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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.188 OF 2010

SICGIL INDIA LIMITED,
Through its DGM-Operations,
Shri S. Shankarasubramanian,
Post Box No.11, Plot A-2,
Survey No.188/1, Zuarinagar,
Goa, 403 726. **... Petitioner**

Versus

1. The State of Goa,
Through the Chief Secretary,
Having office at Secretariat,
Porvorim, Bardez-Goa.

2. The Director of Transport,
Directorate of Transport,
Government of Goa,
Having office at Junta House,
Panaji, Goa 403 001 **... Respondents**

Mr Abhijeet Kamat, Advocate *for the Petitioner.*

Mr Pravin N. Faldessai, Additional Government Advocate *for the Respondents.*

CORAM: M. S. KARNIK &
BHARAT P. DESHPANDE, JJ.

DATED : 21st July 2023

ORAL JUDGMENT: (Per M. S. KARNIK, J.)

1. The challenge in this petition filed under Article 226 and 227 of the Constitution of India is to the imposition of cess under "The Goa Rural Improvement And Welfare Cess

Act, 2000" on the liquid and solid Carbon Dioxide being transported by the petitioner.

2. The State of Goa enacted "The Goa Rural Improvement And Welfare Cess Act, 2000" ('The Cess Act, 2000' for short) on 16.10.2000. The constitutional validity of the Cess Act, 2000 and the Goa Rural Improvement & Welfare Cess Rules, 2006 was subject matter of challenge before this Court in Writ Petition No.670 of 2010 in the case of ***Sociedade de Fomento Industrial Private Limited v/s. State of Goa & Others*** **[2018 (6) AIR Bom. R224**) which was decided on 26.09.2018. This Court held that the impugned enactment cannot be struck down on the basis of the challenge levelled by the petitioner. As a consequence, the impugned notification is held to be valid and lawfully issued and therefore the demands made under the impugned Act, Rules and Notification to be valid and legal. This Court therefore was of the view that there is no question of refund of cess collected.

3. Shri Faldessai, learned Additional Government Advocate for the respondent submitted that this Court, having categorically held that the notification issued under the Act is valid and lawfully issued and the demands made are valid and legal, it is now not open for the petitioner to seek refund. According to the learned Additional Government Advocate, even this petition ought to be dismissed in view of the decision in the case of ***Sociedade de Fomento*** (supra).

The contention of learned Additional Government Advocate is that the challenge in the present petition was heard along with the aforesaid petition and hence only on this ground the petition deserves to be dismissed. We are not impressed with this submission in view of the observations of this Court in paragraph 8 of the judgment. No doubt even this petition was to be heard along with the other petitions which had raised the issue of constitutional validity of the Cess Act, 2000. The relevant portion in paragraph 8 reads thus:-

> *`8. When this Petition along with the group of Writ Petitions came up for hearing, the Counsel in other petitions requested that the two arguments raised in this Petition, that is the legislative competence of the State and retrospective application, are common in almost all matters and they requested to be heard in support when this Petition is heard. The Counsel requested that after the decision is rendered in this petition, the other petition be taken up for consideration on other individual grounds. <u>Given this request by the Counsel, the other grounds of challenge than the two argued before us in this petition, are not be construed as foreclosed by this decision.</u>*
>
> *(Emphasis supplied by us)*

As can be seen from paragraph 8, two arguments were common to all the petitions, i.e. the legislative competence of the State and retrospective application, which challenge was negated. The determination of the question raised in this petition is not foreclosed.

4. In this petition, what we are required to consider is, whether under the provisions of the Cess Act, 2000 and as per the amended provisions, the State of Goa can levy cess on the liquid and solid Carbon Dioxide being transported by the petitioner.

5. The petitioner is engaged in the manufacturing of Carbon Dioxide liquid/solid/gas at the unit located at Zuarinagar, Goa. The State of Goa amended the Schedule-I of the Cess Act, 2000 on 01.09.2009 to include entry 13A which provides for levy of cess on inflammable and hazardous material (except petrol and diesel). The said entry 13A does not specify the materials which would be covered under it. The respondents levied cess on the petitioner's truck transporting Carbon Dioxide on the strength of said entry 13A. The petitioner's trucks were detained at the border check-post and compelled to pay cess.

6. The petitioner made a representation on 02.12.2009 to the respondent no.2-The Director of Transport, contending that Carbon Dioxide which is being transported is neither inflammable nor hazardous and therefore no cess should be levied. This Court by the order dated 09.03.2010 called upon the Additional Government Advocate to take instructions on the representation made by the petitioner dated 21.01.2009, addressed to the Director of Transport, Government of Goa. The representation was rejected. On 17.03.2010 this Court passed the following order:-

> *`Rule.*
>
> *2. Respondents waive notice of rule.*
>
> *3. Recovery of any cess shall be subject to the outcome of this writ petition. If the petition succeeds,*

> *the petition shall be entitled to recovery of the amounts as a separate order in this writ petition itself without being compelled to take recourse to any other proceedings.*
>
> *4. To be tagged with W.P. No.146/2009.'*

7. This Court, thus, had clearly observed that recovery of any cess shall be subject to the outcome of this writ petition and if the writ petition succeeds, the petitioner shall be entitled to the recovery of amounts in this petition itself without being compelled to take recourse to any other proceedings.

