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NEW DELHI

PRINCIPAL BENCH

EXCISE APPEAL NO. 51557 OF 2022

(Arising out of Order-in-Order No. RPR/EXCUS/000/COM/AUDIT/23/2022 dated 20.04.2022 passed by the Commissioner (Audit), Central GST & Central Excise, Raipur)

South Eastern Coalfields Limited **...Appellant**
Finance Department, Taxation Cell,
Seepat Road, Bilaspur, Chhattisgarh

Versus

Commissioner (Audit), CGST & C. Ex., **...Respondent**
Central GST Bhawan,
Dhamtari Road, Raipur

APPEARANCE:

Shri Rajeev Kumar Agarwal and Shri Sanjay Dixit, Advocates for the Appellant
Shri Ajay Jain, Special Counsel and Shri Rakesh Agarwal Authorized Representative for the Respondent

CORAM: **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 10.08.2023
Date of Decision: 03.01.2024

FINAL ORDER NO. 50001/2024

JUSTICE DILIP GUPTA:

South Eastern Coalfields Limited[1] has sought the quashing of the order dated 20.04.2022 passed by the Commissioner (Audit), CGST & C. Ex., Raipur[2] confirming the demand of Clean Energy Cess[3] and ordering for its recovery from the appellant with interest and penalty.

2. The appellant is engaged in the business of mining and selling of coal. Prior to the introduction of Goods and Service Tax[4] w.e.f. 01.07.2017 on 'supply' of goods under the provisions of the Central

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1. **the appellant**
2. **the Commissioner**
3. **CEC**
4. **GST**

Goods and Services Tax Act, 2017[5], the appellant was discharging the levy of CEC @ Rs. 400 per M.T. on coal under section 83 of Chapter VII of the Finance Act, 2010[6] read with the Clean Environment Cess Rules, 2010[7], in addition to the central excise duty which was payable @ 6% ad valorem. Clean Energy Cess was renamed as Clean Environment Cess by the 2016 Finance Act.

3. Section 18(1) of the Taxation Laws (Amendment) Act, 2017[8] repealed enactments specified in the third column of the Third Schedule w.e.f. 01.07.2017. Chapter VII of the 2010 Finance Act was also included in the Third Schedule. Thus, on repeal of the 2010 Finance Act w.e.f. 01.07.2017, the 2010 Cess Rules that had been framed under the said Act also stood repealed w.e.f. 01.07.2017. However, a new levy of cess, namely, GST Compensation Cess @ Rs. 400 per M.T. was made leviable w.e.f. 01.07.2017 under the provisions of the Goods and Service Tax (Compensation to States) Act, 2017[9].

4. The appellant claims that it had been paying central excise duty and CEC on the coal removed from the mines till 30.06.2017, and the statutory returns in ER-1 and Form-I were also filed for the month of June 2017. This is not disputed by the department. The dispute in the present case is whether CEC would be payable on the stock of coal lying with the appellant on 30.06.2017. The appellant claims that since on 30.06.2017 no 'removal' of coal took place within the meaning of rule 4 of the 2010 Cess Rules, the appellant was not required to pay CEC. The appellant also did not pay the central excise duty on the said stock of

5. CGST Act
6. the 2010 Finance Act
7. the 2010 Cess Rules
8. the 2017 Taxation Amendment Act
9. the 2017 Compensation Act

coal. There is, however, no dispute with regard to non-payment of central excise duty. According to the appellant, when the coal was removed from the mines on or after 01.07.2017, rule 4 of the 2010 Cess Rules stood repealed with the repeal of the 2010 Finance Act, 2017. The appellant, however, paid the applicable GST and GST Compensation Cess, as and when the coal was supplied within the meaning of the CGST Act.

5. The department believed that although the provisions relating to levy of CEC were repealed w.e.f. 01.07.2017 by virtue of section 18(1) of the Taxation Amendment Act, the liability of CEC @ 400 per M.T. had accrued on the stock of coal lying on 30.06.2017 by virtue of the savings clause contained in section 18(2) of the 2017 Taxation Amendment Act. Thus, CEC was recoverable on the stock of coal that was lying in balance with the appellant as on 30.06.2017.

6. Accordingly, a show cause notice dated 25.06.2019 was issued to the appellant on the grounds that:

> **(i)** The leviability of CEC accrued on the stock of coal held by the appellant on 30.06.2017 as the taxable event of production of coal had happened on the said date, and by virtue of savings clause under section 18(2) of the 2017 Taxation Amendment Act, CEC would be recoverable on the removal of coal stock available as on 30.06.2017;
>
> **(ii)** The appellant did not file the return in Form I for the period after June 2017 onwards showing details of the coal removed that was produced on or prior to 30.06.2017. The appellant was obligated to comply

with the procedure of payment of CEC on removal of such coal on or after 01.07.2017; and

(iii) No exemption parallel or similar to Notification No. 12/2017-CE has been issued to exempt CEC.

