

UNION OF INDIA & ANR.

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v.

MOHIT MINERAL PVT. LTD.

(Civil Appeal No. 10177 of 2018)

OCTOBER 03, 2018

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[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Goods and Services Tax (Compensation to States) Act, 2017:

Validity of – Held: Is constitutionally valid – Article 270 empowers Parliament to levy any cess by law and s. 18 of the Constitution (One Hundred and First Amendment) Act, 2016 expressly empowers Parliament shall, by law on the recommendation of the Goods and Services Tax Council, provide for compensation to the states for loss of revenue arising on account of implementation of the goods and services tax and expression law used therein is of wide import which includes levy of any cess for the above purpose – Thus, the 2017 Act is not beyond the legislative competence of the Parliament – Furthermore, the objectives in statements of objects and reasons of Constitution (One Hundred and First Amendment) Bill, 2014 was conferring concurrent taxing powers upon Parliament and the State Legislature to make laws for levying goods and services tax – Article 246A(1) empowers the Parliament to make laws with respect to goods and services tax – Power to make law is not general power related to a general entry rather it specifically relates to goods and services tax – When express power is there to make law regarding goods and services tax, it cannot be comprehended that how such power shall not include power to levy cess on goods and services tax – Thus, the 2017 Act does not violate Constitution (One Hundred and First Amendment) Act, 2016 nor is against the objective of Constitution (One Hundred and First Amendment) Act, 2016 – 2017 Act is not a colourable legislation – Goods and Services Tax Compensation Cess Rules, 2017 – Constitution of India.

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Levy of Compensation to States Cess and GST on the same taxing event – Permissibility of – Held: Two taxes/imposts which are separate and distinct imposts and on two different aspects of a transaction are permissible as in law there is no overlapping – Goods

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- A *and Services Tax imposed under the 2017 Act and levy of cess on such intra-State supply of goods and services or both as provided under the Act and such supply of goods and services or both as part of the Act are two separate imposts in law and are not prohibited by any law so as to declare it invalid – Thus, it cannot be said that*
- B *levy of Compensation to States Cess on same taxable event is not permissible – Levy of compensation to States Cess is an increment to goods and services tax which is permissible in law.*

- C Clean Energy Cess paid by the petitioner on the stocks of coal till 30.06.2017 – Entitlement to set off the same in payment of Compensation to States Cess – Held: Clean Energy Cess and the States Compensation Cess are collected for wholly different purposes – Clean Energy Cess was levied and collected for the purposes of financing and promoting clean energy initiatives, funding research in the area of clean energy whereas States Compensation Cess is collected to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax – Giving credit or set off in the payment is legislative policy which had to be reflected in the legislative scheme – Compensation to States Act, 2017 or Rules framed thereunder does not indicate giving of any credit or set off of the Clean Energy Cess already paid till 30.06.2017 – Thus, the petitioner not entitled for set off in payment of Compensation to States Cess to the extent he had already paid Clean Energy Cess.
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Allowing the appeals and dismissing the transferred cases, the Court

- F **HELD:**
Whether the Compensation to States Act, 2017 is beyond the legislative competence of Parliament?

- G **1.1 Article 246A provides that “notwithstanding anything contained in Articles 246 and 254, Parliament, and, subject to clause(2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State”. In the instant case, the concern is with a cess imposed by Compensation to States Act, 2017. The Act by Section 8 levies and authorizes collection of cess. [Para 35][161-A-B]**

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Shinde Brothers Etc. v. Deputy Commissioner, Raichur & Others Etc. AIR 1967 SC 1512 : [1967] SCR 548;
India Cement Ltd. & Others v. State of Tamil Nadu & Others (1990) 1 SCC 12 : [1989] 1 Suppl. SCR 692;
Vijayalashmi Rice Mill & Others v. Commercial Tax Officers, Palakol & Others (2006) 6 SCC 763 : [2006] 4 Suppl. SCR 279 – referred to. A B

Black's Law Dictionary, Tenth Edn; Advanced Law Lexicon by P. Ramanatha Aiyar 3rd Edn – referred to.

