Reserved On : 19/12/2024
Pronounced On : 09/05/2025

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6701 of 2023

With
R/SPECIAL CIVIL APPLICATION NO. 7073 of 2023
With
R/SPECIAL CIVIL APPLICATION NO. 15708 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and
HONOURABLE MR.JUSTICE D.N.RAY

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Approved for Reporting	Yes	No
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M/S. SOPARIWALA EXPORT PVT. LTD.
Versus
JOINT COMMISSIONER, CGST AND CENTRAL EXCISE & ORS.

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Appearance:
MR V SRIDHARAN, SENIOR ADVOCATE WITH MR ANAND NAINAWATI(5970) for the Petitioner(s) No. 1(SCA NO.6701/2023 & SCA NO.7073/2023)
MR PARESH M DAVE for the Petitioner(s) No. 1(SCA NO.15708/2024)
MR UTKARSH SHARMA, for the Respondent(s) No. 4
MR CB GUPTA(1685) for the Respondent(s) No. 1,2,3,5

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR.JUSTICE D.N.RAY

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Advocate Mr. V.Sridharan with learned advocate Mr. Anand Nainawati with learned advocate Mr. Paresh M. Dave for the petitioner, learned advocate Mr. C.B. Gupta for respondent nos. 1,2,3 and 5 and learned advocate Mr. Utkarsh Sharma for respondent no.4.

2. By these petitions under Article 227 of the Constitution of India, the petitioners have prayed for quashing and setting aside the order-in-original for levy of goods and service tax in form of compensation Cess at the rate of 160% on branded tobacco products i.e. scented/flavoured chewing tobacco

manufactured by the petitioners for export through merchant exporters which are subject to GST at 0.1% as per Notifications No.40/2017 and 41/2017 dated 23/10/2017.

3. As the issue arising in these petitions are common, same were heard analogously and are being disposed off by this common judgment.

4. For the sake of convenience Special Civil Application No.6701 of 2023 is treated as a lead matter.

5. Factual matrix of Special Civil Application No. 6701 of 2023 can be summarised as under:

FACTS

6. The petitioner is engaged in the business of manufacture of branded tobacco products falling under HSN 24039910 on which GST is payable at the rate of 28% and Compensation Cess is payable at the rate of 160%.

7. The goods manufactured by the petitioners are exported directly or through merchant exporters.

8. The procedure followed by the petitioners during different taxation regime is as under:

A) As per pre-GST Regime

9. Prior to the introduction of GST, the main indirect taxes applicable were Central Excise Duty, Value Added Tax ("VAT") / Central Sales Tax. ("CST").

B) As per Central Excise

10. As per Section 3 of the Central Excise Act, 1994, excise duty was leviable on manufacture of all excisable goods in India. However, Rule 19 of the Central Excise Rules, 2002 provided for export of manufactured goods without payment of duty.

11. In exercise of powers under Rule 19(3) of the Central Excise Rules, 2002, Notification No. 42/2001-CE (NT) dated 26.6.2001 was issued prescribing

conditions, safeguard and procedure for removal of goods for export without payment of duty. Explanation III of the aforesaid notification read as under:

> "Explanation-III. For the purposes of this notification "duty" means, the duties of excise collected under the following enactments, namely:-
>
> (a) the Central Excise Act, 1944 (1 of 1944);
>
> (b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
>
> (c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);
>
> (d) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by Section 169 of the Finance Act, 2003 (32 of 2003) which was amended by Section 3 of the Finance Act, 2004 (13 of 2004);

(e) any special excise duty collected under a Finance Act.

(f) The additional duties of excise as levied under section 157 of the Finance Act, 2003 (32 of 2003);

(g) the Education cess on excisable goods as levied and collected under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004).

(h) the additional duty of excise leviable under clause 85 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law,

(i) Secondary and Higher Education Cess on excisable goods leviable under clause (126) read with clause (128) of the Finance Bill, 2007, which has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law.

(j) Infrastructure Cess leviable under sub-clause (1) of clause 159 of the Finance Bill, 2016, which clause has, by virtue of the

declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law."

12. According to the procedure prescribed under the aforesaid Notification, a merchant-exporter shall furnish a bond to the Assistant/Deputy Commissioner of Central Excise Duty. After furnishing the bond, a merchant-exporter shall obtain certificates in CT-1.

13. The petitioner removed the goods from its factory under the cover of Excise Invoice to be supplied to the merchant exporter for export. As per the Notification in case of self-sealing, the owner, working partner,

Managing Director etc. of the assessee is required to certify the copies of ARE-1 that goods for export have been sealed in his presence and send the original and duplicate copies along with goods at the place of export and sent the triplicate and quadruplicate copies of the application to the Superintendent or Inspector of Central Excise having jurisdiction over the factory of the petitioner.

14. Thereafter Commissioner of Customs shall certify that the goods are exported and return the original copy of ARE-1 to the exporter and the duplicate copy to the officer specified in the application, with whom the

exporter has furnished bond or a letter of undertaking.

15. The petitioner followed the above procedure and exported the goods through merchant exporter without payment of excise duty including National Calamity Contingency Duty (NCCD).

C) As per Central Sales Tax/Value Added Tax

16. Section 5(3) of the Central Sales Tax Act, 1965 states that the last sale or purchase of any goods preceding the sale or purchase occasioning the export of those goods out of the territory of

India shall also be deemed to be in the course of such export, if such last sale or purchase took place after, and was for the purpose of complying with, the agreement or order for or in relation to such export. This is generally referred to as penultimate sale. No VAT/CST is leviable on such sales.

17. The sales made by the Petitioner to merchant exporters were covered under Section 5(3) of the Central Sales Tax Act, 1965 and were treated as in the course of export. VAT/CST was also not leviable on production of Form-H in accordance with Rule 12 of the Central Sales Tax Rules, 1956.

18. Further the transactions were also disclosed in VAT returns filed by the petitioner.

D) As per GST Regime

19. Prior to issuance of Notification exempting tax on supplies to merchant exporter in excess of 0.1% with effect from 23.10.2017, no tax was payable on goods procured by the merchant exporter. Therefore, discontinuing the facility to merchant exporters to procure export goods free of taxes was leading to working capital blockage.

20. The GST Council in its 22nd Meeting held on 06.10.2017 deliberated on this

issue. The Council observed that the merchant exporter procures the supplies on payment of tax which is ultimately refunded. However, this entire exercise leads to working capital blockage for merchant exporters. In the present case, the Petitioner and most of its group entities also acts as merchant exporters.

21. During the discussion, it was being proposed that the supplies made to merchant exporter may be exempted, however that would have led to blocking of credit and cascading effect.

22. Thus, it was ultimately decided that the rate of tax on supplies to merchant exporter will be restricted to

0.1% only. Keeping in mind the background, the mischief sought to be remedied and the discussion on the proposal for alleviating the hardship faced by the merchant exporter, Notification No. 40/2017 - Central Tax (Rate), Notification No. 40/2017 - State Tax (Rate) and Notification No. 41/2017 Integrated Tax (Rate) all dated 23.10.2017 were issued on the recommendation of the Council.

23. After issuance of Notification No.40/2017-Central Tax (Rate) dated 23.10.2017, the tax payable on supplies to merchant exporter is exempted in excess of 0.1%. The said notification prescribes detailed conditions and

procedures to be followed for making supplies to merchant exporter in order to claim exemption. The petitioners have complied with all the conditions which are summarised as under:

a) The registered manufacturer supplier shall supply the goods to the merchant exporter on a tax invoice.

b) The registered recipient shall export the said goods within a period of ninety days from the date of issue of a tax invoice by the registered manufacturer supplier.

c) The merchant exporter shall indicate the GSTIN number and tax invoice number

issued by the registered manufacturer supplier in the shipping bill.

d) The merchant exporter shall be registered with an Export Promotion Council or a Commodity Board recognised by the Department of Commerce

e) The merchant exporter shall place a purchase order on the registered manufacturer supplier for procuring the goods at concessional rate. A copy of the same shall also be provided to the jurisdictional tax officer of the manufacturer supplier

f) The merchant exporter shall move the said goods from the place of registered

manufacturer supplier directly to the port.

g) When goods have been exported, the merchant exporter shall provide copy of shipping bill containing details of GSTIN and tax invoice of the registered manufacturer supplier along with proof of export general manifest having been filed to the manufacturer supplier as well as jurisdictional tax officer of such supplier.