7. The appellant filed a detailed reply denying the allegations made in the show cause notice.

8. The Commissioner, however, confirmed the demand holding that:

(i) CEC is leviable at the time of production of coal and there is no ambiguity in the provisions contained in section 83(3) of the 2010 Finance Act;

(ii) The contention of the appellant that CEC is leviable on removal of coal as per rule 4 of the 2010 Cess Rules is not correct. The provisions of section 83(3) of the 2010 Finance Act shall prevail over the 2010 Cess Rules. CEC is leviable on the incidence of production of coal, though it is payable on its removal;

(iii) The saving clause under section 18(2) of the 2017 Taxation Amendment Act provides that the leviability of CEC accrued on the production of coal lying in stock on 30.06.2017 shall not be affected despite the repeal by section 18(1) of the said Act; and

(iv) The appellant failed to file periodical returns under rule 11 of the 2010 Cess Rules and also failed to assess the liability towards CEC on stock of coal as on 30.06.2017.

9. Shri Rajeev Kumar Agarwal, learned counsel appearing for the appellant made the following submissions:

(i) Liability to pay CEC did not accrue on 30.06.2017. Hence, saving clause under section 18(2) of the 2017 Taxation Amendment Act would not be applicable. CEC is payable only at the time of removal of coal in terms of rule 4 of the 2010 Cess Rules. It is an admitted position that the demand of CEC has been raised on coal stock lying on 30.06.2017 which had not been removed on that date;

(ii) The savings clause contained in section 18(2) of the 2017 Taxation Amendment Act is also of no relevance. When CEC itself has not crystallized/accrued, the question of it being saved by the savings clause is misconceived. On the date when the coal was subsequently removed on or after 01.07.2017 from the mines, the statutory provisions for levy of CEC stood repealed. In other words, when rule 4 and rule 6 of the 2010 Cess Rules were not in existence in July 2017, no liability for payment of CEC arose in the GST regime;

(iii) The provisions contained in the savings clause are only relevant to enforce the recovery of the duty amount which has already accrued, but had not been paid by the appellant;

(iv) Even otherwise, the charging section under 83(3) of the 2010 Finance Act is not attracted in the case of the appellant as coal was neither produced nor manufactured. Coal is formed naturally without any human intervention and the appellant cannot, therefore, be said to have produced coal. The only act done by the appellant is to have raised the coal;

(v) A reasonable conclusion that can, therefore, be drawn is that the appellant was legally not required to take support of the Notification no. 12/2017 to claim any exemption from payment of central excise duty liability, as no liability had actually arisen under the Central Excise Act as on 30.06.2017 in the absence of removal of goods; and

(vi) Penalty is not imposable.

10. Shri Ajay Jain, learned special counsel and Shri Rakesh Agarwal, learned authorized representative appearing for the department, however, made the following submissions:

(i) CEC was a cess which was leviable under the 2010 Finance Act on production of coal. The incidence of levy and the incidence of collection are two different events. The leviability accrues with the production of coal by virtue of section 83 of the 2010 Finance Act and the liability to pay cess accrues on the removal of goods from the mine by virtue of rule 4 of the 2010 Cess Rules. Thus, in respect of the coal lying in stock on 30.06.2017, the leviability of CEC had already accrued;

(ii) By virtue of section 18(1) the 2017 Taxation Amendment Act, the provisions contained in Chapter VII of the 2010 Finance Act relating to levy of CEC were repealed, but under section 18(2) the liability that had already accrued and the proceedings for collection of these liabilities would not be affected;

(iii) The procedural requirements of assessing the liability under rule 5 of the 2010 Cess Rules and to pay cess at

the time of clearance under rule 4 of the 2010 Cess Rules and to file a return under rule 11 will continue in terms of the savings clause contained in section 18(2) of the 2017 Taxation Amendment Act. To support this contention, reliance has been placed on the decision of the Supreme Court in **Collector of C. Ex., Hyderabad** vs. **Vazir Sultan Tobacco Co. Ltd.**[10]; and

(iv) The appellant is not justified in claiming exemption under the notification dated 30.06.2017 as the exemption is only with respect to duty of excise which is leviable under the Central Excise Act. CEC is leviable under the 2010 Finance Act under which CEC leviable as a duty of excise. CEC is, therefore, different from the duties of excise leviable under section 3 of the Central Excise Act, 1944[11].

11. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

12. As noticed above, the appellant was discharging CEC @ 400 per M.T. on coal under the provisions of section 83 of the 2010 Finance Act read with the provisions of the 2010 Cess Rules, in addition to the central excise duty which was paid @ 6% ad valorem. GST was introduced w.e.f. 01.07.2017 and in view of the provisions of the section 18(1) of the 2017 Taxation Amendment Act, the levy of CEC under the 2010 Finance Act stood repealed w.e.f 01.07.2017. The 2010 Cess Rules, therefore, also stood repealed. However, GST

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10. 1996 (83) E.L.T. 3 (S.C.)
11. the Central Excise Act

Compenstation Cess @ 400 per M.T. was made leviable w.e.f. 01.07.2017 under the provisions of the 2017 Compensation Act.

13. The dispute in the present appeal relates to the stock of coal of the appellant as on 30.06.2017, which was subsequently removed by the appellant on or after 01.07.2017. According to the appellant, as the coal was removed on or after 01.07.2017, the appellant would have to pay the applicable CGST and GST Compensation Cess when the coal was supplied. According to the department, as the relevant date for determining the dutiability is the date of production, though the relevant date for payment of duty liability may be the date of clearance, the appellant would have to pay CEC on the stock of coal as on 30.06.2017, even though the stock of coal may have been removed on or after 01.07.2017.

