

**HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
AND
HON'BLE SMT JUSTICE VENKATA JYOTHIRMAI PRATAPA**

W.P.No.1009 of 2019 and W.P.Nos.2631 & 6216 of 2021

COMMON ORDER: *(Per Hon'ble Sri Justice U. Durga Prasad Rao)*

W.P.No.1009 of 2019 and W.P.No.6216 of 2021:

These two writ petitions are filed by same petitioner. The petitioner's case in W.P.No.1009 of 2019 is that it is a company engaged in the business of ferro alloys manufacturing. It was established as a SEZ unit as per the terms of the Special Economic Zones Act, 2005 (for short, 'the SEZ Act') on obtaining letter of approval. As per Section 26 of the SEZ Act, the petitioner's unit is exempt from paying any duty, tax or cess under the Customs Act, 1962 or Customs Tariffs Act, 1975.

(a) While so, the petitioner sent two letters dated 05.07.2017 and 09.08.2017 seeking clarification from Director (SEZ) for exemption of cess payable under Goods and Services Tax (Compensation to States) Act, 2017 (for short "the GST Compensation Act") on import of coal under the Customs Act, 1962 or Customs Tariff Act, 1975.

(b) With regard to the above letters, 2nd respondent issued impugned letter dated 04.09.2017 stating that Section 26(1)(a) of SEZ Act, 2005 provides exemption to SEZ units from any duty of Customs under Customs Act, 1962 or Customs Tariff Act, 1975. Further, under notification No.64/2017 dated 05.07.2017, the IGST leviable U/s 3(7) of Customs Tariff Act, 1975 is exempted on all the goods imported into India by a SEZ unit. However no such exemption for compensation cess leviable U/s 3(9) of Customs Tariff Act, 1975 is provided either under Customs Act or IGST Act. Hence the cess on coal under GST Compensation Act cannot be exempted unless (i) CBEC/GST issues a notification exempting the said cess or (ii) the first schedule under section 7 of SEZ Act is amended by virtue of the power U/s 54 of the said Act. The said view of the 2nd respondent is misconceived and erroneous for the reason that U/s 26 of SEZ Act itself, the levy of duty, tax or cess under Customs Act, 1962 or Customs Tariff Act, 1975 is exempted. Since the 2nd respondent on erroneous view started demanding the petitioner to submit a bond along with a bank guarantee equal to the amount of compensation cess

and on fulfilling the same only allowing the goods to be brought into the SEZ area, W.P.No.1009/2019 is filed.

(c) Along with writ petition I.A No.1 of 2019 was filed seeking interim order and this court vide order dated 12.06.2019 granted interim stay restraining the respondents from levying/collecting or demanding bank guarantee for compensation cess initially, till 10.07.2019 and later by virtue of order dated 10.07.2019 extended the interim stay until further orders.

(d) While so, pending the WP No.1009/2019 the 2nd respondent sent a letter in VIII/48/47/APSEZ/Maithan/2017, dated 04.11.2020 demanding the petitioner to renew the bank guarantees offered by the petitioner earlier, as their time was going to be expired. Challenging the said letter dated 04.11.2020, the petitioners filed the W.P.No.6216/2021 seeking a writ of mandamus, declaring the impugned letter dated 04.11.2020 as illegal, arbitrary and contrary to Section 21(a) of the SEZ Act, 2005.

2. Counters in W.P.No.1009/2019 and 6216/2021 :

Respondents 1 to 4 filed counters and opposed the writ petitions:

(a) The 4th respondent is wrongly impleaded as a party. The correct respondent is – Commissioner, Customs, Customs Preventive Commissionerate, Vijayawada, A.P. Hence, the writ petition is liable to be dismissed for non-joinder of proper parties.

(b) The impugned letter dated 04.09.2017 issued by 2nd respondent is an appealable order u/s 128 of the Customs Act, 1962. In view of availability of efficacious alternative remedy, the writ petition is not maintainable.

(c) The petitioner sent two letters dated 05.07.2017 and 09.08.2017 seeking clarification from the Development Commissioner, SEZ, Duvvada for availing exemption from payment of cess on the import of coal under the Customs Act, 1962 and Customs Tariff Act, 1975. The 2nd respondent sent the impugned letter dated 04.09.2017 denying such exemption. Hence, the petitioner submitted bond along with bank guarantee in respect of compensation cess leviable for

import of each consignment of coal and then filed the W.P.No.1009 of 2019.

(d) U/s 26(1)(a) of SEZ Act, 2005, a SEZ unit is entitled for exemption from any duty of Customs Under the Customs Act, 1962 or Customs Tariff Act, 1975 or any other law on goods imported into or services provided in a SEZ Unit. However, there is no exemption of payment of cess under GST Compensation Act.