24. As per the above procedure, goods moved from the factory of the petitioner directly to the port for export and earmarked for export in compliance with both the GST and excise

formalities.

25. In view of above, the supplies made by the petitioner to merchant exporter are eligible for the benefit of the aforesaid Notification. The petitioner has also filed GST returns disclosing the details of supplies made to merchant exporter by levy of 0.1% GST along with HSN wise details and applicable rate of tax and amount of tax.

26. The goods supplied by the petitioner i.e. branded tobacco is always leviable to excise duty and NCCD even after introduction of GST and such excise duty and NCCD is payable in

addition to GST. The petitioner has also complied with the conditions of Notification No.42/2001-CE(NT) dated 26.06.2001 issued under Rule 19(3) of Central Excise (No.2) Rules, 2011 for export of goods without payment of excise duty and NCCD.

27. The Merchant exporters have claimed input tax credit of the tax charged at 0.1% by the petitioner and wherever the merchant exporters could not utilise the said amount, it has been claimed as refund under section 54 of the GST Act. All claims filed by the Merchant Exporters have been sanctioned and no dispute has been raised and declarations have been obtained by the

petitioners from the Merchant Exporters to that effect.

28. The officers of DGGI, Surat Zonal Unit initiated an investigation on 12.06.2021 against the petitioner in respect of non payment of Compensation Cess on supplies of tobacco made to the merchant exporters.

29. During the investigation, it was revealed that the petitioner has paid the applicable 0.1% GST for the period in dispute i.e. from 01.07.2017 to 31.05.2021. However, Compensation Cess applicable on the taxable value of supply was not paid by the petitioners. Thereafter, summons were issued on the

Director and other CFO of the petitioner company and during the course of recording of statements, it was submitted that the issue raised for non-payment of Compensation Cess on the taxable value of supplies was an industry wide issue and there is a bona fide belief in the industry that no Compensation Cess is leviable on supplies to a merchant exporter.

30. The respondent authorities thereafter issued intimation in Form DRC-01A dated 21.07.2022 under section 74(5) of the GST Act.

31. The petitioner submitted reply dated 29.07.2022 contending inter-alia

that supplies made by the petitioner is for export and the entire exercise is revenue neutral and even if the petitioner would have paid the Compensation Cess, same would have been availed as credit by the Merchant Exporter and subsequently claimed as refund.

32. Thereafter show cause notice dated 11.08.2022 was issued wherein it is alleged as under:

> “i) Notification No. 40/2017 Central Tax (Rate) and 41/2017 - IGST (Rate) both dated 23.10.2017 only exempts CGST and IGST. No exemption, or any concessional rate as such has been provided in respect of compensation cess.
>
> ii) The law has been settled by the Hon'ble Supreme Court in M/s.

Unicorn Industries v. Union of India, 2019 (370) E.L.T. 3 (S.C.), wherein the Court held that exemption to excise duty will not apply to NCCD, education cess and secondary and higher education cess.

iii) The product of the Petitioner is classifiable under HSN 24039910 and thus Compensation Cess at the rate of 160% as prescribed in Compensation Cess Notification in respect of branded manufactured tobacco is payable by the Petitioner.

iv) The supplies made by the Petitioner are not export supplies. They have themselves shown their supply as outward supply instead of exports. Further, the Petitioner has themselves paid tax @ 0.1% and claimed the benefit of exemption notification.

v) The Petitioner has suppressed the fact of non-payment of compensation cess as the Petitioner has not intimated the fact to the department and it came to the knowledge of the department only at the time of audit."

33. The petitioner by reply dated

11.10.2022 in Form DRC-06 reiterated the contentions along with the requisite documents.

34. Thereafter personal hearing was held on 23.12.2022 wherein also the petitioner reiterated the submissions made in reply to the show cause notice.

35. The respondent adjudicating authority thereafter passed the impugned order-in-original dated 13.01.2023 confirming the demand of GST (Compensation Cess) of Rs.18,63,12,078/- under section 74(1) of the GST Act read with section 11 of the Goods and Services (Compensation to the States) Act,2017 (For short “the

Compensation Cess Act") along with appropriate rate of interest under section 50(1) of the GST Act, 2017 read with section 11 of the Compensation Cess Act on the confirmed demand and penalty of equal amount read with section 122(2)(b) of the GST Act. The findings in the impugned order are summarised as under:

> "i) Branded tobacco products supplied by the Petitioner is covered under Notification No. 01/2017 - Compensation Cess (rate) dated 28.06.2017 and therefore, compensation cess along with applicable GST on intra state supplied and inter-state supplied of goods is required to be paid by the Petitioner.
>
> ii) Exemption has been provided from GST on supply of goods vide Notification No. 40/2017- Central Tax (Rate) and 41/2017 IGST (Rate) both dated 23.10.2017, but no

exemption for compensation cess has been provided. The supply at concessional rate under the said notifications are optional and not mandatory in nature. If the Petitioner has not opted for supply at concessional rate, it will be liable to pay GST and compensation cess on that supply.

iii) The CBIC has clarified vide Circular No. 1/1/2017-Compensation Cess dated 26.07.2017 that Compensation cess is payable even on exported goods being inter-state supply. However, it will be refunded under Section 16 of the IGST Act. Further, if the exports are made under bond, no compensation cess will be charged.

iv) The CBIC Board has clarified vide circular 37/11/2018-GST dated 15.03.2018, clarified that the benefit of Supplies at concessional rate is optional and are subject to certain conditions prescribed therein.

v) The Petitioner has supplied goods to the merchant exporter who has exported then out of India. Thus, the Petitioner is not exporter of goods.

vi) On the ground of revenue

neutrality, the impugned order relies on Star Industries Ltd. v. Commissioner of Customs (Import), Raigad, 2015 (324) E.L.T. 656 (S.C.). Further, reliance is placed on the decisions holding that exemption notifications have to be construed strictly.

vii) The Petitioner has failed to declare correct details in returns filed under the GST law and the short-payment/non-payment was detected only after investigation was initiated."

36. It is the case of the petitioner that Tobacco and Tobacco Product Manufacturers Association (Tobacco Product Trader Association) made a representation dated 13.02.2023 regarding the clarification on confusion with respect to levy and collection of compensation Cess on supplies made to Merchant Exporter under Notification No.40/2017 and

Notification No.41/2017 along with a prayer for retrospective exemption before GST Council and Chairman of CBIC.

37. Being aggrieved, the petitioner has preferred these petitions though alternative remedy is available under the provisions of GST Act to challenge the impugned order-in-original before the Commissioner (Appeals) on the ground that the impugned order is violative of Article 14 and Article 19(1)(g) of the Constitution of India.

38. Heard learned Senior Advocate Mr. V.Sridharan with learned advocate Mr. Anand Nainawati for the petitioner in

Special Civil Application No.6701 of 2023 and Special Civil Application No.7073 of 2023, learned advocate Mr. Paresh M. Dave for the petitioner in Special Civil Application NO.15708 of 2024.

Submissions of the petitioners

39. Learned Senior Advocate Mr. V. Sridharan with learned advocate Mr. Anand Nainawati for the petitioners in Special Civil Application No.6701 of 2023 and Special Civil Application No. 7073 of 2023 submitted that as per the recommendation of GST Council, the petitioners are subject to payment of 0.1% GST on the goods manufactured by the petitioners i.e. branded tobacco

products falling under HSN 24039910 for export instead of 28% rate of GST.

40. It was submitted that the Compensation Cess is payable at the rate of 160% on the branded tobacco product which are sold in the domestic market, however, Compensation Cess is not leviable on the branded tobacco products which are exported and therefore, the petitioners are not liable to pay the Compensation Cess on the goods supplied to merchant exporter.

41. It was submitted that the Compensation Cess Act is to provide for compensation to the States for loss of

revenue arising on account of the implementation of the goods and service tax. It was pointed out that section 11 of the Compensation Cess Act provides that the provisions of the GST Act and IGST Act and the rules made thereunder would apply *mutatis mutandis* in relation to levy and collection of the Cess leviable under section 8 of the Compensation Cess Act. It was therefore, submitted that as per the provisions of section 2(5) of the IGST Act which defines export of goods as taking goods out of India to a place outside India, would also be applicable for the purpose of levy of Compensation Cess. Therefore, sale made by the merchant exporter to overseas customer

is export of goods and therefore, is zero rated supply under section 16 of the IGST Act, not liable to GST and Compensation Cess when supplied against LUT.