14. To appreciate the contentions, it would be appropriate to reproduce section 83 of the 2010 Finance Act which deals with CEC. It is as follows:

> "**83. Clean Energy Cess.** – **(1)** This Chapter extends to the whole of India.
>
> **(2)** It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
>
> **(3)** There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Clean Energy Cess, as duty of excise, on goods specified in the Tenth Schedule, being goods produced in India, at the rates set forth in the said Schedule for the purposes of financing and promoting clean energy initiatives, funding research in the area of clean energy or for any other purpose relating thereto.
>
> **(4)** The proceeds of the cess levied under sub-section (3) shall first be credited to the Consolidated

Fund of India and the Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the cess for the purposes specified in sub-section (3), as it may consider necessary.

(5) The cess leviable under sub-section (3) shall be in addition to any cess or duty leviable on the goods specified in the Tenth Schedule under any other law for the time being in force.

(6) The cess leviable under sub-section (3) shall be for the purposes of the Union and the proceeds thereof shall not be distributed among the States and the manner of assessment, collection, utilisation and any other matter relating to cess shall be such as may be prescribed by rules.

(7) The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Central Excise Act, 1944(1 of 1944), relating to levy of and exemption from duty of excise, refund, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary, be applicable in respect of cess levied under sub-section (3)."

15. By a Notification dated 22.06.2010, the Central Government notified 01.07.2010 as the appointed date for coming into force of the provisions of Chapter VII of the 2010 Finance Act.

16. The Tenth Schedule referred to in section 83 is reproduced below:

"**The Tenth Schedule**

[See section 83(3) and (5)]

Notes:

1. In this Schedule, "Chapter", "heading", "sub-heading" and "tariff item" mean respectively a Chapter, heading, sub-heading and tariff item of the First Schedule to the Central Excise Tariff Act.

2. The rules for the interpretation of the First Schedule to the Central Excise Tariff Act, the Section and Chapter Notes and the General Rules for the Interpretation of the First Schedule shall apply to the interpretation of this Schedule.

Sl. No.	**Chapter, heading, sub-heading or tariff item**	**Description**	**Rate**
(1)	(2)	(3)	(4)
1.	2701	Coal; briquettes, ovoids and similar solid fuels manufactured from coal	Rs. 100 per tonne
2.	2702	Lignite, whether or not agglomerated, excluding jet	Rs. 100 per tonne
3.	2703	Peat (including peat litter), whether or not agglomerated	Rs. 100 per tonne

17. Thus, levy of cess on coal was to be at rate of Rs. 100 per tonne. It was subsequently revised to Rs. 400/- per tonne by the 2016 Finance Act.

18. In exercise of the powers conferred by section 84 of the 2010 Finance Act, the Central Government made the 'Clean Environment Cess Rules 2010', which have been referred to as the 2010 Cess Rules. They came into force on 01.07.2010.

19. Rule 2(g) defines 'removal' to mean despatch of specified goods from a mine and shall include despatch of such goods for captive consumption within that mine for any purpose other than for raising of such goods. The 'specified goods' under rule 2(h) are raw coal, raw lignite and raw peat.

20. Chapter 2 of the 2010 Cess Rules, deals with collection and assessment of cess. Rules 4, 5 and 6 contained in Chapter 2 are reproduced below:

"**Rule 4. Cess payable on removal.** – Every producer shall pay the cess leviable on the removal of the specified goods in the manner provided in rule 6.

Rule 5. Assessment of cess. – The producer shall himself assess the cess payable on the specified goods.

Rule 6. **Manner of payment.** – (1) Cess on the specified goods removed from the mine during a month shall be paid by the 5th of the second month, following the month in which the removals were made.

(2) *****

(3) *****

(4) *****

(5) *****

(6) The provisions of Section 11 of the Central Excise Act , 1944 (1 of 1944) shall be applicable for recovery of the cess as assessed under rule 5 and the interest under sub-rule (4) in the same manner as they are applicable for recovery of any sums payable to the Central Government.

Explanation.– For the purposes of this rule, -

(i) Cess liability shall be deemed to be discharged only if the amount payable is credited to the account of the Central Government by the specified date;

(ii) Where the registered person deposits cess by cheque, the date of presentation of the cheque in the bank designated by the Board for this purpose shall be deemed to be the date on which the cess has been paid subject to realization of the cheque."

21. Rule 11 relates to filing of return and it is reproduced below:

"**Rules 11. Filing of return**. - Every producer shall submit to the Jurisdictional Central Excise Officer, a return in Form-I showing the quantities of specified goods removed during the month in respect of which the payment has been made, the amount paid under rule 6 and other particulars specified in that form enclosing the evidence of payment of cess not later than 10th day of the second month, following the month in which removals were made:

> **Provided** that in the case of a producer who has obtained centralized registration under rule 3, the return in Form-I shall contain mine-wise information.
>
> **Illustration.** - Return for the month of July 2010 shall be due by the 10th of September, 2010."

22. In exercise of the powers conferred by section 83(7) of the 2010 Finance Act, the Central Government declared by a notification dated 22.06.2010, that the provisions of sections 5A, 6, 9, 9A, 9C, 9D, 9E, 11, 11A, 11AA, 11AB, 11AC, 11B, 11BB, 11C, 11D, 11DD, 11DDA, 12A, 12B, 12C and 12D and Chapters III, VI, VIA and VIB of the Central Excise Act relating to matters specified therein shall be applicable in regard to like matters in respect of cess imposed under section 83 of the 2010 Finance Act.

