinct and separate and on two different aspects of a transaction are permissible as “in law there is no overlapping.” Thus as there is no prohibition in law so as to declare it invalid and thus levy of Compensation to States Cess and GST on the same taxing event is permissible in law.

Issue No.05 – The petitioner also claims set off of clean energy cess paid under the Finance Act, 2010 on the stocks of coal lying up to 30th June 2017, in payment of compensation to states cess.

The Hon'ble Supreme Court replied that the petitioner is not entitled to set off the payments made toward clean energy cess with payment of Compensation to State for the reason being is the Clean Energy Cess which was charged under the Finance Act, 2010 was taken for the purpose of financing and promoting clean energy initiatives, funding research in the area of clean energy whereas the compensation cess is collected to “provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax”. Also, Compensation to States Act, 2017 or Rules thereunder does not provide any provisions of credit or set off of clean energy cess which were paid up to 30th June, 2017.

Conclusion

The Hon'ble Supreme Court in the judgment of *UOI VS. Mohit Minerals Pvt. Ltd*, challenging the legal competency of the parliament to enact the Compensation to States Act, 2017 held that the GST Compensation cess is enacted as per the powers of the Constitution. Also it was held that clean energy cess charged under Finance Act, 2010 cannot be set off against cess levied under Compensation to States Act, 2017. Hence, the petitioner is to bear double taxation of clean energy cess and compensation cess on the stocks of coal lying on 30th June, 2017.

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Career History:

Twenty years of experience in Indirect Tax practice. Before moving to BT was heading eastern India Indirect Tax Practice of Ernst & Young from Kolkata office.

Education: Chartered Accountant

Specialty Areas:

Structuring & Planning under Indirect Tax including foreign trade Policy; Litigation at various levels till Tribunal & Planning under SEZ & EOU Schemes.

- Advisory services with regards to applicability of the taxes & duties as well as procedural compliance such as registration, assessments, to name a few.
- Review of contract and agreement to help mitigate the overall incidence of taxes & duties.
- Contributed thought leadership on technical papers as member of Indirect Tax committee at various chambers of commerce.
- Prolific speaker at various institutes, chambers, public gatherings.
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- Providing the right guidance to enable clients to make the most of duties & taxes by setting up of EOU/SEZ.

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