(e) The Government of India issued notification No.64/2017 dated 05.07.2017 only exempting IGST leviable u/s 3(7) of the Customs Tariff Act, 1975 on all goods imported into India by a SEZ unit for authorized operations. However, no such exemption was granted in respect of compensation cess leviable under Section 3(9) of the Customs Tariff Act.

(f) Further, as per Section 7 of the SEZ Act, 2005, the taxes, duties or cess under the enactments specified in the 1st Schedule are only exempted for the SEZ developer / SEZ unit. However, the SEZ payable under GST Compensation Act, 2017 is not included in the 1st schedule. Unless the said Act is also included in the 1st schedule by

amending the Schedule u/s 54 of the SEZ Act, 2005, the petitioner cannot claim exemption against the compensation cess.

(g) So far as applicability of the concept of zero rated supply u/s 16 of the IGST Act, 2017 is concerned, Section 16 discusses only with regard to the exemption granted in respect of a supplier / unit registered in India and not for the import of goods from a supplier outside India (Foreign territory) and exporting to a SEZ unit in India. Such supplies made from outside the country amount to imports as per SEZ Act and same will attract duties under the provisions of the Customs Act. Hence, the petitioner cannot claim exemption in that regard. The writ petition is liable to be dismissed.

(h) So far as W.P.No.6216/2021 is concerned, the 1st respondent filed counter with the averments similar to the counter in W.P.No.1009/2019.

The writ petitioner in W.P.No.1009/2019 filed rejoinder refuting the averments in the counter. It is pleaded that the appeal to the Commissioner (Appeals), Guntur is available against an order of assessment but not against the levy of compensation cess. Even otherwise, as per the decisions of the Hon'ble Apex Court, a writ

petition is maintainable even though alternative remedy is available when the impugned orders are issued without jurisdiction like in the present case.

It is further pleaded that as per section 11(2) of the GST Compensation Act, 2017, the provisions of CGST Act and the rules thereunder including those relating to assessment, ITC, non-levy, short levy, interest, appeals, offences and penalties shall as far as may be, *mutatis mutandis* apply in relation to the levy and collection of cess leviable u/s 8 on the intra-state supply of goods and services and inter-state supply of goods and services. Further, as per Circular No.1 /1/2017 dated 26.07.2017 issued by respondent No.1, clarification regarding the application of section 16 of IGST Act in relation to zero rated supply for the purpose of compensation cess was issued. It clarifies and exempts levy of compensation cess.

3. W.P.No.2631 of 2021:

(i) This writ petition is filed by Parry Sugars Refinery (India) Pvt Ltd which is also a SEZ unit established in Vakalapudi Village, Kakinada after obtaining a letter of approval as per SEZ Act, 2005.

This petitioner also, as in the above two writ petitions, questions the levy of cess under GST Compensation Act on import of coal.

(j) Petitioner's case is that it addressed letters dated 14.05.2019, 31.12.2019, 03.07.2020, 23.11.2020 and 31.12.2020 to the 2nd respondent requesting to waive the compensation cess under the Customs Act. However, the 2nd respondent issued the impugned letter dated 04.01.2021 rejecting the petitioner's request stating that although Section 26(1)(a) of SEZ Act provides exemptions to SEZ unit from any duty or customs under Customs Act, 1962 or the Customs Tariff Act, 1975, the notification No.64/2017 dated 05.07.2017 only exempts IGST but no such exemption is granted in respect of compensation cess and hence such cess cannot be exempted. Such stand taken by the 2nd respondent is illegal and contrary to the relevant enactments.

Hence the writ petition.

4. Counters of respondents 1 and 4 in W.P.No.2631 of 2021:

While admitting that the petitioner established SEZ unit in Vakalapudi Village, Kakinada and that the petitioner addressed letters dated 14.05.2019, 31.12.2019, 03.07.2020, 23.11.2020 and 31.12.2020

seeking exemption from compensation cess on import of coal, the respondents pleaded that the 2nd respondent issued letter dated 04.01.2021 stating that the relief prayed by the petitioner was not considered. The said refusal order is appealable U/s 128 of Customs Act, 1962 / Section 107 of CGST Act, 2017 and hence the writ petition is not maintainable.

The Government of India, Ministry of Finance, Department of Revenue vide notification No.64/2017 – Customs dated 05.07.2017 exempted IGST leviable u/s 3(7) of Customs Tariff Act, 1975 on all the goods imported to India by a SEZ unit. However, no such exemption was given in respect of compensation cess leviable U/s 3(9) of Customs Tariff Act, 1975. The exemptions u/s 7 of the SEZ Act are concerned, the same will apply in respect of enactments specified in the 1st Schedule of the said Act. However, the GST Compensation Act has not been mentioned in the 1st schedule. Unless the same is mentioned in the 1st schedule by way of amendment, cess cannot be exempted. The circular No.1/1/2017 of compensation cess dated 26.07.2017 is concerned, it is applicable only for exports including supply from DTA (Domestic Tariff Area) units to SEZ units.