23. In exercise of the powers conferred by section 5A(1) of the Central Excise Act, the Central Government issued a notification dated 30.06.2017 exempting all excisable goods, except petroleum crude, high speed diesel, motor spirit (commonalty known as petrol), natural gas, aviation turbine fuel, tobacco and tobacco products, from the whole of the duty of excise leviable thereon under the Central Excise Act subject to the following conditions:

> "(a) The goods should have been manufactured on or before 30th June, 2017 but not cleared from the factory of production before the 1st July, 2017; and
>
> (b) The appropriate Central tax, State tax, Union territory tax or integrated tax, as the case may be, shall be payable on such goods, if cleared on or after the 1st July, 2017 as leviable on such goods under the Central Goods and Service Tax Act, 2017 (12 of 2017), the State Goods and Services Tax Act of the State concerned, the Union Territory Goods and Services Tax

> Act, 2017 (14 of 2017) or the Integrated Goods and Services Tax Act, 2017 (13 of 2017)"

24. The aforesaid Notification dated 30.06.2017 came into force w.e.f. 01.07.2017.

25. Section 18 of the 2017 Taxation Amendment Act deals with repeal and savings of certain enactments. It is reproduced below:

> "**18. (1)** The enactments specified in the third column of the Third Schedule are hereby repealed to the extent specified in the fourth column thereof.
>
> **(2)** Notwithstanding the repeal under sub-section (1), such repeal shall not—
>
> (a) affect any other law in which the repealed enactment has been applied, incorporated or referred to;
>
> (b) affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing under the repealed enactment;
>
> (c) affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in or from any enactment hereby repealed;
>
> (d) revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice,

> procedure or other matter or thing not now existing or in force.
>
> **(3)** The mention of particular matters in sub-section (1) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897, with regard to the effect of repeals."

26. The Third Schedule repeals, amongst others, Chapter VII of the 2010 Finance Act w.e.f. 01.07.2017.

27. Section 19 of the 2017 Taxation Amendment Act deals with collection and payments of arrears of duty and it is reproduced below:

> "**19.** Notwithstanding the repeal of the enactments specified in the Third Schedule, the proceeds of duties levied under the said enactments immediately preceding the date appointed under sub-section (2) of section 1,—
>
> (i) if collected by the collecting agencies but not paid into the Reserve Bank of India; or
>
> (ii) if not collected by the collecting agencies,
>
> shall be paid or as the case may be, collected and paid into the Reserve Bank of India for being credited to the Consolidated Fund of India."

28. It is in the light of the aforesaid provisions that the contentions that have been advanced by the learned counsel for the parties have to be examined.

29. What transpires from the records is that the appellant had been paying central excise duty and CEC on coal 'removed' from the mines till 30.06.2017 and the statutory returns had also been filed for the month of June 2017.

30. The dispute in the present appeal is as to whether CEC is payable on the stock of coal lying with the appellant as on 30.06.2017

which stock was removed on or after 01.07.2017. According to the appellant, since the coal had not been 'removed' before 01.07.2017 within the meaning of rule 4 of the 2010 Cess Rules, the appellant would not be required to pay CEC and when the coal was 'removed' on or after 01.07.2017, rule 4 of the 2010 Cess Rules stood repealed with the repeal of the 2010 Finance Act and the appellant also paid the applicable CGST and GST Compensation Cess as and when the coal was 'supplied' within the meaning of CGST Act, 2017.

31. The contention of the department, however, is that the levy of cess is on the 'production' of goods and, therefore, the moment the coal is produced, the appellant incurred the duty liability, though cess is required to be paid on removal of the goods.

32. To examine the contentions that have been advanced, it would be appropriate to examine the provisions under which cess was levied under section 83 of the 2010 Finance Act and the 2010 Cess Rules. Sub-section (3) of section 83 of the 2010 Finance Act stipulates that there shall be levied and collected a cess to be called Clean Energy Cess, as duty of excise, on goods specified in the Tenth Schedule, being goods produced in India, at the rates set forth in the said Schedule for the purposes of financing and promoting clean energy initiatives and for funding research in the area of clean energy.

33. Sub-section (4) of section 83 of the 2010 Finance Act provides that the proceeds of the cess levied shall first be credited to the Consolidated Fund of India. Sub-section (5) of section 83 of the 2010 Finance Act provides that the cess shall be in addition to any cess or duty leviable on the goods specified in the Tenth Schedule. The Tenth Schedule includes, amongst others, coal and the rate of duty that has

been specified is Rs. 100 per tonne. This was subsequently revised to Rs. 400/- per tonne by the 2016 Finance Act.

34. Rule 4 of the 2010 Cess Rules provides that every producer shall pay the cess leviable on the removal of the specified goods in the manner provided in rule 6. Under rule 5 the producer shall himself have to assess the cess payable on the specified goods. Rule 6 deals with manner of payment. It provides that cess on the specified goods removed from the mine during a particular month shall be paid by the fifth of the second month, following the month in which the removals were made. The Explanation to rule 6 provides that cess liability shall be deemed to be discharged only if the amount payable is credited to the account of the Central Government by the specified date. Rule 11 deals with filing of return. It provides that every producer shall submit a return in Form 1 showing the quantity of specified goods removed during the month, the amount paid under rule 6 and other particulars.