42. It was submitted that however, it is not necessary that in a particular chain of transactions only one supply can be an export of goods as in the facts of the case, even supply by the petitioner to merchant exporter would also quality as export of goods as the goods manufactured by the petitioners are removed from factory of the petitioners against the purchase order of the merchant exporter for procuring goods at concessional rate for the purpose of export.

43. It was submitted that the goods are sealed and are cleared directly to the port for export without being stored at any intermediate place of merchant exporter in accordance with the procedure prescribed under Rule 19 of the Central Excise Rules, 2002 as well as Notification No.40/2017-Central/ State Tax and Notification No.41/2017-Integrated Tax (Rate). It was therefore submitted that diversion of the goods is not possible as that will amount to breach of conditions of Notification. It was submitted that merchant exporters consolidate the cargo and ships the same for export thus resulting into movement of goods from the factory to the port and from the

port to outside India which are so integrally connected that they are part and parcel of the same transactions resulting into export of goods.

44. It was pointed out that the GSTIN of the petitioners and the tax invoice number is also mentioned in the shipping bill filed by the merchant exporter which is submitted along with relevant documents before the Jurisdictional Superintendent Excise of the petitioners. In support of his submission, reliance was placed on the decision of Hon’ble Apex Court in case of **Amritsar Sugar Mills Co. Ltd. v. Commissioner of Sales Tax, Uttar Pradesh** reported in AIR 1966 SC 1242

wherein the Hon’ble Supreme Court was considering the question as to whether delivery of goods outside Uttar Pradesh by the petitioner was entitled to rebate under section 5 of the Uttar Pradesh Sales Tax Act, 1948 or not. It was submitted that section 5 of the Uttar Pradesh Sales Tax Act provided that when sales of certain goods was made for delivery outside the State subject to restrictions and conditions as may be prescribed, a rebate of one-half of the tax levied on sales of such goods for delivery was allowed. It was submitted that Hon’ble Apex Court by interpreting the word “delivery” to mean “constructive delivery” with an intention to export an actual delivery

to ensure that only real export sales enjoy the rebate would be fulfilled and therefore, the word “delivery” occurring in the said section would mean actual delivery and when the sales were made by the assessee Mills, therefore, is actual delivery outside Uttar Pradesh through selling agents.

45. Learned Senior Advocate Mr. Sridharan therefore submitted that similar analogy would apply to the petitioners who supplied the goods to merchant exporters for the purpose of actual export and therefore, petitioners would also be entitled to the same benefit as merchant exporter would be entitled to under the

provisions of GST Act, IGST Act or Compensation Cess Act.

46. It was submitted that as per Rule 19 of the Central Excise Rules, 2002 along with the provisions of Central Excise Act, 1944 also recognizes supplies to merchant exporter as export supplies.

47. Reference was made to Notification No. 42/2001-CE(NT) dated 26.06.2001 which provides for the conditions, safeguards and procedure for the purpose of export. It was submitted that the petitioners have followed the prescribed procedure and removed the goods for export under the cover of

Form ARE-1.

48. It was further submitted that Foreign Trade Policy also recognizes the supplies made to merchant exporters as an export supply by EOU as per para 6.10 of the Foreign Trade Policy 2015-2020 subject to conditions mentioned in para 6.19 of the Handbook of Procedure.

49. Learned Senior Advocate Mr. Sridharan therefore, submitted that considering such supply of goods by the petitioners to merchant exporters for actual export recommended that tax on supplies to merchant exporters in excess of 0.1% will be exempted as per the provisions of section 11 of the

CGST Act. It was submitted that considering the recommendation of GST Council, Government has issued Exemption Notification No.40/2017 for Central and State Tax (Rate) dated 23.10.2017 exempting payment of GST in excess of 0.1% (0.1% in case of IGST and 0.05% each in case of CGST and SGST).

50. Learned Senior Advocate Mr. Sridharan thereafter, referred to the decision of Hon'ble Supreme Court in case of **Union of India v. Mohit Minerals** reported in 2022 (61) GSTL 257 (SC) wherein it is held that recommendations of the GST Council are binding on the Government while

prescribing subordinate legislation.

51. Reliance was placed on the minutes of 22nd Meeting of GST Council held on 06.10.2017 wherein it was suggested that for the purpose of importing goods without payment of tax by exporters availing Advance Authorisation/Export Promotion Capital Goods /100% Export Oriented Units Scheme, exemption should be granted from IGST and Cess under section 6 of the IGST Act and in case of domestic procurement, such supplies should be deemed as exports and to tackle the problem of fund blockage in the hands of merchant exporter, it was suggested that the supplies to such persons shall be on payment of nominal

0.1% GST.

52. It was submitted by learned Senior Advocate Mr. Sridharan that Compensation Cess levied under section 8 of the Compensation Cess Act is also a tax on supplies as held by Hon'ble Supreme Court in case of **Union of India v. Mohit Minerals** reported in (2019) 2 Supreme Court Cases 599 while upholding levy of Compensation Cess, sustained the same under Article 246A of the Constitution as a tax on supply of goods or services.

53. It was submitted that the findings arrived at by the respondent to the effect that exemption notification

issued by the Government in relation to the GST Act applicable to the taxes payable on supply of the goods in question to merchant exporter in excess of 0.1% will not apply to Compensation Cess Act relying upon the decision of Hon'ble Supreme Court in case of **Unicorn Industries v. Union of India** reported in 2019 (370) ELT 3 (SC) wherein it was held that the exemption granted to Central Excise duty will not apply to NCCD and Cess is erroneous. It was submitted that Compensation Cess is at par with CGST, SGST and IGST and therefore, stand taken by the respondents that the recommendation of GST Council cannot be applied to compensation Cess would frustrate the

entire purpose of the recommendation and therefore, strict interpretation of exemption notification issued by the Government in relation to CGST and SGST would equally apply to the Compensation Cess and the respondents were not justified in levy of Compensation Cess at the rate of 160% which ultimately is required to be refunded to the merchant exporter as the goods supplied by the petitioners to merchant exporter is zero rated supply. It was therefore, submitted that Notification No. 40/2017 and Notification No.41/2017 dated 23.10.2017 will also include exemption from Compensation Cess in excess of 0.1%.

54. It was submitted that without prejudice to the above contentions, not granting exemption from Compensation Cess on supplies made to merchant exporter will be violative of Article 14 of the Constitution of India as the GST Council in its 22nd Meeting held on 06.10.2017 made recommendation to resolve the issue of payment of GST and Compensation Cess at the time of procurement to the effect that supplies of goods to merchant exporters registered with Export Promotion Council/Commodity Board shall be on payment of tax at the rate of 0.1% and to prevent misuse, adequate safeguards shall be provided.

55. It was therefore submitted that

rationale/objective of granting exemption to basic GST levy applies with equal force to the Compensation Cess and it cannot be said that in absence of any Notification in relation to Compensation Cess, the petitioners were liable to pay Compensation Cess at the rate of 160% which ultimately is to be refunded.

56. It was submitted that Compensation Cess is also a tax on supply of goods or services or both and only some of the goods or services are specified for the purpose of levy of Compensation Cess which generally includes luxury or sin goods or services. It was submitted that there is nothing discriminatory in

prescribing higher rate of tax in respect of sin goods or services when supplied domestically. However, in case of export of such goods or services, the policy of the Government is to export goods and not taxes and the Government does not discourage export of so-called luxury or sin goods like branded tobacco which is evident from the fact refund is granted in case of export of such goods.

57. It was submitted that in case of supply of such goods to the merchant exporter, the basic GST i.e. CGST/SGST/IGST has been exempted which clearly shows that the intention of the Government is not to deny exemption to

such goods on which Compensation Cess is leviable. It was therefore, submitted that to deny exemption to Compensation Cess on supplies to merchant exporter is therefore, clearly discriminatory, arbitrary and violative of Article 14 of the Constitution which provides for equality before the law and equal protection of law.