1.2 The expression “cess” means a tax levied for some special purpose, which may be levied as an increment to an existing tax. The Scheme of Compensation to States Act, 2017 indicate that the cess is with respect to goods and services tax. There are more than one reason to uphold the legislative competence of Parliament to enact the Compensation to States Act, 2017. [Para 40][163-C] C D

1.3 In context of impugned legislation, Compensation to States Act, 2017, no entry is found in List II or List III of Seventh Schedule, which may refer to levying of cess in question. Article 248 read with Articles 246 and 246A clearly indicate that residuary power of legislation is with the Parliament. In the instant case, no contention has been raised that the subject matter of legislation was within the competence of State Legislature, and that the Parliament had no competence to legislate. Applying the H.S. Dhillon’s test no lack of legislative competence is found in the Parliament. [Para 41][164-B-C] E

Union of India v. Harbhajan Singh Dhillon (1971) 2 SCC 779 – followed. F

Hoechst Pharmaceuticals Ltd. & Others v. State of Bihar & Others (1983) 4 SCC 45; *M.P.V. Sundararamier & Co. v. State of A.P. & Others* AIR 1958 SC 468 : [1983] 3 SCR 130 – held inapplicable. G

1.4 The present is a case where cess in question is levied in respect of goods and services tax, the definition of cess as given in Compensation to States Act, 2017 in Section 2(c) states “cess means the goods and services tax compensation cess levied under section 8”. [Para 44][166-H; 167-A] H

A **1.5 Article 270 of the Constitution, both as it existed prior to Constitution (One Hundred and First Amendment) Act, 2016 and subsequent to Constitution (One Hundred and First Amendment) Act, 2016 uses the expression “any cess levied for specific purposes under any law made by Parliament”. After**
B **Constitution (One Hundred and First Amendment) Act, 2016, as per Article 270, Parliament can levy cess for a specific purpose under a law made by it. Article 270, thus, specifically empowers Parliament to levy any cess by law. Lastly, Section 18 of the**
C **Constitution (One Hundred and First Amendment) Act, 2016 expressly empowers Parliament shall, “by law” on the recommendation of the Goods and Services Tax Council, provide for compensation to the states for loss of revenue arising on account of implementation of the goods and services tax....” When**
D **Constitution provision empowers the Parliament to provide for Compensation to the States for loss of revenue by law, the expression “law” used therein is of wide import which includes levy of any cess for the above purpose. There is no merit in the submission that Parliament has no legislative competence to enact the Compensation to States Act, 2017. Thus, the Compensation to States Act, 2017 is not beyond the legislative competence of the Parliament. [Para 46, 47][167-C-D]**

E **Whether Compensation to States Act, 2017 violates Constitution (One Hundred and First Amendment) Act, 2016 and is against the objective of Constitution (One Hundred and First Amendment) Act, 2016 and Whether the Compensation to States Act, 2017 is a colourable legislation?**

F **2.1 One of the objectives in Statements of Objects and Reasons was “conferring concurrent taxing powers upon Parliament and the State Legislature to make laws for levying goods and services tax”. Article 246A sub- article(1) empowers the Parliament to “make laws with respect to goods and services tax”. The word “with respect to” is word of expansion.**
G **[Para 50][168-F-G]**

H *M/s. Doypack Systems Pvt. Ltd. v. Union of India & Others (1988) 2 SCC 299 : [1988] 2 SCR 962; Dewan Chand Builders and Contractors v. Union of India and Others (2012) 1 SCC 101 : [2011] 13 SCR 214;*

Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282 : [1954] SCR 1005 – held inapplicable. A

2.2 The expression used in Article 246A is “power to make laws with respect to goods and services tax”. The power to make law, thus, is not general power related to a general entry rather it specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, it cannot be comprehended that how such power shall not include power to levy cess on goods and services tax. The Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied. [Para 55][171-A-B] B C

2.3 Additional tax, which was contemplated by Clause 18 of the Constitution (One Hundred and Twenty Second Amendment) Bill, 2014 did not find place in Constitution Amendment Act. Further, Clause 19 of the Bill find place as Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016. Thus, power of Parliament to make law providing for compensation to the States for loss of revenue was expressly included by constitutional provision. Further, the Preamble of Compensation to States Act, 2017 expressly mentions the Act to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services Tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016. Thus, the Compensation to States Act, 2017 has been enacted under the express Constitution (One Hundred and First Amendment) Act, 2016. Thus, there is no force in the submission that Compensation to States Act, 2017 transgresses the Constitution (One Hundred and First Amendment) Act, 2016. [Para 56, 57] [171-D-F, H; 172-A] D E F G

2.4 Having held that Parliament has full legislative competence to enact the Act and the Act having been enacted to implement the Constitution (One Hundred and First Amendment) Act and the object being clearly to fulfill the Constitution (One H H

A **Hundred and First Amendment) Act’s objective, the submission of the petitioner that Compensation to States Act, 2017 is a colourable legislation is rejected. The Compensation to States Act, 2017 does not violate Constitution (One Hundred and First Amendment) Act, 2016 nor is against the objective of Constitution (One Hundred and First Amendment) Act, 2016.**

B [Para 58][172-B-D]

Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law?