35. It is, therefore, clear that cess is levied and collected in accordance with the provisions of Chapter VII of the 2010 Finance Act on goods specified in the Tenth Schedule, being goods produced in India at the rates set forth in the Tenth Schedule. Emphasis is that the goods specified in the Tenth Schedule should be goods produced in India. Rule 4 of the 2010 Cess Rules specifically provides that every producer shall pay the cess leviable on the removal of the specified goods in the manner provided in rule 6.

36. Learned counsel for the appellant relied upon a decision of the Delhi High Court in **Caltex Oil Refining (India) Limited** vs. **Union of**

India and others[12] to contend that the liability of cess occurs only on removal of the goods and not when the goods are produced. The provisions of sections 3 and 4 of the Central Excise Act had come up for consideration. The Delhi High Court held that though a particular article that is produced may attract levy of central excise duty contemplated under section 3, but removal is the essence of the crystallization of the charge as would be clear from section 4 and the Rules. The High Court further held that section 3 lays down the legislative policy on what products central excise duty can be levied but the quantum of the charge is on the value of the goods at the time of removal. The observations are as follows**:**

> "17. ***** **Indeed though a particular article produced may attract levy of excise duty, as contemplated by Section 3 of the Act, which is the charging section, removal is the essence of the crystalisation of the charge as would be apparent from a reading of Section 4 of the Act and Rule 4 of the Excise Rules.** The quantum of the charge is on the value at the time of removal and the value at the time of removal is the yard-stick for quantifying the charge. **Though levy is attracted on production the power to collect duty is only on removal. There may be circumstances where production may take place and yet the product may not be issued out, utilised, or marketed in which case the scheme of the Act and the Rules tend to show that no excise duty would be collected on the product.** For example the glut of a particular article in the market may make it expedient for a manufacturer to hold back his product or financial circumstances may prevent the finished product to be marketed. It is in this context, therefore, that the provisions of Section 3 of the Act and Rules 9 and 49 of the Excise Rules have to be harmonised. Indeed, these provisions complement each

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12. 1979 (4) E.L.T. (J 581) (Del.)

> other. **Section 3 lays down the legislative policy on what products excise duty may be levied. Rule 9 is an injunction on the manufacturer that he has not to remove any excisable goods from the place of manufacture or any specified premises appurtenant thereto, whether** for consumption, export or manufacture of any other commodity in or outride such place unless he first pays the excise duty leviable on those goods. Rule 49 is a direction to the excise authorities that the payment of excise duty shall not be demanded until excisable goods are about to be issued out of place or premises specified under Rule 9 or are about to be removed from a store room or other place or storage approved by tile Collector under Rule 47. **Thus, the point of time when duty must be paid or may be collected is clearly given. Similarly, it is provided that there must be removal from the specified place to attract the payment of duty. If there is no removal there would be no question of payment. Removal is a positive act and cannot have any reference to disappearance of the product.** For example evaporation would not be removal for that takes place by natural causes in the process of manufacture or even afterwards. ***** ”
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> **(emphasis supplied)**

37. The aforesaid decision of the Delhi High Court in **Caltex Oil** was followed by the Tribunal in **Harinagar Sugar Mills Ltd.** vs. **Collector of Cus. and C. Ex.**[13] and the relevant observations of the Tribunal are reproduced below:

> “11. We have heard both sides. It is clear from Rule 49 that duty cannot be demanded unless excisable goods are to be issued out of place of manufacture or storage. Accordingly, though levy of duty is attracted on the manufacture or production, the power to collect duty is only when the excisable goods are to be issued out. **Therefore, even if the production has taken place, duty cannot be demanded unless the goods are to**

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13. 1992 (58) E.L.T. 270 (Tribunal)

> **be issued out. A combined reading of Rule 9 and Rule 49 makes it clear beyond doubt that there is no liability to pay duty until the goods are to be removed. Liability to duty and liability to pay duty are separate and distinct.** Liability to duty is not the same thing as liability to pay duty."
>
> **(emphasis supplied)**

38. In **Radhakrishna Ramnarain Limited** vs. **R. Parthasarathy & other**[14], the Bombay High Court also observed that the taxable event is the removal of goods and not the manufacture. The relevant observations are:

> "6. Though it may be in doubt in the year 1968 as to whether the contentions raised by Mr. Phadnis are correct or not in view of the judgment of this Court in Union of India v. Elphinston Spinning & Weaving Co. Ltd. - 1978 (2) E.L.T. 680, **it is now beyond dispute that the duty payable is at rate applicable on the date of removal, even though the goods may have been manufactured earlier. It is further held in the said judgment that the taxable event is the removal of the goods and not the manufacture. This was so held by accepting the contention raised on behalf of the Union of India that the stage of point of time at which the duty is to be levied, by reason or the provisions of the said Act and the rules, is not the point of time of manufacture or production of goods but at a subsequent stage when the goods are soughs to be removed from the factory concerned.** It is therefore clear that no demand for payment of duty can be made before the goods are removed or sought to be removed. It is also clear that the rate applicable is the rate prevailing at the time of removal. In view of this position the demand notices are clearly bad."
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> **(emphasis supplied)**

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14. 1980 (6) E.L.T. 709 (Bom)

39. It, therefore, transpires that though cess may be attracted when the article is produced, but removal is the essence of the crystallization of the charge. There has to be removal from the specified place to attract the payment of cess and if there is no removal, there would be no question of payment of cess.

