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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C) No. 7459/2017**

MOHIT MINERALS PVT. LTD.

..... Petitioner

Through: Mr. J.K. Mittal, Mr. Rajveer Singh,
Ms. Nidhi Gupta, Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Ravi Prakash, CGSC with
Mr. Nitish Gupta, Mr. Farman Ali,
Advocates with Ms. Aarti Saxena,
Deputy Secretary (DOR).

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

% **25.08.2017**

C.M. No. 30755/2017 (Exemption)

1. Allowed, subject to all just exceptions.

W.P. (C) No. 7459/2017 & C.M. No. 30754/2017 (Stay)

2. Notice. Mr. Ravi Prakash, learned Central Government Standing Counsel, accepts notice for Respondent No. 1, the Union of India.

3. The challenge in this petition is to the constitutional validity of the Goods and Services Tax (Compensation to States) Act, 2017 ('Act'). The context in which the challenge is laid is that the Petitioner is a trader of imported and Indian coal having its operation in various parts of the country. Prior to the

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impugned Act, under the Finance Act, 2010 ('FA 2010'), with effect from 1st July 2010, a 'Clean Energy Cess' was levied under Chapter VII. As a result, on every metric tonne of coal that was sold by the Petitioner, it was required to pay initially a cess @ Rs. 100 per tonne which was progressively increased and stood at Rs.400 per tonne as on the date of its abolition when the new GST regime was introduced.

4. Section 18 of the Taxation Laws (Amendment) Act, 2017 ('TLA Act') states that enactments specified in the third column of the Third Schedule thereto stand repealed to the extent specified in the fourth column thereof. Under the Third Schedule has been included the entire Chapter VII of the FA, 2010. Chapter VII pertained to the 'Clean Energy Cess'. In other words with effect from 1st July 2017 the Clean Energy Cess levied under the FA 2010 stands abolished. Clause 4 (a) of Article 279 A of the Constitution of India, which was inserted by the Constitution (One Hundred and First Amendment) Act 2016 (hereafter the 'COI 101st Amendment Act'), states that the Goods and Services Tax Council (GST Council) shall make recommendations to the Union and States on "the taxes, cesses and surcharges levied by the Union, the States and local bodies which may be subsumed in the goods and services tax." Further Clause 4 (f) states that the GST Council may recommend special rates for a specified period "to raise additional resources during any natural calamity or disaster." The idea was to have all the cesses and levies abolished and subsumed under the GST. Additional revenue could be raised only for natural calamities and disasters.

5. A very forceful case is made by Mr. J. K. Mittal, learned counsel for the

Petitioner, that Parliament did not propose or intend to use the GST regime to impose new cesses. Significantly Clause 18 of the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 contemplated levying an additional tax not exceeding 1% on supply of goods in the course of inter-State trade or commerce. Such additional tax was to be levied for a period of two years or for such other period as the GST Council recommended and was to be assigned to the States in the manner prescribed thereunder. However, when the Bill was debated in the Parliament, Clause 18 was dropped. What was clause 19 of the said Bill has today been enacted as Section 18 of the COI 101st Amendment Act. It states that the Parliament shall, by law, on the recommendation of the GST Council, provide for compensation to the States for loss of revenue arising on account of implementation of GST, for a period which may extend to 5 years.

6. The crux of the Petitioner's submission is that Section 18 of the COI 101st Amendment Act does not enable the Parliament to levy any cess which stood abolished in terms of the Third Schedule of the TLA Act. Mr. Mittal submits that even if the purpose was to compensate the States for loss of revenue, that had to be done by some other means. Section 18 does not permit the levy of such cess.

7. Interestingly, when the Goods and Services Tax (Compensation To States) Bill, 2017 was introduced in the Parliament, it made an express reference to only Section 18 of the COI 101st Amendment Act. Para 2 of the Statement of Objects and Reasons accompanying the Bill preceding the Act reproduces Section 18 of the COI 101st Amendment Act. The Long Title of

the Act also makes a reference only to the COI 101st Amendment Act.

8. The Court sees *prima facie* merit in the contention of the Petitioner, based on the history of the abolition of the Clean Energy Cess and the introduction of the GST regime, that the power of Parliament to enact the impugned Act cannot be traced to Section 18 of the COI 101st Amendment Act. There is therefore a *prima facie* case made out as regards the legislative competence of the Parliament to enact the impugned Act.

9. Another aspect of the matter is that Section 8 of the impugned Act contemplates levy of “a cess on such intra-State supplies of goods or services or both”, the same that is provided in Section 9 of the Central Goods and Services Tax Act, 2017 (‘CGST Act’) and such “inter-State supply of goods and services or both” as provided for in Section 5 of the Integrated Goods and Services Tax Act, 2017 (‘IGST Act’). Therefore, it is clear that cess is being levied on the same taxable event that is the subject matter of the levy under the CGST and IGST Acts, viz., supply of goods and services.