C **3.1 Two taxes/imposts which are separate and distinct imposts and on two different aspects of a transaction are permissible as “in law there is no overlapping”. [Para 60][172-H]**

D *Federation of Hotel & Restaurant Associate of India, Etc. v. Union of India and others (1989) 3 SCC 634 : [1989] 2 SCR 918 ; Avinder Singh and others v. State of Punjab and others (1979) 1 SCC 137 : [1979] 1 SCR 845 – referred to.*

E **3.2 Goods and Services Tax imposed under the 2017 Acts and levy of cess on such intra-State supply of goods and services or both as provided under Section 9 of the CGST Act and such supply of goods and services or both as part of Section 5 of CGST Act is, thus, two separate imposts in law and are not prohibited by any law so as to declare it invalid. Thus, it cannot be said that levy of Compensation to States Cess on same taxable event is not permissible. Levy of compensation to States Cess is an increment to goods and services tax which is permissible in law.**

F [Para 63-64][174-D-F]

Whether on the basis of Clean Energy Cess paid by the petitioner till 30.06. 2017, the petitioner is entitled for set off in payment of Compensation to States Cess?

G **4.1 The Clean Energy Cess and the States Compensation Cess are collected for wholly different purposes. As per subsection (3) of Section 83 of the Finance Act, 2010, the Clean Energy Cess was levied and collected for the purposes of financing and promoting clean energy initiatives, funding research in the**

H **area of clean energy or for any other purpose relating thereto**

whereas States Compensation Cess is collected to “provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax”. The distribution between the Union and States of the Clean Energy Cess and GST Compensation Cess so collected are also different. Under Section 83(6) the Clean Energy Cess was to be used for the purposes of the Union and not to be distributed to the States whereas States Compensation Cess has to be wholly distributed amongst the States to compensate the States. [Para 65-66] [174-G-H; 175-A-B]

4.2 The petitioner’s submission that the petitioner should be given the credit to the extent of payment of Clean Energy Cess upto 30.06.2017 cannot be accepted. The Clean Energy Cess and States Compensation Cess are entirely different from each other, payment of Clean Energy Cess was for different purpose and has no bearing or connection with States Compensation Cess. Giving credit or set off in the payment is legislative policy which had to be reflected in the legislative scheme. Compensation to States Act, 2017 or Rules framed thereunder does not indicate giving of any credit or set off of the Clean Energy Cess already paid till 30.06.2017. Thus, the petitioner is not entitled for set off in payment of Compensation to States Cess to the extent he had already paid Clean Energy Cess. [Para 67][175-C-E]

Case Law Reference

[1967] SCR 548	referred to	Para 37	
[1989] 1 Suppl. SCR 692	referred to	Para 38	F
[2006] 4 Suppl. SCR 279	referred to	Para 39	
(1971) 2 SCC 779	followed	Para 41	
(1983) 4 SCC 45	held inapplicable	Para 45	
[1983] 3 SCR 130	held inapplicable	Para 45	G
[1988] 2 SCR 962	referred to.	Para 50	
[2011] 13 SCR 214	referred to.	Para 51	
[1954] SCR 1005	referred to	Para 52	
[1989] 2 SCR 918	referred to	Para 61	
[1979] 1 SCR 845	referred to	Para 62	H

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10177 of 2018

From the Judgment and Order dated 25.08.2017 of the High Court of Delhi at New Delhi in Writ Petition No. 7459 of 2017

WITH

B T.C. (C) No. 9/2018, Civil Appeal No. 10179/2018.

K. K. Venugopal, AG, Ms. Nisha Bagchi, B. Krishna Prasad, J. K. Mittal, Rajveer Singh, Praveen Swarup, M/S. Khaitan & Co., Advs. for the appearing parties.

C The Judgment of the Court was delivered by

ASHOK BHUSHAN, J. 1. Leave granted.

D 2. The validity of the Goods and Services Tax (Compensation to States) Act, 2017 enacted by Parliament as well as the Goods and Services Tax Compensation Cess Rules, 2017, the Rules framed by the Central Government in exercise of power under Section 11 of the Goods and Service Tax (Compensation to States) Act, 2017 are under challenge in these cases.