40. Section 18 of the 2017 Taxation Amendment Act, which came into force on 01.07.2017, repeals Chapter VII of the 2010 Finance Act. Thus, section 83 of the Finance Act was repealed w.e.f. 01.07.2017 and consequently, the 2010 Cess Rules, which were framed under section 84 of the 2010 Finance Act, also stood repealed. Resultantly, cess @ Rs. 400 per M.T. would not be payable under rule 4 of the 2010 Cess Rules w.e.f. 01.07.2017 on removal of the specified goods. However, as a new levy of cess, namely, GST Compensation Cess @ Rs. 400 per M.T. was made leviable w.e.f. 01.07.2017 under the provisions of the 2017 Compensation Act, the appellant contends that w.e.f. 01.07.2017 it has been paying the GST Compensation Cess on the goods supplied by the appellant.

41. Emphasis has been placed by the learned special counsel for the department on the provisions of sub-section 2(b) of section 18 of the 2017 Taxation Amendment Act to contend that despite the repeal of Chapter VII of the 2010 Finance Act w.e.f. 01.07.2010, the obligation or liability already acquired or accrued or incurred under the repealed enactment shall not be affected. Learned special counsel for the department also placed reliance upon section 19 of the 2017 Taxation Amendment Act to contend that notwithstanding the repeal of Chapter VII of the 2010 Finance Act, the proceeds of duties levied under section 83 immediately preceding the appointed date i.e. 01.07.2017, if

collected but not paid into the Reserved Bank of India or if not collected, shall be paid or as the case may be, collected and paid into the Reserve Bank of India for being credited to the Consolidated Fund of India.

42. Section 18(2) of the 2017 Taxation Amendment Act would not come to the aid of the department. Section 18(2) of the 2017 Taxation Amendment Act merely provides that notwithstanding the repeal of section 83(1) of the 2010 Finance Act, the liability already acquired, accrued or incurred shall not be affected. In the present case, as the goods were removed on or after 01.07.2017, liability had not accrued or incurred for the simple reason that when CEC itself did not crystallize/accrue, there is no question of it being saved by the savings clause. The provisions contained in the savings clause are relevant to enforce the recovery of the cess amount which had already accrued, but had not been paid.

43. In this connection it would be useful to refer to a decision of the Bombay High Court in **Commr. of Income Tax, Pune-III** vs. **Loknete Balasaheb Desai S.S.K. Ltd.**[15]. The issue that arose before the Bombay High Court was regarding the excise duty liability incurred on the manufacture of sugar in the light of the provisions of section 145A(b) of the Income Tax Act, 1961. The relevant portion of this section is reproduced below:

> "**145A. Method of accounting in certain cases.** –
>
> Notwithstanding anything to the contrary contained in Section 145, **the valuation of purchase and sale of goods** and inventory **for the purposes of**

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15. 2015 (315) E.L.T. 534 (Bom.)

> **determining the income** chargeable under the head "Profits and gains of business or profession" **shall be** -
> *****
>
> (b) **further adjusted to include the amount of tax, duty, cess or fee** (by whatever name called) **actually paid or incurred by the assessee** to bring the goods to the place of its location and condition as on the date of valuation.
>
> Explanation - ******"
>
> **(emphasis supplied)**

44. The Bombay High Court held that the expression 'incurred' in section 145A(b) must be construed to mean liability that was actually incurred by the assessee. The issue that arose for consideration before the Bombay High Court was whether in a case where excisable goods are manufactured and lying in stock on the last day of the accounting year, the manufacturer has 'incurred' liability to pay excise duty on the manufactured goods. The Bombay High Court held that though the date of manufacturer may be the relevant date for dutiability, the relevant date for duty liability is the date on which the goods were cleared. Thus, in respect of excisable goods manufactured and lying in stock, the excise duty liability would get crystallized on the date of clearance of goods and not on the date of manufacture. The relevant portion of the decision of the Bombay High Court is reproduced below:

> "10. **Where the excisable goods are manufactured and are lying in stock on the last day of the accounting year, whether the manufacturer has incurred liability to pay excise duty on the manufactured goods is the question.**
>
> 11. The Apex Court in the case of Commissioner of Central Excise v. Polyset Corporation & Anr. reported in 2000 (115) E.L.T. 41 (S.C.) has held that the dutiability of excisable goods is determined with reference to the date of manufacture and the rate of excise duty

> payable has to be determined with reference to the date of clearance of the goods. **Therefore, though the date of manufacture is the relevant date for dutiability, the relevant date for the duty liability is the date on which the goods are cleared. In other words, in respect of excisable goods manufactured and lying in stock, the excise duty liability would get crystallised on the date of clearance of goods and not on the date of manufacture. Therefore, till the date of clearance of the excisable goods the excise duty payable on the said goods does not get crystallised and consequently the assessee cannot be said to have incurred the excise duty liability. In respect of the excisable goods lying in stock, no liability is determined as payable and consequently, there would be no question of incurring excise duty liability.**
>
> 12. In the present case, it is not in dispute that the manufactured sugar was lying in stock and the same were not cleared from the factory. Therefore, in the facts of the present case, the ITAT was justified in holding that in respect of unsold sugar lying in stock, central excise liability was not incurred and consequently the addition of excise duty made by the assessing officer to the value of the excisable goods was liable to be deleted."
>
> **(emphasis supplied)**