However, it is not applicable to the imports of coal as in the present case. Hence, the petitioner cannot claim exemption under the said circular.

So far as the refund under section 16 of the IGST Act, 2017 is concerned, it deals with the exemptions granted in respect of supplier / unit registered in India and not for import of goods from a supplier outside India (foreign territory) and exporting to a SEZ unit in India. Further, the CBESC issued notification No.64/2017 dated 05.07.2017 by exempting IGST for import of goods by SEZ unit for authorized operations. However, no specific notification was issued by the Government for exemption of compensation cess imposed on import of coal or any other goods to SEZ units as per Sec. 3(9) of the Customs Tariff Act, 1975.

The provision of section 26(1)(a) of the SEZ Act r/w Sec.3(7) of the Customs Tariff Act, 1975 referred to by the petitioner relates to exemption from any duty of customs under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law on goods imported into a SEZ unit. However, compensation cess is a cess but not a duty / levy imposed under the Customs Act, 1962 or the Customs Tariff Act,

1975. Therefore, those provisions cannot be relied upon by the petitioner.

It is further stated that DGFT (Director General of Foreign Trade) issued notification No.57/2015/20 dated 20.03.2019 extending exemption of IGST and compensation cess under advance authorization, ETCG and to 100% EOU upto 31.03.2020. However, no such notification was issued by the Government exempting compensation cess to the SEZ units. The respondents prayed to dismiss the writ petitions.

The respondents 2 and 3 also filed their counter with averments similar to respondents 1 and 4.

5. Heard arguments of Sri Vikram Poosarla, learned counsel for petitioners in W.P.No.1009/2019 and WP No.6216/2021 and Sri Challa Gunaranjan, learned counsel for petitioner in W.P.No.2631/2021 and Sri O. Udaya Kumar, learned Central Government Counsel representing 1st respondent and Sri Suresh Kumar Routhu, learned Senior Standing Counsel for CBIC.

6. The point for consideration is whether the petitioners in W.P.No.1009 of 2019 and W.P.Nos.2631 & 6216 of 2021 being SEZ units are exempted from payment of GST compensation cess?

7. **Point:** Admittedly, the petitioners have established SEZ units and conducting authorized operations. They claim exemptions on payment of tax, duty and cess payable on goods and services imported to SEZ units under the provisions of the SEZ Act. Among the exemptions claimed, one is in respect of cess payable under the GST compensation Act for import of coal from foreign countries. Hence, it is pertinent to refer to the concept of cess payable under the GST compensation Act.

8. The Goods and Services Tax (compensation to State) Act, 2017 has taken its birth along with the Central Goods and Services Tax Act, 2017. Hence, the relevant constitutional provisions enabling the Parliament to enact the aforesaid two Acts need to be perused.

9. A bill was introduced in the Lok Sabha known as “The Constitution (122nd amendment) Bill, 2014 on 19.12.2014 proposing constitutional amendment to introduce Goods and Services Tax and

confer concurrent taxing powers on the Union as well as the States / Union Territories to make laws for levying goods and services tax on every transaction of supply of goods or services or both. It was proposed that the said Goods and Services Tax Act shall replace a number of indirect taxes being levied by the Union and State Governments and it was also intended to remove the cascading effect of taxes and provide for a common national market for goods and services. The proposed bill *inter alia* provided for subsuming various Central and State indirect taxes. So far as State taxes are concerned, they are Value Added Tax, Sales Tax, Entertainment Tax, Octroy and Entry Tax / Central Sales Tax, Purchase tax, Luxury Tax etc. Since the proposed bill subsumes various indirect taxes hitherto collected by the respective State Governments and thereby they would incur loss with the introduction of the Central Goods and Services Tax Act, it was contemplated to compensate the States for loss of revenue for a period of five years. It is apposite here to extract clause 19 of the Amendment Bill 2014 which reads thus:

“19. Parliament may, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of

the goods and services tax for such period which may extend to five years.”

10. While so, with the above objects, the Constitution (101st amendment) Act, 2016 dated 08.09.2016 was passed and thereby new articles 246A, 269A and 279A were inserted.

11. (a) Article 246A is a special provision with respect to goods and services tax. In essence, this provision creates legislative power on the States to legislate taxing law on intra-state sale of goods and supply of services. This provision also created exclusive legislative power on the Parliament to make laws with respect to goods and services tax leviable on sale of goods or supply of services in the course of inter-state trade or commerce.