58. Reliance was placed on the decision of Hon'ble Apex Court in case of **Budhan Chaudhry v. State of Bihar** reported in AIR 1955 SC 191 wherein it is held that Article 14 forbids class legislation but it does not forbid reasonable classification for the purposes of legislation. It was

therefore submitted that in the facts of the case, the object sought to be achieved is to relieve merchant exporters from the problem of working capital blockage as the taxes paid at input stage are ultimately refunded and keeping this object in mind, the classification sought to be made between the basic GST and Compensation Cess is not based on any intelligible differentia and the only permissible classification is between supplies meant for exports including to merchant exporters and other domestic supplies. It was therefore, submitted that for levy of Compensation Cess on such supplies made to merchant exporters is arbitrary, discriminatory and violative

of Article 14 of the Constitution of India.

59. It was further submitted that entire exercise of payment of Compensation Cess at the rate of 160% on the supplies made to merchant exporter is revenue neutral as even nominal tax which is 0.1% to be paid by the petitioners is also refunded to merchant exporter, therefore, even Compensation Cess levied at 160% by the respondent authorities on the supplies of merchant exporter is also to be refunded resulting into revenue neutral exercise.

60. Reliance was placed on Circular No.

37/11/2018-GST dated 15.03.2018 in which it is clarified that the benefit of supplies at concessional rate is subject to certain conditions and the said benefit is optional and the supplier who supplies goods at concessional rate is also eligible for refund on account of inverted tax structure as per the provisions of sub-section(3) of section 54 of the CGST Act. It was therefore, submitted that if Compensation Cess was paid by the petitioners, the same would also have been refunded by the Government to the merchant exporter as there is no dispute regarding the fact that the goods have actually been exported.

61. It was therefore, submitted that

even if it is assumed that the contention of the respondent authority is correct then also the impugned demand is not sustainable as the entire tax is otherwise refundable and there is no revenue implication and any other interpretation would lead to exporting taxes which is not the policy of the Government.

62. In support of his submission, reliance was placed on the following decisions:

i) In case of **CCE v. Coca-Cola India Pvt. Ltd.** reported in 2007 (213) ELT 490 (SC).

ii) In case of **Apar Industries Ltd. v. B.S. Ganu** reported in 2017 (354) ELT 74 (Bom).

iii) In case of **Cipla India v. Union of India** reported in 1995 (80) ELT 17 (Bom.)

63. It was therefore, submitted that reliance placed by the respondent authorities on the decision in case of **Star Industries Ltd** reported in 2015 (324) ELT 656 (SC) is not applicable to the facts of the case.

64. It was submitted that section 15(1) of the CGST Act provides that the value of supply shall be the transaction

value i.e. the price paid or payable for the supply but the provision does not apply to related parties and as per section 15(4) where value is not determinable as per section 15(1), the value shall be determined in the manner prescribed under the Rules. It was pointed out that Rule 28 of the CGST Rules provides the mechanism for valuing supplies between related parties and as per the said Rule, supplies shall be valued at open market value or the value of supply of goods or services of like kind and quality and if the value is also not determinable then further rules are provided. It was submitted however in case where the recipient is eligible

for full input tax credit, then the value declared in the invoice shall be deemed to be open market value.

65. It was therefore, submitted that in facts of the case, merchant exporter is entitled to full input tax credit and further entitled to refund of entire amount so claimed as credit and for the purpose of the Compensation Cess Act, the value declared in the invoice is Nil and hence, the said value will be accepted in accordance with the second proviso to Rule 28 of the CGST Rules.

66. Reliance was also placed on Circular No.199/11/2023-GST dated 17.07.2023 in which proviso to Rule 28

is clarified. It was therefore, submitted that no Compensation Cess will be payable by the petitioners and therefore, the impugned order is required to be quashed and set aside.

67. Learned Senior Advocate Mr. Sridharan also referred to sections 8 and 10(1) of the Compensation Cess Act to submit that the Compensation Cess, if any, collected from the petitioners will be available as credit to the merchant exporters and will be refunded to them as the goods are exported and such Compensation Cess would not be credited to the Goods and Services Tax Compensation Fund to be distributed to the States as compensation for loss of

revenue. It was therefore, submitted that the amount which cannot be distributed to the States in accordance with the purpose of the Act, the same cannot be levied itself at the threshold stage under section 8(1) of the Compensation Cess Act.

68. It was therefore, submitted that inter-state and intra-state supplies referred to in section 8 of the Compensation Cess Act refers only to the supplies within India and an export supply is not within the contemplation of charging section.

69. Learned Senior Advocate Mr. Sridharan therefore submitted that the

purpose of the Compensation Cess is to compensate States for loss of revenue and considering the fact that no tax was levied on the supplies to merchant exporter in earlier regime and therefore, there is no purpose for levying Compensation Cess on such supplies in GST regime also. It was therefore, submitted that Central Excise duty and other ancillary duties like NCCD and Cess were not leviable as the supply was treated as export under Rule 19 of the Central Excise Rules, 2002 as well as no VAT was leviable as per provisions of section 5 of the Central Sales Tax Act, 1956 on production of Form-H.

70. It was therefore submitted that no Compensation Cess is leviable as no compensation is required to be given in respect of supplies made to merchant exporters.

71. It was further submitted that respondents could not have invoked the provisions of section 74 of the CGST Act for issuance of show cause notice if there is no fraud, willful misstatement or suppression of facts to evade tax in facts of the present case and no penalty is payable under section 74(1) read with section 122(2) of the CGST Act.

72. It was further submitted that there

is no intention on part of the petitioners nor there is any suppression as the petitioners have declared HSN number of the goods supplied in its monthly return along with applicable rate of tax and tax amount paid. The petitioners have also declared Nil payment of Compensation Cess. It was therefore, submitted that none of the ingredients for invocation of section 74 of the CGST Act is present in facts of the case as the transaction is entirely revenue neutral and entire amount which is alleged to be payable is eligible as credit to the merchant exporter and subsequently, refundable and therefore, there is no intention to evade the payment of tax.

73. It was submitted that burden of proving that the assessee has suppressed the facts with an intent to evade payment of tax is on the revenue as per the decision of Hon’ble Apex Court in case of **Continental Foundation v. Commissioner of Central Excise** reported in 2007 (216) ELT 177 (SC) wherein it is held that mere omission to give correct information is not suppression of facts within the meaning of section 11A of the Central Excise Act, 1944 unless it was deliberate to stop payment of tax and the burden is cast upon the Revenue to prove such suppression to invoke extended period of limitation.

74. It was therefore, submitted that in facts of the case no penalty is leviable under section 74 and section 122(2)(b) of the CGST Act. It was further submitted that no interest is also recoverable from the petitioners under section 50 of the CGST Act as the demand is not sustainable.

75. Learned advocate Mr. Paresh M. Dave appearing for the petitioner in Special Civil Application No.15708 of 2024 adopted the submissions and contentions made by learned Senior Advocate Mr. Sridharan and further emphasised upon the contention that supply made by the petitioner of branded tobacco product

to merchant exporter would be equivalent to export of goods as per the provisions of section 2(5) of the IGST Act and therefore, same would be zero rated supply. Reliance was placed on decision in case of **Lord Krishna Sugar Mills v. Commissioner of Sales Tax, UP Lucknow** reported in (1966) 18 STC 498 (SC) wherein relying upon decision in case of **Amritsar Sugar Mills Co. Ltd.**(supra), it was held that the appellant before the Court was entitled to rebate under section 5 of the Uttar Pradesh Sales Tax Act, 1948 in respect of transaction of sale of goods to selling agents meant for actual delivery outside Uttar Pradesh. It was therefore submitted that

applying the same, supply of goods by the petitioners to merchant exported would also have to be considered as export of goods.

76. It was submitted that Circular No.1/1/2017-Compensation Cess dated 26.07.2017 issued by the Central Board of Excise & Customs, New Delhi provides clarification regarding applicability of section 16 of the IGST Act, 2017 relating to zero rated supply for the purpose of Compensation Cess on exports wherein it is clarified that provisions of section 16 of the IGST Act will apply *mutatis mutandis* for the purpose of Compensation Cess also and no Compensation Cess would be charged on

the goods exported by an exporter under bond and exporter would be eligible for refund of input tax credit of Compensation Cess relating to the goods exported.

77. It was therefore, submitted that if the petitioner exports the goods without payment of IGST under LUT, no Compensation Cess is payable, however, if the petitioner exports the goods on payment of IGST as per Notification No.40/2017 and Notification No.41/2017, the petitioner would be liable to pay GST @ 0.1% on the goods supplied to the merchant exporter for export but the petitioner would be liable to pay Compensation Cess at the rate of 160% in absence of similar Notification

being issued by Government for levy of Compensation Cess which ultimately would be refunded to the merchant exporter as input tax credit relating to the goods exported. It was therefore submitted that levy of Compensation Cess at the rate of 160% would result into a revenue neutral exercise.