45. It would also be useful to refer to a decision of the Gujarat High Court **Asst. Commr. of I.T., Bharuch** vs. **Narmada Chematur Petrochem Ltd.**[16] wherein a similar view, as expressed by the Bombay High Court in **Loknete Balasaheb Desai**, was expressed. The relevant portions of the judgment are reproduced below:

> "17. **If one reads Section 3(1) of the Excise Act in isolation, it appears to indicate that the**

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16. 2012 (278) E.L.T. 178 (Guj.)

charge is levied in Section 3 and the liability stands incurred upon manufacture of excisable goods at the rates set out in First Schedule to the Central Excise Tariff Act, 1985. However, though the opening portion of sub-section (1) states that there shall be levied and collected, there is no other provision for collection in the said section and the manner of collection as well as levy are found in the Rules as prescribed. It may indicate that Section 4 would be a stand-alone provision, but when one reads the said provision it becomes clear that the levy is incomplete, inasmuch as the assessee under the Excise Act is not required to discharge the liability to pay duty levied upon the manufacture of excisable goods, till such goods are removed from the factory premises, or a bonded warehouse. **The test to determine as to whether the liability had been incurred or not would be as to whether a corresponding right is available with the excise authority to enforce such a liability. Mere production or manufacture by itself would not be sufficient. Though there might be levy under Section 3 of the Excise Act, yet neither the rate nor the value would be determinable till the point of time of removal of the excisable goods from the factory premises and hence the scheme itself indicates that so far as an assessee is concerned, he incurs liability to pay excise duty only upon both the events taking place, namely manufacture of excisable goods and removal of excisable goods.** This position has to necessarily be adopted considering that the duty of central excise is levied and collected on an *ad valorem* basis. In other words, unless and until the value is known, the levy and the collection would not be correct and valid.

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20. **Thus, though Section 3 of the Excise Act talks of levy and collection, the actual collection is only at the time of removal of excisable goods from the factory premises or any other specified place of removal.** The duty is leviable and is actually imposed on the transaction value defined in sub-section

(3D) of Section 4 of the Excise Act. **In these circumstances, it is not possible to state that under the Excise Act, the duty has become due and payable only by operation of Section 3 simpliciter.** If Section 3 of Excise Act is considered to be the only charging section and Section 4 of the Excise Act is considered as only a provision for assessment, the charge levied by Section 3 of the Excise Act cannot be brought home. Sections 3 and 4 have to be read together to bring the charge home. The charge is partially embedded in both the provisions. **It is in this context that one finds various judgments in relation to disputes raised on the basis of a particular cut-off date say, 28th February or 1st March qua the goods already manufactured and lying in stock up to 28th February which become amenable to duty of central excise only upon the point of time of removal namely, after 1st March. Therefore, to read provisions of Section 3 of the Excise Act to be a complete provision for the purposes of charging duty of central excise would not be a fully correct proposition of law. Under a taxing statute when a charge is fastened, the purpose is to collect tax.** A levy is for the purposes of imposing a tax or a duty, by whatever name called, and for the purposes of collection of such impost. A State cannot be interested in a levy which does not result in inflow of revenue to the exchequer.

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22. Excise duty is admittedly an indirect levy. The manufacturer does not effectively pay from his own pocket. **The duty of central excise is collected by a manufacturer from the purchaser, whether wholesaler or retailer. Hence at the time and place of removal of excisable goods the duty is recovered by the manufacturer from the purchaser and simultaneously paid to Revenue. The point of time of removal of excisable goods is the point of time when the liability to pay central excise duty is incurred resulting in corresponding right under law in the excise department to take**

> **steps to effect recovery if the liability is not discharged. Till that point of time liability to pay duty of central excise cannot be stated to have been incurred in law as the same is not due and payable.** Reference: Wallace Flour Mills Co. Ltd. v. Collector of Central Excise, Bombay, Division-III, (1990) 186 ITR 440 (SC)= 1989 (44) E.L.T. 598 (S.C.)."
>
> **(emphasis supplied)**

46. The aforesaid decision of the Gujarat High Court in **Narmada Chematur Petrochem** would show that though section 3 of the Central Excise Act talks of levy and collection, the actual collection is only at the time of removal of the excisable goods and, therefore, it cannot be said that duty becomes due and payable only by operation of section 3. The test to determine whether the liability had been incurred or not would be to see whether there is a corresponding right available with the excise authority to enforce such a liability. Thus, as production is not sufficient, an assessee would incur liability to pay duty upon both the events taking place, namely manufacture of excisable goods and removal of excisable goods. In other words, the point of time of removal of excisable goods is the point of time when the liability to pay central excise duty is incurred resulting in a corresponding right in the excise department to takes steps for recovery if the liability is not discharged.

47. Section 19 of the 2017 Taxation Amendment Act would also not come to the aid of the department. The said section talks of the proceeds of duties levied under the 2010 Act immediately preceding 01.07.2017 and its collection and payment as arrears of duty, as the marginal note to the section also indicates. It is only when the cess has been collected but not paid into the Reserve Bank of India or if actually

leviable but not collected that it could be deposited or collected. In the present case, there were no proceeds of cess levied under section 83 before 01.07.2017, as the goods had not been removed on or before 30.06.2017.