8. The Cess Act, 2000 was enacted to provide additional resources for improvement of infrastructure and health with a view *to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials. Whereas it is expedient to provide additional resources for improvement of infrastructure and health with a view to promote the welfare of people residing in the rural areas affected by the use of plastics, dumping of garbage and spillage of materials.* It is necessary to bear in mind some of the relevant provisions necessary to deal with the issue raised in this petition. Section 2(a) defines "carrier" means any mode or conveyance of facility by which material is transported from one place to another by mechanical device. Section 2(d) defines "material" means the material specified in Schedule I. Section 3 provides for levy and collection of cess which reads thus:-

> *`3. Levy and collection of cess—(1) With effect from such date as the Government may, by notification in the Official Gazette, appoint, there shall be levied and collected from the owner a cess on all carrier transporting material and at such rates as specified in Schedule I, for the purposes of this Act.*
>
> *(2) The Government may, from time to time, by notification in the Official Gazette, revise the items and the rates of cess by amending Schedule I.*

Thus, as per Section 3, the State Government can levy and collect from the owner a cess on all carrier transporting material and at such rates as specified in Schedule-I by notification in the Official Gazette. It is pertinent to note that sub-section (2) of Section 3 clearly provides that by notification in the Official Gazette, the Government may revise the item and the ratio of cess by amending Schedule-I.

9. It is the submission of the learned Additional Government Advocate that so long as the items are transported by the owner of a carrier, the cess has to be levied and collected. He submits that it can be any item. According to learned Additional Government Advocate, it does not matter as to the nature of the item transported, as the cess is to be levied and collected on the transport of items.

10. Section 14 provides that every rule made and every notification issued by the Government under the Cess Act, 2000, shall be laid, as soon as may be after it is made or issued, as the case may be, before the State Legislature.

Schedule-I (See section 3) reads thus:-

`SCHEDULE –I
(See section 3)

	Material	Rate
1.	*Iron ore where royalty is paid to Government.*	*Rs.2/- per metric ton.*
2.	*Manganese ore where royalty is paid to Government.*	*Rs.2/- per metric ton.*
3.	*Bauxite ore where royalty is paid to Government.*	*Rs.2/- per metric ton.*
4.	*Iron ore where royalty is not paid to Government.*	*Rs.5/- per metric ton.*
5.	*Manganese ore where royalty is not paid to Government.*	*Rs.5/- per metric ton.*
6.	*Bauxite ore where royalty is not paid to Government.*	*Rs.5/- per metric ton.*
7.	*Coal*	*Rs.5/- per metric ton.*
8.	*Coke*	*Rs.5/- per metric ton.*
9.	*Sand*	*Rs.2 cubic metric ton.*
10.	*Murrum*	*Rs.2 per cubic metric ton.*
11.	*Debris other than local self Government Authority debris.*	*Rs.2/- per cubic metric ton.*
12.	*Garbage other than local self Government Authority Garbage.*	*Rs.2/- per cubic metric ton.*
13.	*Packaged water supplied in plastic bottles or sachet made up of plastic, sold for human consumption.*	*Rs.0.50 per bottle/packet.*

14.	*Any other items as notified by Government from time to time.*	*Rs.2/- per ton /cubic meter /per package, as specified by the Government.*

Secretariat Annexe, *R.RaghuRaman,*
Panaji, *Secretary to the*
Government of Goa,
Dated: 16-10-2000 *Law Department (Legal Affairs).*

11. It is urged by the learned Additional Government Advocate that entry 14 of Schedule-I would cover the case of the petitioner for levy and collection of cess. We find that the item Carbon Dioxide does not fall in any of the entry from 1 to 13 of Schedule-I nor is it notified as such as per entry 14.

12. In exercise of powers conferred under sub-section (2) of Section 3 of the Cess Act, 2000 and all powers enabling it in this behalf, the Government amended the Schedule-I on 01.09.2009 as follows:-

`In the Schedule-I appended to the said Act.