78. Reference was also made to Circular No.37/11/2018-GST dated 15.03.2018 which provides that Notification No.40/2017 and Notification No.41/2017 would be applicable to supplies to merchant exporter also. It was therefore, submitted that levy of Compensation Cess at 160% on supply of the goods for export to merchant

exporter is contrary to the provisions of GST Act, IGST Act and the Compensation Cess Act and the petitioner should not be saddled with such huge liability resulting into blockage of working capital as such exercise would not result in payment of any compensation to State which is the object of the levy of Compensation Cess.

Submissions of the respondents:

79. Learned advocate Mr. C.B. Gupta and learned advocate Mr. Utkarsh Sharma appearing for the respondents submitted that there is no exemption notification issued by the Central Government to for exemption from levy of Compensation

Cess on the inter-state supply and the same rate would be applicable to the goods which are sold by the petitioners to the merchant exporter for exports.

80. It was submitted that the petitioners have an alternative remedy to challenge the order-in-original passed by the respondent authorities by filing an appeal before the appellate authority as per the provisions of section 107 of the GST Act and as such, the petitions should not be entertained while exercising the jurisdiction under Article 227 of the Constitution of India.

81. It was submitted that issuance of notification of exemption from levy of

GST is a policy decision and the notification issued for the purpose of exemption of the goods to be exported by restricting the levy to 0.1% on CGST, SGST and IGST cannot be applied to Compensation Cess to be levied under the Compensation Cess Act.

82. In support of the submissions, reliance was placed on the following averments made in the affidavit in reply:

> “13. In the present case, the petitioner has supplied the goods to merchant exporter and then merchant exporter has exported the goods. The petitioner has shown the supply to the merchant exporter in the E-way bills as outward supply and also availed the benefit of exemption notification and removed the goods after charging 0.1% GST and thus they have themselves treated the supply as not export of goods.

Therefore, the petitioner was not exporter in the present case. Since the supplies made by the petitioner was outward supply as mentioned in E-way Bill, the petitioner was liable to pay applicable GST and compensation cess on supply of goods to merchant exporter as per the provisions of CGST Act, 2017.

14. I submit that in view of the aforesaid and in view of the provisions referred hereinabove, regardless of whether the Petitioner exports his products directly or through a merchant exporter, it would be a case of inter-State / intra-State transfer of goods and hence section 8 of the GST (Compensation to the States) Act,2017 would be attracted.

15. I state that the CBIC vide circular no. 37/11/2018-GST dated 15.03.2018 (Copy at Annexure-3 hereto) clarified that the benefit of supplies at concessional rates such as in the present case is subject to certain condition and the said benefit is optional. The option may or may not be availed by the supplier and or the recipient and the goods may be procured at the normal applicable tax rate. The petitioner is not exporter. I state

that even otherwise, as mentioned in paragraph 24.4 of the impugned order, the provisions of the Integrated Goods and Service Tax Act and rules thereunder apply mutatis mutandis in relation to levy and collection of cess under section 8 of GST(Compensation to the States) Act,2017 and hence the exporter would be eligible for refund of compensation cess paid on goods exported by him or no compensation cess would be charged on goods exported by an exporter under bond and he would be eligible for refund of input tax credit of compensation cess relating to goods exported.

16. With reference to the prayer for issuance of writ of mandamus or any other appropriate writ extending exemption to compensation cess on supplies made to merchant exporters similar to exemptions under the notifications dated 23.10.2017, I submit that grant of the said prayer by this Hon'ble Court would tantamount to formation of a policy decision. I submit that in matters of formation of policies and more particularly fiscal policy, this Hon'ble Court would ordinarily refrain from exercising extraordinary writ jurisdiction and intervening. Hence, on this ground alone, the

said prayer is liable to be rejected.

17. I submit that it is amply clear that compensation cess is completely and independent and distinct from GST, it has been introduced for a limited period for a specific purpose and the supply effected by the Petitioner to merchant exporter attracts levy of compensation cess. I state that the products of the Petitioner are covered under the notification being Notification No.1/2017-Compensation Cess (Rate) dated28.06.2017 and hence compensation cess along with applicable GST on intra and inter state supply of goods is required to be paid by the assessee along with interest and penalty in terms of the impugned order.“

83. It was submitted that as per Notification No.1/2017 dated 28.06.2017, the rate of Compensation Cess for chewing tobacco without lime tube under Chapter Heading 2403 99 10 is 160% being sin goods and as such,

Compensation Cess is to be levied at the same rate as per section 8 of the Compensation Cess Act.

84. Reliance was also placed on Circular No.1/1/2017-Compensation Cess dated 26.07.2017 wherein it is clarified that the provisions of section 16 of the IGST Act, 2017 relating to zero rated supply will apply *mutatis mutandis* for the purpose of Compensation Cess also.

85. It was therefore, submitted that the petitioners have not made supply to merchant exporters under LUT/bond but has availed the benefit of Notification No.40/2017 and Notification No.41/2017 which provides for supplies for export

at a concessional rate of 0.1% subject to certain conditions specified therein and in absence of similar notification for Compensation Cess, the petitioners are liable to pay the Compensation Cess at the normal rate of 160%.

86. It was submitted that clarification issued by CBEC in Circular No.37/11/2018-GST dated 15.03.2018 cannot be relied upon by the petitioners for payment of Compensation Cess at par with the Notifications no. 40/2017 and 41/2017 for exemption form levy of GST in excess of 0.1%.

87. In support of the submission that the Court shouls not interfere with the fiscal policy where the Government acts

in “public interest” and neither any fraud or lack of bona fide is alleged much less established and the Government has to be left free to determine the priorities in the matter of utilisation of finances and to act in the public interest while issuing or modifying or withdrawing an exemption Notification, reliance was placed on the decision of Hon’ble Supreme Court in case of **Kasinka Trading v. Union of India** reported in 1994 (74) ELT 782 (SC).

88. It was therefore, submitted by the learned advocates for the respondents that the reasons are assigned by the adjudicating authority to arrive at the conclusion that the petitioners are

liable to pay Compensation Cess on exported goods zero rated supply being inter-State supply as per section 7(5) of the IGST Act which is 160% as per Notification No.1/2017.

89. It was further submitted that the adjudicating authority has rightly invoked the provisions of section 74 for the extended period of limitation as the petitioners have not paid Compensation Cess on the goods supplied to the merchant exporters and failed to declare the correct information and returns under the provisions of GST Act which was detected only after investigation was initiated by the officers of the DGGI. It was therefore, submitted that the petitioners have

been rightly saddled with interest and penalty in the impugned order-in-original.

90. It was further submitted that as per Notifications No.40/2017 and Notification No.41/2017, no exemption for Compensation Cess has been provided and supply at the nominal rate under the said notifications is not mandatory and it is optional and the assesse will be liable to pay GST and Compensation Cess on supply at normal rate if such option of supply at exemption/nominal rate is not exercised.

91. It was therefore, submitted that since exemption/nominal rate of GST and IGST has been provided by the said

notifications and no exemption has been provided thereof on Compensation Cess, the petitioners are liable to pay Compensation Cess along with exemption/nominal rate of CGST and IGST.

92. It was therefore, submitted that no interference may be made in the impugned orders and the petitioners may be relegated to avail the alternative efficacious remedy by preferring an appeal to challenge the impugned order-in-original.

93. Learned Senior Advocate Mr. Sridharan in rejoinder submitted that alternative efficacious remedy is not an absolute bar to entertain writ

petition, more particularly, in case of exorbitant and arbitrary demand raised by the authorities. In the alternative, it was submitted that if the writ petitions are not entertained then while exercising writ jurisdiction in facts of the case, mandatory pre-deposit may be waived. In support of his submissions reliance is placed on the following decisions:

1) **Godrej Sara Lee Ltd. v. Excise and Taxation Officer** reported in 2023 (384) ELT 8 (SC).
2) **Government of A.P. v. P. Laxmi Devi** reported in (2008) 4 SCC 720.
3) **Sumati Nath Jain v. State of UP** reported in 2016 SCC OnLine All 2840.

4) **Ganesh Yadav v. Union of India** reported in 2015 (320) ELT 711 (All).