(b) Article 269A speaks of levy and collection of goods and services tax in the course of inter-state trade or commerce. It lays down that such goods and services tax shall be levied and collected by Govt. of India and same shall be apportioned between Union and States in the manner provided by the Parliament by law on the recommendation of Goods and Services Tax Council.

(c) Then Article 279A speaks of constitution of Goods and Services Tax Council headed by Union Finance Minister to make recommendations to Union and States on the subjects mentioned in the said Article.

(d) Clause 18 of Amendment Act, 2016 is akin to Clause 19 of Amendment Bill, 2014. It reads thus:

“18. Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years.”

12. In consonance with the above constitutional amendment, the Parliament enacted:

- i. The **Central Goods and Services Tax Act, 2017** (Act 12 of 2017, dated 12.04.2017) to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the Central Government and for the matters connected therewith or incidental thereto.
- ii. The **Integrated Goods and Services Tax Act, 2017** (Act 13 of 2017, dated 12.04.2017) to make a provision for levy and collection of tax on inter-state supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto.
- iii. The **Union Territory Goods and Services Tax Act, 2017** (Act 14 of 2017, dated 12.04.2017) to make a provision for levy and collection of tax on intra-state supply of goods or services or both by the Union Territories and for matters connected therewith or incidental thereto.

- iv. The **Goods and Services Tax (Compensation to States) Act, 2017** (Act 15 of 2017, dated 12.04.2017) to provide for compensation to the States for the loss of revenue arising on account of implementation of the Goods and Services Tax in pursuance of the provisions of the constitution (101st Amendment) Act, 2016.

Now, of the above, we are concerned with the GST Compensation Act.

13. It is germane to look into some of the relevant provisions of GST Compensation Act before discussing the contentions raised by both parties.

(i) Section 2(c) of the Act defines the term ‘cess’ means the goods and services tax compensation cess levied U/s 8.

(ii) The term ‘compensation’ is defined U/s 2(d), means an amount in the form of goods and services tax compensation as determined U/s 7.

(iii) Section 2(r) defines ‘transition period’ means a period of five years from the transition date.

(iv) As per Section 2(q) transition date in respect of any State shall mean the date on which the State Goods and Services Tax Act of the concerned State comes into force.

(v) Section 7 deals with the method of calculation and release of compensation to the States during the transition period.

(vi) Section 8 deals with levy and collection of cess. This section says that (i) cess shall be levied on intra-state supplies of goods or services or both as provided for in Section 9 of CGST Act and (ii) inter-state supplies of goods and services or both as provided for in Section 5 of IGST Act and collected in the manner prescribed on the recommendations made by GST council for a period of five years or for such period as may be prescribed on the recommendation of the council. The cess shall be levied on such supplies of goods or services or both as are specified in the schedule of this Act. Provided that the cess on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of Customs Tariff Act, 1975 at the point when duties or customs are levied on the said goods U/s 12 of Customs Act, 1962 on a value determined under Customs Tariff Act, 1975.

14. It should be noted in **Union of India v. Hind Energy and Coal Benefication (India) Ltd.**,¹ the constitutional validity of GST Compensation Act, 2017 and its rules was challenged on the ground

¹ AIR 2018 SC 5318 = MANU/SC/1118/2018

that the same were beyond the legislative competence of the Parliament. In this regard, the Apex Court framed the following issues:

- (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?

15. Regarding the issue No.1, having observed that the entries in the List-II or List-III of 7th schedule have not referred to the subject of levy of compensatory cess in question and further Article 248 confers the residuary power of legislation to the Parliament, it was held that Parliament had legislative competence to legislate the GST Compensation Act. It was also observed that Article 270(1) of Constitution used the expression “any cess levied for specific purposes under any law made by Parliament” and thereby Parliament is empowered to frame the law.

16. Issues 2 and 3 are concerned, it was contended that when all the taxes, surcharges and cesses were subsumed in by Goods and Services Tax Act, imposition of compensation to States through cess falls foul to the Constitution (101st amendment) Act, 2016. The Apex Court observed that the expression used in Article 246-A is “power to make laws with respect to Goods and Services Tax”. It was held the said power is not a general power related to a general entry rather it specifically relates to Goods and Services Tax. Having so observed the Apex Court concluded that when express power is there to make a law regarding Goods and Services Tax, it is incomprehensible as to how such power shall not include power to levy cess on Goods and Services Tax. Though Constitution (101st Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the said Amendment Act does not specify that henceforth no surcharge or cess shall be levied. Thus, it was held the GST Compensation Act, 2017 does not violate Constitution and it was not a colourable legislation.