(i) for the existing entry at serial number 7, the following entry shall be substituted, namely:-
"7. Coal .... Rs. 250/- per metric ton;";

(ii) for the existing entry at serial number 8, the following entry shall be substituted, namely:-
"8. Coke .... Rs. 250/- per metric ton;";

(iii) for the existing entry at serial number `13', the following entry shall be substituted, namely:-
"13A. Inflammable and hazardous materials (except petrol and diesel) .... Rs. 250/- per metric ton;";'

13. It is the contention of learned counsel for the petitioner that what was transported by the petitioner was Carbon Dioxide and the same is neither inflammable nor a hazardous material. In any case, according to learned counsel for the petitioner, to attract entry 13A, the item has to be 'inflammable and hazardous'. At this juncture it is material to note that the representation made by the petitioner came to be rejected. On the other hand it is the contention of learned Additional Government Advocate that Carbon Dioxide would fall within the amended clause 13A being an inflammable and hazardous material. According to learned Additional Government Advocate, what is excluded is specifically provided, i.e. petrol and diesel. According to him there is no reference to Carbon Dioxide and therefore the petitioner's challenge must fail as Carbon Dioxide is inflammable and hazardous material. There is a subsequent development during the pendency of the petition which needs to be noted. By virtue of notification dated 28.01.2010, entry 13A underwent further amendment as under:-

> ***`13A. Inflammable and hazardous materials other than those listed hereinunder:- Rs. 250/- per metric ton.***
>
> *(i) Petrol, diesel and Light Diesel Oil.*
>
> *(ii) Aviation Turbine Fuel (ATF).*
>
> *(iii) Nafta and Furnace Oil.*
>
> *(iv) Kerosene sold through PDS .*
>
> *(v) Liquefied Petroleum Gas (LPG) for domestic and commercial use.*
>
> *(vi) Waste and Pollutant gases including Argon gas.*

(vii)	*Ammonia, Phosphoric Acid and Sulphuric Acid and other raw material used in the manufacture of Chemical Fertilizers.*
(viii)	*MS Scrap, MS Ingots, Sponge and Pig Iron.*
(ix)	*Mineral ore used in the manufacture of Sponge, Iron and Pig Iron and MS ingots.'*

14. Thereafter, by virtue of a notification dated 03.02.2011, the Cess Act, 2000 was again amended and certain items including Carbon Dioxide is excluded from the ambit of entry 13A. The relevant portion of the notification reads thus:-

`In Schedule-I appended to the said Act,--

(i) for the existing entries at serial numbers 7 and 8, the following entry shall be substituted, namely:-

`"7.(a)	*Coal, other than that used by industries in the State of Goa.*	*Rs.250/- per metric ton;*
(b)	*Coal used by industries in the State of Goa.*	*Rs.50/- per metric ton;*
8.(a)	*Coke, other than that used by industries in the State of Goa.*	*Rs.250/- per metric ton;*
(b)	*Coke used by industries in the State of Goa.*	*Rs.50/- per metric ton;*

(ii) in the existing entry at serial number 13A, after item (ix), the following entry shall be inserted, namely:-

"(x) Paints and paints related material.;
<u>(xi) Carbon Dioxide – liquid/solid/gas</u>.".

This Notification shall come into force from the date of its publication in the Official Gazette.

By order and in the name of the Governor of Goa.

Arun L. Desai, Director & ex-officio Joint Secretary (Tpt).

Panaji, 1st February, 2011.'

(Emphasis supplied)

15. We may hasten to add that the subsequent exclusion of Carbon Dioxide from the ambit of entry 13A will not by itself render the decision of the respondent collecting levy on Carbon Dioxide for the period prior thereto as illegal. The challenge of the petitioner will have to be considered on the basis of the provisions as they stood on the date of the levy of cess.

16. The Act does not contain any provision for adjudicating a claim based on a dispute whether the item is subject to levy of cess or otherwise. This petition is of the year 2010. Admittedly, prior to the amendment of 2011 when Carbon Dioxide was excluded from the ambit of entry 13A of Schedule-I, there is no notification issued specifying Carbon Dioxide to be an item on which cess can be collected. It is not possible for us to lay down a blanket proposition that every item or material which is subject matter of transport is subjected to such levy and collection of cess. Carbon Dioxide is not an item covered under Schedule-I nor any notification is placed on record covering Carbon Dioxide for such levy. Schedule-I makes a reference to the items which is subjected to levy. If the intent were to levy cess on the transport and not on the materials to be transported, there was no need to have specified the items and the rates in Schedule-I. From reading of Section 3 of the Cess Act, 2000 it is evident that cess can be levied only on the items listed in Schedule-I which are subject matter of transport at such rates specified. Even as per item 14 of Schedule-I the item has to be notified by Government from time to time on which a fixed levy of cess is provided. There is no such notification brought on record in respect of Carbon Dioxide. It is therefore not possible to give Section 3 of the Cess Act, 2000 such a broad meaning as the learned Additional Government Advocate urges us, for that would render the Schedule-I meaningless.