5) **Pioneer Corporation v. Union of India** reported in 2016 (340) ELT 63 (Del.).

Discussions and Findings:

94. The short controversy which arises for consideration of this Court in the facts of the case is whether the petitioners are liable to pay Compensation Cess at the rate of 160% on the supply of goods i.e. branded tobacco products to the merchant exporters for export or no Compensation Cess is payable or at-least nominal/concessional Compensation Cess

at the rate of 0.1% is payable by applying Notification No.40/2017 and Notification No.41/2017 dated 23.10.2017?

95. To consider the issue arising in these petitions, it would be germane to refer to the relevant provisions of the Act.

IGST Act

2(5) - "export of goods" with its grammatical variations and cognate expressions, means taking goods out of India to a place outside India;

7. Inter-State supply

(1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in-

(a) two different States;
(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

xxx

(5) Supply of goods or services or both,-

(a) when the supplier is located in India and the place of supply is outside India;
(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or
(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

16. Zero-rated supply

(1) "zero-rated supply" means any of the following supplies of goods or services or both namely:-

(a) export of goods or services or both; or
(b) supply of goods or services or

both [for authorised operations] to a Special Economic Zone developer or a Special Economic Zone unit.

xxx

(3) A registered person making zero-rated supply shall be eligible to claim refund under either of the following options, namely:-

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied,

in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder."

Goods and Service Tax (Compensation To States) Act, 2017.

2. Definitions

(1) In this Act, unless the context otherwise requires,-

xxx

(c) "cess" means the goods and services tax compensation cess levied under section 8;

(d) "compensation" means an amount, in the form of goods and services tax compensation, as determined under section 7;

8. Levy and collection of cess

(1) There shall be levied a cess on such intra-State supplies of goods or services or both, as provided for in section 9 of the Central Goods and Services Tax Act, and such inter-State supplies of goods or services or both as provided for in section 5 of the Integrated Goods and Services Tax Act, and collected in such manner as may be prescribed, on the recommendations of the Council, for the purposes of providing compensation to the States for loss of revenue arising on account of implementation of the

goods and services tax with effect from the date from which the provisions of the Central Goods and Services Tax Act is brought into force, for a period of five years or for such period as may be prescribed on the recommendations of the Council:

PROVIDED that no such cess shall be leviable on supplies made by a taxable person who has decided to opt for composition levy under section 10 of the Central Goods and Services Tax Act.

(2) The cess shall be levied on such supplies of goods and services as are specified in column (2) of the Schedule, on the basis of value, quantity or on such basis at such rate not exceeding the rate set forth in the corresponding entry in column (4) of the Schedule, as the Central Government may, on the recommendations of the Council, by notification in the Official Gazette, specify:

PROVIDED that where the cess is chargeable on any supply of goods or services or both with reference to their value, for each such supply the value shall be determined under section 15 of the Central Goods and Services Tax Act

for all intra-State and inter-State supplies of goods or services or both:

PROVIDED FURTHER that the cess on goods imported into India shall be levied and collected in accordance with the provisions of section 3 of the Customs Tariff Act, 1975 (51 of 1975), at the point when duties of customs are levied on the said goods under section 12 of the Customs Act, 1962 (52 of 1962), on a value determined under the Customs Tariff Act, 1975 (51 of 1975).

11. Other provisions relating to cess

(1) The provisions of the Central Goods and Services Tax Act, and the rules made thereunder, including those relating to assessment, input tax credit, 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 the cess leviable under section 8 on the intra-State supply of goods and services, as they apply in relation to the levy and collection of central tax on such intra-State supplies under the said

Act or the rules made thereunder.

(2) The provisions of the Integrated Goods and Services Tax Act, and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall, mutatis mutandis, apply in relation to the levy and collection of the cess leviable under section 8 on the inter-State supply of goods and services, as they apply in relation to the levy and collection of integrated tax on such inter-State supplies under the said Act or the rules made thereunder:

PROVIDED that the input tax credit in respect of cess on supply of goods and services leviable under section 8, shall be utilised only towards payment of said cess on supply of goods and services leviable under the said section.

GST ACT

54(3) - Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the

end of any tax period:

PROVIDED that no refund of unutilised input tax credit shall be allowed in cases other than-

(i) zero-rated supplies made without payment of tax;
(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

PROVIDED FURTHER that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

PROVIDED ALSO that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

GST Rules
28. Value of supply of goods or services or both between distinct

or related . persons, other than through an agent

The value of the supply of goods or services or both between distinct persons as specified in sub-sections (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall-

(a) be the open market value of such supply;

(b) if the open market value is not available, be the value of supply goods or services of like kind and quality;

(c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order:

PROVIDED that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person:

PROVIDED FURTHER that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services."

96. It would also be germane to refer to various circulars/notifications at this stage as under:

Circular No. 199/11/2023-GST dated 17.7.2023

S. No.	Issues	Clarification
2.	In respect of internally generated services, there may be cases where HO is providing certain services to the BOs for which full input tax credit is available to the concerned BOs. However, HO may not be issuing tax	The value of supply of services made by a registered person to a distinct person needs to be determined as per rule 28 of CGST Rules, read with sub-section (4) of section 15 of CGST Act. As per clause (a) of rule 28, the

	invoice to the concerned BOs with respect to such services, or the HO may not be including the cost of a particular component such as salary cost of employees involved in providing said services while issuing tax invoice to BOs for the services provided by HO to BOs. Whether the HO is mandatorily required to issue invoice to BOs under section 31 of CGST Act for such internally generated services, and/ or whether the cost of all components including salary cost of HO employees involved in providing the said services has to be included in the computation of value of services provided by HO to BOs when full input tax	value of supply of goods or services or both between distinct persons shall be the open market value of such supply. The second proviso to rule 28 of CGST Rules provides that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services. Accordingly, in respect of supply of services by HO to BOs, the value of the said supply of services declared in the invoice by HO shall be deemed to be open market value of such services, if the recipient BO is eligible for full input tax credit. Accordingly, in cases where full

	credit is available to the concerned BOs.	input tax credit is available to a BO, the value declared on the invoice by HO to the said BO in respect of a supply of services shall be deemed to be the open market value of such services, irrespective of the fact whether cost of any particular component of such services, like employee cost etc., has been included or not in the value of the services in the invoice. Further, in such cases where full input tax credit is available to the recipient, if HO has not issued a tax invoice to the BO in respect of any particular services being rendered by HO to the said BO, the value of such services may be deemed to be

		declared as Nil by HO to BO, and may be deemed as open market value in terms of second proviso to rule 28 of CGST Rules.

Circular No. 37/11/2018-GST dated 15.3.2018

13. **Supplies to Merchant Exporters:** Notification No. 40/2017 Central Tax (Rate), dated 23rd October 2017 and notification No. 41/2017 Integrated Tax (Rate) dated 23rd October 2017 provide for supplies for exports at a concessional rate of 0.05% and 0.1% respectively, subject to certain conditions specified in the said notifications.

13.1 It is clarified that the benefit of supplies at concessional rate is subject to certain conditions and the said benefit is optional. The option may or may not be availed by the supplier and/or the recipient and the goods may be procured at the normal applicable tax rate.

13.2 It is also clarified that the

exporter will be eligible to take credit of the tax @ 0.05% /0.1% paid by him. The supplier who supplies goods at the concessional rate is also eligible for refund on account of inverted tax structure as per the provisions of clause (ii) of the first proviso to sub-section (3) of section 54 of the CGST Act. It may also be noted that the exporter of such goods can export the goods only under LUT/bond and cannot export on payment of integrated tax. In this connection, notification No. 3/2018-Central Tax, dated 23.01.2018 may be referred.

Circular No. 1/1/2017-Compensation Cess dated 26.7.2018

8. In view of the above, it is hereby clarified that provisions of section 16 of the IGST Act, 2017, relating to zero rated supply will apply mutatis mutandis for the purpose of Compensation Cess (wherever applicable), that is to say that:

a) Exporter will be eligible for refund of Compensation Cess paid on goods exported by him [on similar lines as refund of IGST under

> section 16(3) (b) of the IGST, 2017]; or
>
> b) No Compensation Cess will be charged on goods exported by an exporter under bond and he will be eligible for refund of input tax credit of Compensation Cess relating to goods exported [on similar lines as refund of input taxes under section 16(3)_(a)_of the IGST, 2017].”