17. Issue No.4 is concerned, it is contended that the Goods and Services Tax being already imposed by the three Acts i.e., CGST Act,

IGST Act and UTGST Act, imposition of GST Compensation Cess on the same taxing event amounts to double taxation and having overlapping effect. This contention was also discarded by the Apex Court observing that two separate imposts in law are not prohibited by any law so as to declare it invalid.

18. Issue No.5 is concerned, it was contended that the petitioner having paid Clean Energy Cess till 30.06.2017 on the stock of coal, they are entitled to set off in payment of Compensation to States Cess. The said argument was discarded on the ground that the Clean Energy Cess and States Compensation Cess are collected wholly for different purposes.

Thus Hon'ble Apex Court upheld the constitutional validity of GST Compensation Cess. Thus it has now to be seen whether the petitioners can seek exemption of payment of GST Compensation Cess in the light of provisions contained in SEZ Act, 2005.

19. As stated supra, the petitioners are operating units in the SEZ. A special economic zone (SEZ) is an area in a country that is designed to generate positive economic growth. A SEZ is normally subject to different and more favorable economic regulations compared to

other regions in the same country, including tax incentives and the opportunity to pay lower tariffs. SEZ economic regulations tend to be conducive to and attract foreign direct investment (FDI). The petitioners being the units in the SEZ, are claiming exemption on payment of GST Compensation Cess relying on the provisions of SEZ Act, 2005. Hence it is pertinent to refer to relevant provisions of this Act.

20. The Parliament with an intent to provide for the establishment, development and management of special economic zones for the promotion of exports and for matters connected therewith or incidental thereto, enacted the SEZ Act, 2005.

(i) Section 2(i) defines Domestic Tariff Area (DTA) means the whole of India (including the territorial waters and continental shelf) but does not include the area of the Special Economic Zones.

(ii) Section 2(za) defines Special Economic Zone which means a SEZ notified under the proviso to sub section (4) of Section 3 and sub section (1) of Section 4 (including Free Trade and Warehousing Zone) and includes an existing Special Economic Zone.

(iii) According to Section 2(zc) a Unit means a Unit set up by an entrepreneur in a SEZ and includes an existing unit, an off-shore banking unit and a unit in an international financial service centre whether established before or after the commencement of this Act.

(iv) Section 3 deals with the procedure for making proposal to establish a SEZ. As per this Section a SEZ may be established either jointly or severally by Central Government or State Government or any person for manufacture of goods or rendering services or for both or as a Free Trade and Warehousing Zone. The Central Government after following due procedure grant letter of approval with certain terms and conditions and obligations and entitlements to the developer.

(v) As per Section 4 after grant of letter of approval, the developer shall submit the exact particulars of identified area to the Central Government and thereupon the Government may notify the Specially Identified Area in the State as a SEZ.

(vi) Then Section 7 deals with exemption from taxes, duties or cess which reads thus:

“7. Exemption from taxes, duties or cess:- Any goods or services exported out of, or imported into, or procured from the Domestic Tariff Area by:

- (i) A Unit in a Special Economic Zone; or
- (ii) A Developer,

shall, subject to such terms, conditions and limitations, as may be prescribed, be exempt from the payment of taxes, duties or cess under all enactments specified in the First Schedule.

(vii) Then Section 26 also deals with certain exemptions drawbacks and concessions which reads thus:

“26. Exemptions, drawbacks and concessions to every Developer and entrepreneur.—

(1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely:—

- (a) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods imported into, or service provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;
- (b) exemption from any duty of customs, under the Customs Act, 1962 (52 of 1962) or the Customs Tariff Act, 1975 (51 of 1975) or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India;
- (c) exemption from any duty of excise, under the Central Excise Act, 1944 (1 of 1944) or the Central Excise Tariff Act, 1985 (5 of 1986) or any other law for the time being in force, on goods brought from Domestic

Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;

- (d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;
 - (e) exemption from service tax under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;
 - (f) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 (23 of 2004) in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;
 - (g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 (74 of 1956) if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.
- (2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).

(viii) Then Section 50 deals with power of State Government to grant exemption which reads thus:

“50. Power of State Government to grant exemption:- The State Government may, for the purposes of giving effect to the provisions of this Act, notify policies for Developers and Units and take suitable steps for enactment of any law:-

- (a) granting exemption from the State taxes, levies and duties to the Developer or the entrepreneur;
- (b) delegating the powers conferred upon any person or authority under any State Act to the Development Commissioner in relation to the Developer or the entrepreneur.”

