CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH, COURT NO. III

EXCISE APPEAL NO. 50630 OF 2019

[Arising out of the Order-in-Original No. UDZ-EXCUS-000-COM-65/18-19 dated 17/12/2018 passed by Commissioner, Central Goods & Service Tax, Udaipur.]

M/s ACC Limited, **...Appellant**
(Unit : Lakheri Cement Works)
ACC Complex, Teen Haath Naka,
L.B.S. Road, Thane (West),
Sate : Maharashtra.

Versus

Commissioner, Central Goods and Service Tax, **...Respondent**
142-B, Sector – 11, Hiran Magri,
Udaipur.

APPEARANCE:
Shri M.P. Devnath, Advocate, Shri Rahul Kumar, Advocate, Shri Abhishek Anand, Advocate for the appellant.
Shri Sanjay Kumar Singh, authorized representative for the Department

CORAM:
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 50352/2023

DATE OF HEARING/DECISION : 14.03.2023

P.V. SUBBA RAO

We have heard learned counsel for the appellant and learned authorized representative for the revenue and perused the records.

2. The appellant is assailing the order-in-original dated 17.12.2018[1] passed by the Commissioner, Central Goods &

[1] **impugned order**

Service Tax, Udaipur, wherein he disallowed Cenvat credit of Rs. 8,54,39,430/- taken on clean energy cess levied on coal and ordered its recovery along with interest under section 11AA and imposed penalty under Rule 15 (1) of Cenvat Credit Rules, 2004 read with section 11AC.

3. Both sides submit that the issue involved in this appeal is identical to the issue involved in respect of the same appellant in appeal No. E/52864 of 2018, which was disposed of by final order No. A/50793/2019 – EX (DB) dated 24.06.2019. It was held in the final order that the appellant was not entitled to Cenvat credit on the clean energy cess paid by it and accordingly the appeal was dismissed.

4. Learned counsel for the appellant fairly submits that although the appellant had appealed against the above order, it has not been stayed or over-ruled by a higher judicial forum. We find that the aforesaid final order was reported as **ACC Ltd.** versus **Commissioner of C.G.S.T. & C.E.**[2] Paragraph 6 to 10 of this order are reproduced below :-

> "6. After hearing both the parties and perusing the record of the appeal as well as the referred case laws, we are of the opinion as follows :
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> 6.1 In the impugned appeal, the substantial question of law to be adjudicated is as follows :
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> 6.1.1 Whether the appellant is entitled for Cenvat credit on the clean energy cess levied on coal, peat and lignite vide Finance Act, 2010.
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> 6.1.2 For the purpose, it becomes necessary to first adjudicate as to whether the clean energy cess qualifies to be called as excise duty

[2] **2019 (31) G.S.T.L. 103 (Tri. – Del.)**

or tax or is merely a fee. Section 83 of Finance Act, 2010 imposes the impugned cess which reads as follows :

"**Section 83.**

(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. Clean Environment (Energy) Cess NACEN, RTI, Kanpur Page 6.
(7) The Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Central Excise Act, 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)."

6.1.3 The perusal shows that the clean energy cess :

(i) Is a duty of Excise.

(ii) On the goods specified in 10th Schedule.

(iii) Levied with the object of financing and promoting clean energy initiative funding research in the area of clean energy or for any other purpose relating thereto.

(iv) Shall first be credited to Consolidated Fund of India.

(v) Shall be utilised by Central Government for the purposes as mentioned in sub-section (3)/Clause (4) above.

(vi) The cess shall be in addition to any cess or duty leviable on the goods specified in 10th Schedule.

(vii) It shall be for the purposes of Union and proceeds thereof shall not be distributed among the States.

(viii) Provisions of Central Excise Act, 1944 shall be applicable as far as levy of exemption from duty, refund, offences and penalties are concerned, however with such modifications and alterations as may be deemed necessary.

6.2 Apparent from these clauses is the fact that clean energy cess is nomenclated as duty of Excise and the provisions of Central Excise Act, 1944 are made applicable in relation to levy/exemption, etc. thereof. But whether the cess is actually in the form of excise duty or tax or it is merely a fee, the question is still to be adjudicated for deciding the above mentioned substantial question of law. For the purpose, we refer to the following case laws :

> "17. The Constitution Bench of the Apex Court in the case of *Kewal Krishna Puri & another* v. *State of Punjab & another* reported in (1980) 1 SCC. 416 in which it was held, the *quid pro quo* must exist between the payer of the fee and the special services rendered. It was observed :
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> "that a fee is a charge for special services rendered to individuals by the Governmental Agency and therefore for a levy of fee an element of *quid pro quo* for the service rendered was necessary; service rendered does not mean any personal or domestic service and it meant service in relation to the transaction, property or the institution in respect of which the fee is paid. The element of *quid pro quo* may not be possible or even necessary to be established with arithmetical exactitude but even broadly and reasonably it must be established, with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realized is spent for the special benefit of its payers. Each case has to be judged from a reasonable and practical point of view for finding an element of *quid pro quo*."
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> 18. The Constitution Bench of the Apex Court in the case of *Hingir Rampur Coal Co. Ltd.* v. *State of Orissa* reported in 1961 (2) SCR. 537 explained the different features of tax, a fee and cess in the following passage.
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> "The neat and terse definition of Tax which has been given by Latham, C.J., in *Matthews* v. *Chicory Marketing Board,* (1938) 60 CLR. 263 is often cited as a classic on this subject. "A Tax", said Latham, C.J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a Fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of *quid pro quo* between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee.

Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of Fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied.

It was further held that,

"It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire, what, is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy."

19. Again, yet another Constitution Bench of the Apex Court in the case of State of *W.B*. v. *Kesoram Industries Ltd. & Ors*. - 2004 (10) SCC. 201 explained the distinction between the terms 'tax and fee' in the following words :

"The term cess is commonly employed to connote a Tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of Fee collected. It is equally not necessary that the services rendered by the Fee collected should remain confined to the person from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the services rendered out of the fee collected is enough to uphold the validity of the fee charged."

20. Again the Apex Court in the case of *Sreenivasa General Traders and Ors.* v. *State of Andhra Pradesh and Ors.* reported in 1983 (4) SCC 353 held as under :

"The traditional view that there must be actual *quid pro quo* for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be

> rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area of class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a *quid pro quo* for the services rendered. However, correlationship between the levy and the services rendered (sic or) expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the Fee and the services rendered."
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> 21. From the aforesaid judgments it is clear that the traditional view is that there must be actual *quid pro quo* for a fee, has undergone a sea change in the recent years. The tax recovered by a public authority invariably goes into the Consolidated Fund, which ultimately is utilized for all public purposes. Whereas, a cess levied by way of fee is not intended to be, and does not become, a part of the Consolidated Fund. It is earmarked and set apart for the purpose of services for which it is levied."

6.3 In accordance of Articles 266 and 270 of the Constitution of India it becomes clear

> "26. Any cess levied and collected in order to constitute a fee after such collection should go into a special fund earmarked for carrying out the purpose of the Act. The said fund so set apart should be appropriated specifically for the performance of the specified purpose and it should not be merged in the public revenues. In other words, the cess levied by way of fee is not intended to be and does not become a part of the Consolidated Fund. It should be earmarked and set apart for the purpose of services for which it is levied. Then only it should be described as a fee and not tax. If the cess levied and collected is credited to the Consolidated Fund of India and it has to be appropriated by the Parliament by law and then only the said amount could be credited to the Fund; it ceases to be a fee and partakes the character of a duty or a tax."

7. Reading the above settled principles along with Section 83 of Finance Act, 2010 it becomes clear that the cess was collected, irrespective of being nomenclated as excise duty, but for the specific purpose of funding the clean energy initiatives and for any other purpose in relation thereto. Thus, it becomes clear that the cess was not for the use of general public as such irrespective it was deposited into the Consolidated Fund of India. Also, it was not to be distributed to the States but was to be utilised by the Union Government for a particular section and a particular purpose. Thus, it becomes clear that the impugned cess, irrespective of its nomenclature, was not at all the duty of excise or tax but was a fee. The present case is different from the case law of *Shree Renuka Sugars Limited* (supra) as relied upon by the appellant in the sense that the sugar cess in that case invariably goes to consolidated fund and is ultimately utilised for all purposes. There was no *quid pro quo* between the cess levied and collected and the services referred for such payment on the contrary for clean energy cess, the proceeds though are credited to Consolidated Fund of India but for being utilised for a specific purpose as that of clean energy initiative, as a *quid pro quo.*

8. Rule 3 of CCR, 2004 is applicable only when it is established that what is paid is excise duty or in other words a tax and it is in that case only that the assessee is entitled to Cenvat credit.

9. In view of the entire above discussion, we hereby conclude that CEC in the present case is not actually a duty, it is an additional amount as that of a fee for a specific purpose that Section 3, CCR, 2004 will not be applicable. Otherwise also, Section 3 applies only to the duty of excise specified either in First Schedule to Excise Tariff Act or the Second Schedule thereto. In addition to other additional duties, as mentioned in Clause (iii) to (vii) as discussed. CEC does not fall in any of those sub-clauses. Further, the Notification No. 26/2010-C.E., dated 29-6-2010 has incorporated a proviso in Rule 3, CCR, 2004 which reads as follows :

> "Provided also that the Cenvat credit of any duty specified in sub-rule (1) shall not be utilised for payment of clean energy cess leviable under Section 83 of the Finance Act, 2010."

It becomes clear that CEC was to be paid in cash corroborating the intention of the legislation that it was meant to be used for providing a specific service by the Central Government to a specific sector.

10. In view of entire above discussion, we answer the substantial question of law herein in negative holding that the clean energy cess being actually in the nature of fee and not tax/excise duty that the appellant is not entitled for availing Cenvat credit thereupon. We therefore, do not find any infirmity in the Order under challenge. The Order stands confirmed. Appeal stands dismissed. Miscellaneous application stands disposed of".

5. As the issue involved in this appeal is identical to the above, we find no reason to take different view in this appeal. Respectfully following the precedent decision of this Tribunal, we hold that the appellant was not entitled to Cenvat credit of the clean energy cess paid. The appeal is accordingly dismissed.

(Order dictated and pronounced in open court.)

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

(BINU TAMTA)
MEMBER (JUDICIAL)

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