10. For the purpose of providing compensation to States for loss of revenue arising out of the implementation of the GST regime, Section 8 contemplates the cess being collected in such a manner as may be prescribed. This has led to the enactment of the Goods and Services Tax Compensation Cess Rules, 2017. Notification No.1/2017-Compensation Cess (Rate), dated 28th June 2017 issued by the Ministry of Finance, Department of Revenue has re-introduced the cess @ Rs.400 per tonne of coal. If the Act is vulnerable to being challenged for lack of legislative

competence then the Rules can fare no better.

11. The situation in which the Petitioner is placed is that, for stocks of coal on which the Petitioner has already paid the Clean Energy Cess, the Petitioner has to again pay the fresh levy of cess at the rate of Rs.400/- per tonne under the Act. Further, for the Clean Energy Cess that was already paid by the Petitioner under the FA 2010 no input credit is given. Mr. Mittal draws the attention of the Court to the frequently asked questions ('FAQs') issued by the Central Board of Excise and Customs ('CBEC') in which Question 42 and answer given thereto read as under:

"Question 42: Whether credit of Green Cess (Clean Energy Cess) paid on coal and available at the time of transition be eligible for being carried over?

Answer: No Credit of Clean Energy Cess cannot be carried forward on transition."

12. The Petitioner states that it is a *bona fide* trader in coal, carrying on business for a long time. The immediate concern is that for the transactions that are to take place, the Petitioner is required to make payment of the additional levy as cess which, according to the Petitioner, is clearly without the authority of law. The representations made by the Petitioner to the GST Council and to the central government have not received any response. In para 15 of the petition it is stated:

"15. That the Petitioner has already paid upto 30th June 2017, cess under the Clean Energy Cess levied under the Finance Act, 2010 on the imported coal, and the stock laying out it again subjected to cess under the impugned legislation. Furthermore, the no credit is allowed on the Clean Energy Cess so already paid with the cess levied under

the impugned legislation. The Petitioner have stock of around 1,92,000 tonne of coal as on 30.06.2017 on which the Petitioner have already paid clean energy cess @ 400/- per tonne as per the cess levied under the provisions of Chapter VII of the Finance Act, 2010. Further, w.e.f. 01.07.2017, the Petitioner have to charge cess from customers @ 400/- per tonne under the Goods and Services Tax (Compensation to States) Act, 2017 while selling this stock which will result in double taxation of around Rs. 7.68 crores on the stock of coal on which cess has already been paid. The last date payments of such cess is 25th of August 2017 for the supply made in the month of July 2017. The Petitioner, as narrated hereinabove, already made representation to the Respondents and also had meetings with officers of the Respondents No. 2, but no response and only through the press report came to know that cess already paid will not be available for credit and it will lead to double cess on the same stock.”

13. The Court, at this stage, is of the view that, the Petitioner has made out a *prima facie* case for partial *ad interim* relief subject to conditions. As far as the additional levy on the stocks of coal on which it has already paid the Clean Energy Cess in terms of FA Act, 2010, the Petitioner should not be required to make any further payment. However, on stocks of coal on which no Clean Energy Cess under the FA, 2010 was paid, any payment made in terms of the impugned Act would be subject to the result of this petition. It is ordered accordingly.

14. It is made clear that, in the event of the Petitioner succeeding in the present petition, the Petitioner would be entitled to a refund of amounts of Clean Energy Cess paid under the Act and on such terms as the Court may determine in the final order.

15. To facilitate the implementation of this interim order, it is necessary for the officers of the concerned Department, charged with the responsibility of

levying and collecting Clean Energy Cess on coal to depute a team to the Petitioner's business premises to verify on how much of the stock of coal Clean Energy Cess under the FA, 2010 already stands paid. Subject to the Petitioner furnishing to the satisfaction of the officers proof of such payment, the Petitioner will be given credit for such payment and will not be required to make any further payment under the impugned Act for effecting sales and clearances. Till such time the said exercise is completed, no coercive steps will be taken against the Petitioner to recover the levy under the impugned Act.

16. It is made clear however, that on those stocks for which the Petitioner is not able to produce a satisfactory proof of already having paid the Clean Energy Cess under the FA, 2010, the Petitioner will be required to pay the cess under the impugned Act. This would be subject to the directions issued hereinbefore.

17. Reply be filed within four weeks. Rejoinder thereto, if any, be filed before the next date of hearing.

18. List on 26th October 2017.

19. *Dasti* under the signatures of the Court Master.

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S. MURALIDHAR, J.

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PRATHIBA M. SINGH, J.

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AUGUST 25, 2017/j

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