21. Thus it is obvious that Sections 7, 26 and 50 are the three main provisions which allow the SEZ Units to claim the exemptions on duties, tax, cess and certain drawbacks and concessions.

22. In **GMR Aerospace Engineering Limited v. Union of India**² speaking through the Division Bench of High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, Hon’ble Sri Justice V. Ramasubramanian (as His Lordship was then) observed that the exemptions are covered by the above three sections.

It was observed thus:

“32. A combined reading of Sections 7, 26 and 50 of the SEZ Act, 2005, would show that SEZ Act 2005 speaks of three different types of exemptions. They are,-

- (1) exemption from payment of taxes under the enactments specified in the First Schedule, in respect of goods and services exported out of, or imported into or procured from a DTA by a unit in a Special Economic Zone or a Developer under Section 7

² 2019(2)ALD 537 = MANU/HY/0419/2018

- (2) exemption from payment of duties under the Customs Act, 1962, Customs Tariff Act, 1975, Central Excise Act, 1994, Central Excise Tariff Act, 1985, Finance Act, 1994, Finance (No. 2) Act, 2004 and Central Sales Tax Act, 1956, covered by Section 26(1); and
- (3) exemption from payment of state taxes, levies and duties covered by Section 50, provided there is a state enactment to the said effect.

Pronouncing that the SEZ Act is a self contained code, His Lordship further observed thus:

“37. Even if apply the parameters indicated in *Girnar Traders vs. State of Maharashtra and Ors.* (MANU/SC/0029/2011), the case on hand would pass the test. Section 26(1) of the SEZ Act indicates

- (1) persons who are entitled to exemptions;
- (2) the duties in respect which exemption is available;
- (3) the circumstances under which exemption is available and (4) the provisions of law subject to which the exemptions are available.

To put it in simple terms, Section 26(1) identifying the persons, who are eligible for exemption. They are the Developer and entrepreneur. Section 26(1) identifies the duties from which exemption is available. They are the duties under the Customs Act, Customs Tariff Act etc. Section 26(1) also indicates the circumstances under which the exemptions are available. These circumstances vary from clause to clause under Section 26(1). This can be best understood by providing a tabulation as follows:

Duty exempted	Circumstances under which exempted
1) Duty under Customs Act, 1962	1) on goods imported into or services provided in a special economic zone or a unit to carry on the authorized operations by the Developer or entrepreneur
2) Duty under the Customs Tariff Act, 1975	2) All goods exported from or services provided from a SEZ or from a unit to any place outside India.
3) Duty of excise under the Central Excise Act, 1944 or Central Excise Tariff Act, 1985	3) All goods brought from DTA to a SEZ or unit to carry on the authorized operations by the Developer or entrepreneur
4) Service tax	4) on taxable services provided to a developer or unit to carry on the authorized operations in a SEZ.
5) Securities transaction tax leviable in Finance (No.2) Act, 2004	5) If the taxable securities transactions are entered into by a non-resident through the international financial service centre.
6) Taxes under the Central Sales Tax Act, 1956	6) If such goods are meant to carry on authorized operations by the Developer or entrepreneur.

23. From the above jurisprudence, it is pellucidly clear that, the SEZ Act is a self-contained Act whereunder exemptions on taxes, duties, cess, drawbacks and concessions are provided on imports and exports of the goods and on supply of services to the Developers and SEZ units. Therefore the exemptions etc., have to be looked into from the provisions of the said Act and not from elsewhere.

24. Now the claim of the petitioners is concerned, though at the inception the petitioners claimed exemption on payment of cess under GST Compensation Act U/s 7 of the SEZ Act, however later they have desisted their claim for the reason that the Goods and Services Tax

(Compensation to States) Act, 2017 is not specified in the First Schedule of SEZ Act which is the *sine qua non* for claiming exemption. The petitioners have also not staked their claim U/s 50 of the SEZ Act as they have not produced any enactments made by the State Government for the purpose of giving effect to the provisions of the SEZ Act.

25. However, the petitioners braced their claim much U/s 26 of the SEZ Act. In W.P.No.1009/2019 the petitioner addressed a letter dated 05.07.2017 to the 2nd respondent therein seeking to exempt the GST Compensation Cess in view of provision contained in Section 26(1)(a) of the SEZ Act. In W.P.No.2631/2021 also the petitioner therein addressed letters dated 14.05.2019, 31.12.2019, 03.07.2020 and 23.11.2020 seeking to waive the compensation cess. As a reply, the 2nd respondent addressed letter dated 04.09.2017 to the petitioner in W.P No.1009/2019 clarifying that U/s 26(1)(a) of SEZ Act, 2005 a SEZ unit is entitled for exemption from any duty or customs under the Customs Act, 1962 or the Customs Tariff Act, 1975. Similarly, as per Notification No.64/2017 CUS, dated 05.07.2017 the SEZ units are exempted from IGST leviable U/s 3(7) of Customs Tariff Act, 1975 on