48. The learned special counsel appearing for the department, however, placed reliance upon a decision of the Supreme Court in **Collector of C. Ex., Hyderabad** vs. **Vazir Sultan Tobacco Co. Ltd.**[17] to contend that the levy of cess accrued on the production of goods. The relevant portions of the judgment are reproduced below:

> "9. ***** According to sub-rule (1) of Rule 9A, the rate of duty [apart from tariff valuation] applicable to any "excisable goods" shall be the rate in force on the date of actual removal of such goods from the factory or the warehouse, as the case may be. This is the general rule. Sub-rules (2), (3) and (3A) provide certain exceptional situations which are not relevant for the purpose of these appeals. It is the general rule contained in sub-rule (1) - and in particular clause (ii) of sub-rule (1) - that is relevant here. In other words, the rate of duty as well as the valuation of goods shall be the rate and the valuation as on the date of actual "removal". This rule too opens with the expression "excisable goods".
>
> 10. Sri Vellapally contended that if the above interpretation is adopted, it may lead to an enigmatic situation. He explains his apprehension thus: the special excise duty is levied only for the period March 1, 1978 to February 28, 1979. Take a case, where the goods are manufactured on or before February 28, 1979 are removed on or after March 1, 1979, what would be the rate of duty [and which would be relevant date for valuation purposes]; the assessee may say that on the date of removal, neither the levy is in force nor are Rules 9 and 9A and, hence, he need not pay any special excise duty on such goods. We do not see

17. 1996 (83) E.L.T. 3 (S.C.)

> any valid basis for this apprehension. In the situation contemplated by Sri Vellapally, the date of removal has to be taken as February 28, 1979. It cannot be otherwise. If Rules 9 and 9A are held inapplicable, it would logically follow that the moment the goods are manufactured, the levy becomes payable and, in the circumstances, the last date of levy can reasonably be taken to be the date of removal. Of course, an absurd consequence would follow if it is held that in the above situation, no special excise duty is payable if the removal is on or after March 1, 1979. Such an absurd consequence could not be presumed to have been intended by the Parliament.
>
> 11. We are of the opinion that Section 3 cannot be read as shifting the levy from the stage of manufacture or production of goods to the stage of removal. The levy is and remains upon the manufacture or production alone. Only the collection part of it is shifted to the stage of removal. Once this is so, the fact that the provisions of the Central Excise Act are applied in the matter of levy and collection of special excise duty cannot and does not mean that wherever the Central Excise duty is payable, the special excise duty is also payable automatically. That is so as an ordinary rule. But insofar as the goods manufactured or produced prior to March 1, 1978 are concerned, the said rule cannot apply for the reason that there was no levy of special excise duty on such goods at the stage and at the time of their manufacture/production. The removal of goods is not the taxable event. Taxable event is the manufacture or production of goods.”

49. It would be useful to reproduce the facts of the aforesaid judgment. Section 37(1) of the 1978 Finance Act levied a special duty of excise on goods and it came into effect on and from 01.03.1978 and was to remain in force upto 31.03.1979. The question that arose for consideration before the Supreme Court was whether the goods manufactured prior to 01.03.1978 but removed on or after 01.03.1978

would be liable to special duty of excise. When the goods were manufactured or produced prior to 01.03.1978 there was no levy of special excise duty on such goods, but when the goods were removed between 01.03.1978 and 31.03.1979 special excise duty was leviable under section 37(1) of the 1978 Finance Act. The Supreme Court held that as there was no levy of special excise duty at that time the goods were manufactured, no duty could be levied on removal.

50. In the instant case, the position is different. Section 83(3) of the 2010 Finance Act provided that there shall be levied and collected in accordance with the provisions of the Chapter a cess at the rates set forth in the Tenth Schedule. Section 83(3) was repealed by section 18(1) of the 2017 Taxation Amendment Act w.e.f. 01.07.2017 and consequently the 2010 Rules also stood repealed. However, a new levy of cess, namely, the GST Compensation Cess @ Rs. 400 per M.T. was made leviable w.e.f. 01.07.2017 under the provisions of the 2017 Compensation Act. Section 18(2) of the 2017 Taxation Amendment Act merely provides that notwithstanding the repeal of section 83(1) of the 2010 Finance Act, the liability already acquired, accrued or incurred shall not be affected. In the present case, as the goods were removed on or after 01.07.2017, liability had not accrued or incurred on 30.06.2017 and even section 19 talks of collection and payment of arrears of duty. The appellant admittedly paid GST Compensation Cess w.e.f. 01.07.2017. The department is, however, contending that the appellant should have paid cess under section 83(3) of the 2010 Finance Act read with 2010 Cess Rules @ Rs. 400 per M.T. on goods lying in stock as on 30.06.2017, but removed on or after 01.07.2017 and not the GST Compensation Cess @ Rs. 400 per M.T. The decision of

the Supreme Court in **Vazir Sultan Tobacco**, therefore, does not help the department.

51. The aforesaid discussion leads to the conclusion that the appellant was not required to pay CEC on repeal of the 2010 Finance Act on goods removed on or after 01.07.2017 even though they were lying in stock as on 30.06.2017.

52. The impugned order dated 20.04.2022 passed by the Commissioner, therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced on **03.01.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya, Jyoti Bisht