97. There is no dispute between the parties regarding the supply of goods by the petitioners to merchant exporters to be considered as “export of goods” in the hands of the petitioners and therefore, provision of section 16 of the IGST Act would also apply to the supplies made by the petitioners to merchant exporters as zero rated supply.

98. Prior to GST regime under the provisions of the Central Excise Act and Rules as well as Sales Tax and VAT provisions, there was no levy of tax at any point of time on export of goods and therefore, the goods were exported at the value excluding tax to be levied thereon. Therefore as per Rule 19 of the Central Excise Rules, 2002, export was to be made without payment of any excise duty which reads as under:

> **“19. Export without payment of duty -** (1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Principal Commissioner or Commissioner, as the case may be.
>
> (2) Any material may be removed without payment of duty from a

> factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Principal Commissioner or Commissioner, as the case may be.
>
> (3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.
>
> [Provided that nothing contained in this rule shall apply to Motor spirit, commonly known as petrol, Highspeed diesel oil and Aviation Turbine Fuel.]"

99. As per Notification No.42/2001 dated 26.06.2001, conditions and procedure for export of excisable goods are prescribed without payment of duty. Similarly, after the GST Act coming into force, the basic concept of export of goods without payment of duty or tax

is continued and as per Circular No.37/11/2018-GST dated 15.03.2018 supply of goods to merchant exporters is considered as an export of goods in consonance with decision of Hon'ble Apex Court in case of **Amritsar Sugar Mills Co. Ltd.**(supra) and in case of **Lord Krishna Sugar Mills** (supra), wherein it is held that in a transaction of taking goods out of Utter Pradesh , in facts of the case to a place out of India more than one supply can qualify as export supply and therefore, supply by the petitioners to the merchant exporters would qualify as export supply. Reliance is placed on the following observations of the Hon'ble Apex Court in case of **Amritsar**

Sugar Mills Co. Ltd.(supra) :

> “The first question which arises in these appeals is whether the word "delivery" in the expression "sales of Such goods for delivery outside Uttar Pradesh" occurring in section 5 of the Act means actual delivery or constructive delivery. If it means constructive delivery then there is no doubt that on the facts as stated by the Judge (Revisions) the contract provided for constructive delivery inside Uttar Pradesh and the assessee-mills would not be entitled to rebate under section 5.
>
> The Madras High Court had occasion to consider a similar question in India Coffee and Tea Distributing Co. Ltd. v. The State of Madras [1959] 10 S.T.C. 359. It held that the word "delivery" in section 5 of the Madras General Sales Tax Act, 1939, which exempts from taxation sales of tea "if the sale is for delivery outside the State and delivery actually was made" did not include anything which the law deemed "delivery" but was restricted to physical delivery of the thing sold. In coming to this conclusion, Subrahmanyam, J.,

observed:

> "In deciding whether the word 'delivery' in section 5(v) includes delivery in law, we have to have regard to the objects of the Legislature in enacting section 5(v). The object obviously was the promotion of the export of tea. The Legislature intended that where tea was exported from the State for being delivered outside the State, the sale which resulted in such export should be exempt from taxation. That object would not be wholly achieved if we hold that delivery of documents of title in the State of Madras would make the sale liable to taxation."

We agree with the view expressed by the Madras High Court. It seems to us that the object underlying section 5 is to encourage export of goods manufactured in Uttar Pradesh and notified under section 5. The course of trade adopted by the Indian Sugar Syndicate Ltd. and the assessee-mills shows that if the word "delivery" is interpreted to mean "constructive delivery" very few "export sales", if we may use the expression, would enjoy rebate

> under section 5. As long as the contract evinces an intention to export and actual delivery is given to effectuate that intention the object of the Legislature to ensure that only real "export sales" enjoy the rebate would be fulfilled. It seems to us that in the context of section 5 the word "delivery" occurring in section 5 means "actual delivery".

100. It is also required to be noted that even if the petitioners are saddled with payment of Compensation Cess at the rate of 160%, merchant exporters shall get refund of the same as per the provisions of section 16 of the IGST Act read with section 54(3) of the GST Act and therefore, such payment of Compensation Cess would be revenue neutral and in such circumstances, levy of Compensation Cess at the rate of 160% on supply of goods to merchant

exporters by the petitioners would not be sustainable as held in case of **Coca-Cola India Pvt. Ltd.**(supra).

101. GST Council in its 22nd Meeting held on 06.10.2017 while considering Agenda Item 5 of Report and Recommendations of the Committee on Exports regarding working capital blockage for manufacturer exports including EOUs due to requirement of upfront payment of GST on inputs/capital goods and for merchant exporters due to requirement of upfront payment of GST on finished goods discussed the issue as under:

> “12.17. The Hon'ble Minister from Jammu & Kashmir reiterated that if exemption mechanism was to be kept for exports till March 2018, then

exemption scheme for Special Category States should also be continued till March 2018. The Hon'ble Chairperson stated that exporters formed a different category and for them too, exemption would be phased out. The Senior Joint Commissioner (Commercial Taxes), West Bengal reiterated that supplies to merchant exporters should not be subject to a tax of 1%. The Hon'ble Minister from Karnataka raised a question whether the proposed exemption scheme would also apply to export of services. DGFT clarified that the present scheme of advance authorisation, EPCG, etc. applied only to goods. The Secretary suggested that no new dispensation should be created under the GST. The Council agreed to this suggestion. The Secretary suggested that supplies to merchant exporters could be exempt if the goods were moved immediately to the port of shipment or to an export warehouse. The Senior Joint Commissioner (Commercial Taxes), West Bengal stated that in the earlier scheme of Form H under VAT, no tax was paid when goods were sold to merchant exporter but full tax became payable if goods were not eventually exported. He stated that a similar procedure should be

continued and there should be no mandatory requirement of directly sending the goods to warehouses for export. The Secretary stated that input tax credit would not be available if full exemption was given for supply to merchant exporter. He suggested that a tax of 0.1% could be levied on supplies to merchant exporters. The Hon'ble Deputy Chief Minister of Delhi supported the proposal to keep the rate of tax on supplies to merchant exporters at the rate of 0.1%. The Council agreed to this proposal. The Council also agreed to the other recommendations of the Committee on Exports."

102. Thereafter in para no.13 GST Council approved the exemption from IGST, Cess etc. as under:

"13. For agenda item 5, the Council approved the following:

xxx

(v) Supplies of goods to merchant exporters registered with Export Promotion Council/Commodity Boards

shall be on payment of tax at the rate of 0.1% and to prevent misuse, adequate safeguards shall be provided."

103. Government of India issued Notification No.40/2017 dated 23.10.2017 while exercising powers conferred by sub-section(1) of section 11 of the CGST Act on recommendation of the GST Council to exempt intra-State supply of taxable goods by a registered supplier to a registered recipient for export, from so much of the central tax leviable thereon under section 9 of the GST Act, as in excess of the amount calculated at the rate of 0.05 per cent, so far as levy of CGST is concerned and similar notification is issued by the State Government

resulting into payment of maximum tax at the rate of 0.01%. Similar Notification is also issued being Notification No.41/2017 while exercising powers under section 6 of the IGST Act to grant exemption on IGST leviable upon export in excess of amount calculated at the rate of 0.1% meaning thereby that maximum 0.1% IGST is payable.

104. However, no notification is issued by the Central Government or State Government under the Compensation Cess Act and therefore, the petitioners are made liable to pay Compensation Cess at normal rate i.e. 160% on the supply of goods to merchant exporters for

export.

105. It is true that in absence of any notification, the respondent authorities were justified in passing the impugned order for levy of Compensation Cess at the normal rate of 160% on the supply made by the petitioners to merchant exporters. However, considering the provisions of section 11 of the Compensation Cess Act, which provides for applicability of provisions of CGST and IGST Act, *mutatis mutandis* for levy of Cess as per section 8 of Compensation Cess Act, notification issued under the provisions of GST and IGST Act are required to be applied for levy of Cess

also for the following reasons:

1) The petitioner is saddled with levy of Compensation Cess at the rate of 160% considering the same as inter-State supply under the IGST Act though supplies made by the petitioners to merchant exporters is “export of goods” as per section 2(5) of the IGST Act read with clarification issued by Notification No. 13/2018. Therefore, supplies made by the petitioners to merchant exporter is zero rated supply.