all goods imported into India by a SEZ unit for authorized operation. However, no such exemption for compensation cess leviable U/s 3(9) of Customs Tariff Act, 1975 is provided either under Customs Act or GST Act. He further clarified that U/s 7 of SEZ Act, 2005 only certain cesses specified in the first Schedule are exempted. If a cess levied under new enactment (like the compensation cess under GST Compensation Act, 2017) the same shall be included in the 1st schedule by amending the schedule U/s 54 of SEZ Act for availing exemption. However, no such amendment has been made including the GST (Compensation to States) Act, 2017 in the first schedule. Therefore, the cess on coal under the said Act cannot be exempted. For the same reason, it appears the 2nd respondent rejected the request for exemption of the petitioner in W.P.No.2631/2021. Now it is argued on behalf of the petitioners that Customs duties which are exempted U/s 26(1)(a) include all such duties enumerated in the Customs Tariff Act, 1975 including those mentioned in Section 3(1) to 3(12) of Customs Tariff Act, 1975. In that view, the Compensation Cess leviable U/s 3(9) of the Customs Tariff Act, 1975 is also exempted U/s 26(1)(a) of the SEZ Act. Reliance is placed on **Flextronics Technologies (India) Pvt Ltd**

v. The State of Tamilnadu³. Per contra, it is argued by learned Deputy Solicitor General and Suresh Kumar Routhu, learned Senior Standing Counsel that what is exempted U/s 26(1)(a) is only “duty of customs” under Customs Act, 1962 or the Customs Tariff Act, 1975 but not the “cess” payable under GST Compensation Act, 2017. They argued that the origin of the cess is traceable to GST Compensation Act, 2017 and Section 3 (9) of Customs Tariff Act, 1975 only prescribes the rate as is leviable under Section 8 of GST Compensation Act, 2017. They vehemently argued that since cess is different from duty and what is exempted U/s 26(1)(a) is only a customs duty, the petitioners cannot claim exemption from payment of the said cess unless the SEZ Act is suitably amended to provide for such exemption.

26. We have cogitated upon the respective arguments. In **Union of India v. Hind Energy and Coal Benefication (India) Ltd** (supra 1) while upholding the constitutional validity of GST Compensation Act, 2017, Hon’ble Apex Court has drawn the subtle distinction between tax/duty and cess by referring several decisions. In the above decisions, it was observed thus:

³ 2016(341)ELT522(Mad.) = MANU/TN/1283/2016

“36. P. Ramanatha Aiyar, Advanced Law Lexicon, 3rd Edition defines cess as follows:

"Cess" is "An assessment tax; levy; specifically: (a) A rate or local tax.....(b) In Scotland, the land tax. (c) in India, a tax for a special object; as, a road cess". (Webster)

The word "cess" is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which is an increment. *Guruswamy and Co. v. State of Mysore* AIR 1967 SC 1512, per dissenting judge and *India Cement Ltd. v. State of T.N.* MANU/SC/0226/1989 : AIR 1990 SC 85.

The word 'cess' means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. *Shinde Brothers v. Hy. Commissioner, Raichur* MANU/SC/0298/1966 : AIR 1967 SC 1512, 1525.

37. This Court had considered the expression "cess" in *Shinde Brothers Etc. v. Deputy Commissioner, Raichur and Ors. Etc.* MANU/SC/0298/1966 : AIR 1967 SC 1512, Justice M. Hidayatullah, as he then was in his dissenting opinion has defined the cess ("no contrary opinion was expressed by majority in that regard") in paragraph 39, which is to the following effect:

39. Now the health cess is first assailed on the ground that there is no entry "health cess" as such in the legislative entries. The word "cess" is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment. By Schedule A(1) read with Section 3 of the Act, it is collected as an additional levy with a tax, which, as described in Schedule A, is undoubtedly one within the powers of the State Legislature and has been so even prior to the Constitution....

38. In the Constitution Bench judgment of this Court in *India Cement Ltd. and Ors. v. State of Tamil Nadu and Ors.*, MANU/SC/0226/1989 : (1990) 1 SCC 12, the above definition given by Hidayatullah, J. was quoted with approval in Para 19, which is quoted as below:

19. Here, we are concerned with cess on royalty. One can have an idea as to what cess is, from the observations of Hidayatullah, J., as the learned Chief Justice then was, in *Guruswamy & Co. v. State of Mysore* where at page 571, the learned Judge observed:

The word 'cess' is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must

be judged of in the same way as the validity of the tax to which it is an increment.