17. We now proceed to consider whether Carbon Dioxide, for the purpose of the Cess Act, 2000 can be said to be an inflammable and hazardous material in terms of entry 13A of Schedule-I. In view of the order dated 26.09.2018 of this Court and as we find from the materials on record that the determination of this question for the purpose of Cess Act, 2000, does not involve serious disputed questions of fact, we proceeded to deal with this question.

18. It is material to note that Form F which is a licence to store compressed gas in cylinders issued in favour of the petitioners mentions that gas contained in cylinders, i.e. Carbon Dioxide is non-toxic and non-inflammable. It is also pertinent to refer to the Manufacture, Storage and Import of Hazardous Chemical (Amendment) Rules, 2000 (page 191 of the paper-book), which does not make a reference to Carbon Dioxide in the list of hazardous chemicals. In our considered opinion, it is difficult to accept the submission of learned Additional Government Advocate that Carbon Dioxide is an 'inflammable and hazardous' material within the meaning of Schedule-I of the Cess Act, 2000. Though we do not base our opinion on the subsequent event, but fact remains that even the State of Goa has by the amendment of 2011 excluded Carbon Dioxide from the ambit of entry 13A of the Schedule-I.

19. Though, in our opinion Carbon Dioxide cannot be regarded as inflammable or hazardous material within the meaning of Cess Act, 2000, for the purpose of levy of cess, it has to satisfy the twin condition, i.e., it should be 'hazardous' and 'inflammable'. We may, in this regard draw support from the decision of the Supreme Court in the case of ***Ape Belliss India Ltd. v/s. Union of India And Others (2001) 9 SCC 96.*** Paragraph 6 reads thus:-

> *`6. We are unable to accept the contention of Mr Swami. A plain reading of the section (sic Tariff Public Notice) clearly shows, as contended by Mr Bhatt, that for an alloy steel to be considered as stainless steel, it will have to satisfy two conditions i.e. the alloy steel should be known in the trade as stainless steel and further, it should contain 11% chromium as a component of the alloy steel. This is clear from the use of the word "and". If the intention of the trade notice was to treat the two types of alloy steels as stainless steel then it would have been made clear by using the word "or" instead of the word "and". In the said view of the matter, we are of the opinion that if any alloy steel*

is known as stainless steel in the trade and also has more than11% chromium in it, then alone the same could be considered as stainless steel and not otherwise. In the instant case, assuming that the alloy steel imported by the appellant is known in the trade as stainless steel still, since on any analysis it is found that the chromium content is less than 11%, the same could not have been classified as stainless steel for the purpose of the Customs Tariff Act, 1975 because the second condition as to the content of the chromium is not satisfied. In our considered opinion, the goods imported by the appellant will have to be classified under Tariff Head 73.15(1) since it is not specified anywhere else.'

20. In our considered opinion, Carbon Dioxide transported by the petitioner does not satisfy the twin condition of being 'inflammable and hazardous', and hence the question of levy of cess will not arise. If the intent of entry 13A were to cover material which is either hazardous or inflammable, the word 'or' would have been put to use instead of the word 'and'. Even if one of the twin conditions is not satisfied, the material will not fall within the ambit of the expression 'inflammable and hazardous' for the purpose of Entry 13A of Schedule-I of the Cess Act, 2000. We, therefore, have no hesitation in holding that cess cannot be levied under the Cess Act, 2000 on liquid and solid Carbon Dioxide being transported by the petitioner.

21. The learned Additional Government Advocate then invokes the doctrine of unjust enrichment to contend that even otherwise the petitioner is not entitled for refund, as the cess so collected from the petitioner must have been passed on by them to the consumers. In paragraph 9 of the petition it is specifically averred by the petitioner that they have not passed on any burden incurred due to the imposition of the said cess on the transportation of the Carbon Dioxide to any other person and have completely borne the entire burden by themselves. As indicated earlier, even this Court on 17.03.2010 while issuing Rule had observed that the recovery of any cess shall be subject to the outcome of the writ petition and if the petitioner succeeds, the petitioner shall be entitled to recovery of the amounts in this writ petition itself without being compelled to take recourse to any other proceedings. We, therefore, do not find any merit in this submission of learned Additional Government Advocate and the same stands rejected.

22. Learned counsel for the petitioner, on instructions, submitted that the petitioner is not claiming any interest on the cess collected but only seeks refund of the actual cess collected at the earliest. The petitioner fairly has given up any claim for interest on the amount to be refunded.

23. The petition succeeds. It is held that the respondents were not justified in levying cess and collecting the same from the petitioner on transportation of Carbon Dioxide. The petitioner is entitled to refund. The refund to be processed expeditiously and in any case within a period of 12 weeks from today. It is open for the petitioner to approach the respondents making a claim for such refund along with the receipts regarding cess paid.

24. The Writ Petition is allowed. No order as to costs.

BHARAT P. DESHPANDE, J **M. S. KARNIK, J.**

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