2) If the petitioners are made liable to pay Compensation Cess at the normal rate of 160%, the same

analogy should apply with regard to working capital blockage in the hands of the manufactures who are supplying goods for export to merchant exporters for which GST Council has recommended for exemption from levy of GST and IGST and reduced the rate upto 0.1% only for the purpose of notifying the transaction so as to bring the transaction within the purview of provisions of the GST Act. Accordingly, the Government has issued notification as stated here-in-above. As the Compensation Cess Act is a satellite Act adopting the provisions of GST and IGST Act, Government ought to have issued

notification under the Compensation Cess Act also at par with Notification No.40/2017 and Notification No. 41/2017.

106. In view of above, when there is no revenue loss, there is no purpose of levy of Compensation Cess at the normal rate of 160% as the same is required to be refunded to the merchant exporter on export of goods as per provisions of section 54(3) of the GST Act read with section 16 of the IGST Act.

107. Though the respondent authorities have considered that exporters will be eligible for refund of Compensation Cess paid on goods exported by him on similar line as refund of IGST under

section 16(3)(b) of the IGST Act, 2017 or no Compensation Cess will be charged on goods exported by an exporter under LUT/bond and he will be eligible for refund of input tax credit of Compensation Cess relating to good exported meaning thereby that it is a revenue neutral exercise by levy of Compensation Cess at 160% and thereafter refund the same either on payment basis or as refund of input tax.

108. There is a fallacy in reasoning of the adjudicating authority that as option is given to assessee either to avail benefits of Exemption Notification No.40/2017 and

Notification No.41/2017 or to pay tax at normal rate, the petitioners are liable to pay Compensation Cess at normal rate only in absence of any such notification or option being given by the Government.

109. The contention raised on behalf of the respondents that it is a policy decision of the Government seems to be out of place as provisions of Compensation Cess Act are to be applied *mutatis mutandis* to that of GST Act and IGST Act and in that view of the matter, there cannot be any discrepancy of levy of GST, IGST and Compensation Cess. The Government is therefore, required to issue similar notification

for granting exemption under the Compensation Cess Act also or extend the benefits of Exemption Notification No.40/2017 and Notification No.41/2017 for levy of Compensation Cess also on supply of goods by the petitioners to the merchant exporters on fulfillment of various conditions as prescribed therein.

110. With regard to the objection raised on behalf of the respondents that there is an alternative efficacious remedy, the appellate authority would not be able to decide the issue of grant of exemption from Compensation Cess in absence of any similr notification issued by the Government for exemption

of Compensation Cess or by extending the benefit of Notification No.40/2017 and Notification No.41/2017.

111. It is not in dispute that the goods manufactured by the petitioners are removed from the factory of the petitioners against the purchase orders of the merchant exporters for procuring the goods at concessional rate for the purpose of export. Goods are sealed and are cleared directly to the port for export without being stored at any intermediate place of merchant exporter in accordance with the procedure prescribed under Rule 19 of the Central Excise Rules, 2002 as well as Notification No.40/2017 and

Notification No.41/2017. The merchant exporters thereafter consolidate the cargo and ships the same for export. Therefore, the movement of goods from the factory of the petitioners to the port for export and from the port to outside India are integrally connected and therefore they are part and parcel of the same transaction. The GSTIN of the assessee and the tax invoice number is also mentioned in the shipping bill by the merchant exporter. In such circumstances, as per provisions of section 2(5) of the IGST Act, supply of goods by the petitioners to merchant exporters is to be considered as export of goods and therefore, the same would be zero rated supply as per section 16

of the IGST Act.

112. It is pertinent to note that Compensation Cess Act is brought on statute to provide compensation to the States for loss of revenue arising on account of implementation of good and services tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016 and as per section 5 of the Compensation Cess Act, various Acts are subsumed into Goods and Services Tax Act. Therefore, Compensation Cess as per the provisions of section 7 is payable to the States during the transition period as per the method prescribed in the said section,

considering the projected revenue for any year calculated as per provisions of section 6 of the Compensation Cess Act. Therefore, Compensation Cess is collected to be distributed amongst States to compensate loss of revenue. Life of Compensation Cess Act was initially for five years which is now extended for five years from 2017 which is now further extended. Therefore, the levy of Compensation Cess is required to be considered at par with levy of GST and IGST.

113. At the same time, the contention raised on behalf of the petitioners for violation of Articles 14 and 19(1)(g) of the Constitution that petitioners

cannot be treated differently from similarly placed manufactures, cannot be accepted in absence of notification of exemption from payment of Compensation Cess issued by the Government. It is also true that no notification under Compensation Cess can be issued in absence of any recommendation from GST Council.

114. Therefore, in facts of the case, as the petitioners have a valid case for exemption from payment of Compensation Cess, GST Council is required to consider recommending exemption from levy of Compensation Cess in line with exemption approved for levy of GST and IGST for supply of export or supply to

merchant exporters by the manufactures. The Hon'ble Apex Court in case of **Union of India v. Vkc Footsteps India Private Limited** reported in (2022) 2 SCC 603 has held as under so as to urge the GST Council to reconsider the formula and take a policy decision regarding the same for removing anomaly in Rule 89 of the GST Rules :

> "142. The above judicial precedents indicate that in the field of taxation, this Court has only intervened to read down or interpret a formula if the formula leads to absurd results or is unworkable. In the present case however, the formula is not ambiguous in nature or unworkable, nor is it opposed to the intent of the legislature in granting limited refund on accumulation of unutilised ITC. It is merely the case that the practical effect of the formula might result in certain inequities. The reading down of the formula as proposed by Mr Natarjan and Mr. Sridharan by prescribing an order of utilisation would take this Court down the path of

> recrafting the formula and walk into the shoes of the executive or the legislature, which is impermissible. Accordingly, we shall refrain from replacing the wisdom of the legislature or its delegate with our own in such a case. However, given the anomalies pointed out by the assessees, we strongly urge the GST Council to reconsider the formula and take a policy decision regarding the same."

115. In view of above, when there is no recommendation by GST Council to grant exemption from payment of Compensation Cess at par with GST and IGST on supply of goods for export or supply to merchant exporter, we also strongly urge the GST Council to consider the issue of granting exemption from levy of Compensation Cess at par with GST and IGST as recommended by it in 22nd Meeting so as to see that there is no working capital blockage for

manufacturer or exporters including EOUs due to requirement of upfront payment of Compensation Cess at normal rate on supply of goods by the petitioners to merchant exporters for export which ultimately is required to be refunded considering the fact that no tax is leviable on the export of goods.

116. In view of foregoing discussion and reasons, the impugned action of levy of Compensation Cess at the rate of 160% on the supply of goods i.e. branded tobacco products by the petitioners to merchant exporters for export is required to be kept in abeyance and the matter is referred to GST Council to

decide the issue as to whether exemption is required to be granted on levy of Compensation Cess on supply of goods to merchant exporters for export at par with exemption granted for levy of GST and IGST in excess of 0.1% so as to enable the petitioners to avail input tax credit or refund as the case may be as per the provisions of section 16(3) of the IGST Act read with section 54(3) of the GST Act.

117. Till the GST Council considers the issue in accordance with law for recommendation of the exemption from levy of Compensation Cess, the respondents shall not initiate further proceedings by issuing show cause notice or by passing any adjudication

order in respect of levy of Compensation Cess at normal rate on the goods supplied to the merchant exporter for export if the petitioners fulfill the conditions as prescribed under Exemption Notification No.40/2017 and Exemption Notification No.41/2017 and also file an undertaking before the respondent authorities to deposit the Compensation Cess if GST Council recommends otherwise.

118. With the aforesaid observations and findings, the petitions are disposed of. The operation and implementation of impugned orders are hereby kept in abeyance till the GST Council reconsider on the issue of recommending

exemption from payment of Compensation Cess on the products supplied by the petitioners to merchant exporters for export at par with recommendation issued for exemption from levy of GST and IGST in excess of 0.1% in its 22nd Meeting which has resulted into issuance of Notification No.40/2017 and Notification No.41/2017 dated 23.10.2017.

119. We hope that GST Council shall consider the issue of such recommendation of granting exemption from payment of Compensation Cess at par with GST and IGST at the earliest so as to resolve such anomaly.

120. Rule is made absolute to the aforesaid extent. No order as to costs.

(BHARGAV D. KARIA, J)

(D.N.RAY,J)

RAGHUNATH R NAIR