39. The meaning of "cess" as noticed above was again reiterated by a Two Judge Bench judgment of this Court in *Vijayalashmi Rice Mill and Ors. v. Commercial Tax Officers, Palakol and Ors.*, MANU/SC/3847/2006 : (2006) 6 SCC 763, in paragraph 13, following has been laid down:

13. Hence ordinarily a cess is also a tax, but is a special kind of tax. Generally tax raises revenue which can be used generally for any purpose by the State. For instance, the income tax or excise tax or sales tax are taxes which generate revenue which can be utilised by the Union or the State Governments for any purpose e.g. for payment of salary to the members of the armed forces or civil servants, police, etc. or for development programmes, etc. However, cess is a tax which generates revenue which is utilised for a specific purpose. For instance, health cess raises revenue which is utilised for health purposes e.g. building hospitals, giving medicines to the poor, etc. Similarly, education cess raises revenue which is used for building schools or other educational purposes.

40. The expression "cess" as held above means a tax levied for some special purpose, which may be levied as an increment to an existing tax. The Scheme of Compensation to States Act, 2017 as noticed above indicate that the cess is with respect to goods and services tax.

27. Thus from the above decisions, it is clear that a tax is generally levied to raise the revenue for the State and the same can be used for any public purpose. The tax so raised i.e., income tax, sales tax, excise tax etc., can be utilized for any public purpose i.e., for payment of salaries, infrastructure creation, developmental programmes etc. However a cess is though broadly a tax, it is a special kind of tax levied for some special purpose which will be levied as an increment to the existing tax. The cess is utilized for a specific purpose i.e., for education, health etc., depending the nature of the cess levied. Then duty is concerned, duty is a tax levied on goods and services produced within or imported into a country. Keeping the aforesaid distinction in

view, when Section 26 of SEZ Act is perused, it is discernible that the word “duty” alone is used in the said section but not the word “cess”. More prominently U/s 26(1)(a), on which much reliance is placed by the petitioners, what is exempted is only duty of customs but not any cess much-less the GST Compensation Cess. Therefore, it is difficult to accept the contention that the exemption of duty of customs under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law on import of goods encompasses the Compensation Cess also merely because its rate of tariff is mentioned in Section 3(9) of Customs Tariff Act, 1975. In our considered view, such an argument is of no avail to the petitioners.

28. It should be noted that in Section 7 the words “tax, duty and cess” are specifically and distinctly used and stated that any goods or services exported or imported or procured from the DTA by a SEZ unit or developer shall subject to such terms and conditions and limitations be exempt from payment of taxes, duties or cess under all enactments specified in the First Schedule. The *sine qua non* for application of Section 7 is that in order to get exemption, the enactment which imposes tax, duty or cess shall be mentioned in the First Schedule.

Therefore, from the said section two things are clear. Firstly, the Goods and Services Tax (Compensation to States) Act, 2017 is not mentioned in the First Schedule of the Act and secondly, the words “tax, duty and cess” are differently mentioned. However, in Section 26(1)(a) the phrase “duty of customs” alone is mentioned. In section 2(15) of the Customs Act, 1962 the term ‘duty’ is defined which means a duty of customs leviable under the said Act. It is true that in SEZ Act, 2005 the term ‘duty’ is not defined. However, in Section 2(zd) of the said Act it was explained that the words and expressions which were used but not defined in the said Act but defined in other Acts including the Customs Act, 1962 shall have the meaning respectively assigned to them in those Acts.

Therefore, a conjunctive study of Section 26(1)(a), 2(zd) of SEZ Act, 2005 and Section 2(15) of Customs Act, 1962 would pellucidly tell us that the phrase ‘duty of customs’ used in Section 26(1)(a) of SEZ Act only refers to duty leviable under Customs Act, 1962 but the said phrase does not include cess under GST Compensation Act. The decision in **Flextronics Technologies (India)**’s case (supra 3) has no

application as the said case deals with anti dumping duty but not the GST Compensation Cess.

29. Thus on a conspectus of facts and law, we find no merits in the writ petitions. Accordingly, the Writ Petition Nos.1009 of 2019 and W.P.Nos.2631 & 6216 of 2021 are dismissed. No costs.

As a sequel, interlocutory applications pending if any, shall stand closed.

U.DURGA PRASAD RAO, J

VENKATA JYOTHIRMAI PRATAPA, J

21.11.2023
krk

**HON'BLE SRI JUSTICE U.DURGA PRASAD RAO
AND
HON'BLE SMT JUSTICE V.JYOTHIRMAI PRATAPA**

W.P.No.1009 of 2019 and W.P.Nos.2631 & 6216 of 2021

21ST November, 2023

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