E 3. Civil Appeal arising out of SLP(C)No.25415 of 2017 has been filed by the Union of India challenging ad interim order dated 25.08.2017 passed by the Division Bench of the Delhi High Court in Writ Petition (C) No.7459 of 2017 (Mohit Mineral Pvt. Ltd. vs. Union of India and another). In the writ petition validity of the Goods and Services Tax (Compensation to States) Act, 2017 as well as Rules framed thereunder were under challenge. The Division Bench passed a partial ad interim order providing that additional levy on the stocks of coal on which writ petitioner had already paid Clean Energy Cess in terms of Finance Act, 2010, he shall not be required to make any further payment. However, on stocks of coal on which no Clean Energy Cess under the Finance Act, 2010 was paid any payment in terms of the impugned Act would be subject to the result of the writ petition.

G 4. This Court issued notice in the SLP on 22.09.2017 and stayed impugned order passed by the High Court.

5. Civil Appeal arising out of SLP(C)No.7708 of 2018 has been filed by Union of India challenging interim order dated 08.09.2017 passed

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by the Division Bench of the Delhi High Court in Writ Petition (C) No.7965 of 2017 (Hind Energy and Coal Benefication (India) Ltd. vs. Union of India and another). The Division Bench of the High Court passed interim order dated 08.09.2017 almost in the similar manner as was passed on 25.08.2017. This Court passed an order on 16.01.2018, while hearing SLP(C)No.25415 of 2017 filed against interim order dated 25.08.2017, on oral request of Attorney General, which was also joined by the learned counsel appearing for the respondents-writ petitioners, transferred Writ Petition (C) No.7459 of 2017 to this Court to be heard along with SLP(C)No.25415 of 2017. Transferred Case(C) No.9 of 2018 (Mohit Mineral Pvt. Ltd. vs. Union of India and another) has been registered on transfer of Writ Petition (C)No.7459 of 2017 to this Court.

6. The decision in Transferred Case (C)No.9 of 2018 by which Writ Petition (C)No.7459 of 2018 is to be heard by this Court shall dispose of the transferred writ petition as well as both the civil appeals. With the consent of the learned counsel for the parties, we have proceeded to hear the writ petition finally.

Facts in the Writ Petition (C) No.7459 of 2017

7. Mohit Mineral Pvt. Ltd. (hereinafter referred to as the 'writ petitioner') is a Company incorporated under the Companies Act which is a trader of imported and Indian coal. The writ petitioner imports coal from Indonesia, South Africa and also purchases coal from Indian mines. The Finance Act, 2010 with effect from 01.07.2010 levied Clean Energy Cess which was in the nature of a duty of excise on the production of coal and was being collected at the time of removal of raw coal, raw lignite and raw peat from the mine to the factory. The Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was introduced in the Lok Sabha to seek amendment in the Constitution, inter alia, providing for subsuming of various indirect taxes and Central and States surcharges and cesses so far as they relate to supply of goods and services both on inter-State and intra-State. The Constitution (One Hundred and First Amendment) Act, 2016 was passed to levy goods and services tax. Section 18 of the Amendment Act enabled the Parliament to levy a cess for five years to compensate the States for the loss of revenue on account of GST. On 12.04.2017, Parliament enacted three Acts, namely, (1) The Central Goods and Services Tax Act, 2017; (2) The Integrated Goods and Services Tax Act, 2017; and (3) The Goods and Services Tax

- A (Compensation to States) Act, 2017 (hereinafter referred to as “Compensation to States Act, 2017”). On 04.05.2017, the axation Laws (Amendment) Act, 2017 was enacted, whereunder, several cesses including Clean Energy Cess was repealed. The writ petitioner submitted a representation to the GST Council seeking set off of Clean Energy Cess against GST Compensation Cess. Writ Petition (C) No.7459 of 2017 was filed by Mohit Minerals Pvt. Ltd. in Delhi High Court praying for following reliefs:

“It is therefore, most respectfully prayed that this Hon’ble High Court be pleased to:

- C A) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction against the Respondents by quashing impugned Goods and Services Tax (Compensation to States) Act, 2017 by declaring that same lack legislative competency and unconstitutional;
- D B) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction against the Respondents by quashing impugned the Goods and Services Tax Compensation Rules, 2017 under the impugned legislation are illegal and unconstitutional;
- E C) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction against the Respondents by quashing impugned Notification No.1/2017 & 2/2017-Compensation Cess (Rate), dated 28.06.2017 issued by the Respondent No.1 under the impugned legislation, are illegal and unconstitutional;
- F D) issue a Writ of certiorari/mandamus or any other appropriate Writ/order/direction against the Respondent No.2 by declaring that the Respondent No.2 has no power under Article 279A of Constitution of India to make any recommendation, whatsoever, for levy and collection of cess as envisaged and levied under the impugned Goods and Services Tax (Compensation to States)Act, 2017 or framing of Rules and issuance of Notification under the said impugned legislation;
- G E) issue such other writ/order/direction to the Respondent No.2 to place before this Hon’ble Court the records of the recommendation given and all decision taken in respect of levy and collection of cess as envisaged and levied under the impugned
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Goods and Services Tax (Compensation to States) Act, 2017, framing of Rules and issuance of Notification under the said impugned legislation; A

F) issue such other writ/order/direction and further orders as the Hon'ble Court may deem just and proper in the facts and circumstances of the case.” B

8. The Division Bench of the Delhi High Court passed ad interim order on 25.08.2017. In the interim order dated 25.08.2017, the Division Bench observed that there is a prima facie case made out by the writ petitioner regarding lack of legislative competence of Parliament to enact Compensation to States Act, 2017. In paragraphs 8, 9, 13 and 14 of the interim order following was observed: C

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

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

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

A Cess under the FA, 2010 was paid, any payment made in terms of the impugned Act would be subject to the result of this petition. It is ordered accordingly.

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

B 9. On 08.09.2017, another interim order was passed in Writ Petition (C) No. 7965 of 2017.

C 10. We have heard Shri J.K. Mittal, learned counsel appearing for the writ petitioner and Shri K.K. Venugopal learned Attorney General appearing for the Union of India.

D 11. Shri J.K. Mittal learned counsel for the writ petitioner submits that the Constitution (One Hundred and First Amendment) Act, 2016 was enacted by the Parliament with the intent to consolidate number of indirect taxes which were levied by the Union and States with the intention to reduce the Goods and Services Tax (GST) by giving concurring taxing power to Union and States for levying GST on every transaction of supply of goods or services both. There was a clear objective of the aforesaid constitutional amendment that with the introduction of Goods and Services Tax, not only the indirect taxes but the cesses and surcharges levied on goods and services shall also be subsumed in it.

E 12. By Taxation Laws (Amendment) Act, 2017 various enactments levying various types of cesses were repealed including Clean Energy Cess/Clean Environment Cess which was levied and collected on coal.

F 13. The Compensation to States Act, 2017 is repugnant to and transgress the mandate of the Constitution (One Hundred and First Amendment) Act, 2016. It was the Parliament’s conscious decision to abolish with effect from 01.07.2017 all cesses including cess levied on coal as per mandate of the Constitution (One Hundred and First Amendment) Act, 2016. The impugned legislation is colourable legislation which lacks legislative competence. No power could be traced in Section 18 to the Constitution (One Hundred and First Amendment) Act, 2016 to amend Compensation to States Act, 2017. Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016 does not empower the

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Parliament to levy cess and tax as it provides Parliament to make any law to provide compensation to the States for loss of revenue arising on account of implementation of GST for a period of 5 years. The impugned legislation is a colourable legislation which lacks legislative competence so far as collection of levy on cess is concerned. A

14. The impugned legislation defeat the very objective of the Constitution (One Hundred and First Amendment) Act, 2016. On the very same transaction there cannot be two levies, one under Central GST Act and another under impugned legislation as it would amount to double taxation as levied on the same taxable event and same subject. Thus, there is an overlapping in law which is not permissible. B

15. The writ petitioner suffered cess of Rs.400 per ton on the coal and under the impugned legislation the Union is again levying and collecting cess at the rate of Rs.400 per ton on the stock lying with the petitioner as on 30.06.2017 just on eve of the day when all legislation related to GST including impugned legislation was introduced, whereas on the same stock of coal, cess was already levied and collected under the provisions of Chapter VII of Finance Act, 2010. Thus, it amounts to double collection of tax at the same rate on the same stock. Even if the impugned legislation is found to be within legislative competency, the petitioner may be permitted to set off the cess of Rs.7.68 crores which was already paid on the stock lying with the petitioner on 30.06.2017. Levy under impugned legislation is tax and not a cess, hence, not permissible in law. C D E

16. Shri K.K. Venugopal, learned Attorney General submits that cess is nothing but a special kind of tax. If the legislature is competent to levy the main tax, i.e. GST under Article 246A of the Constitution, then legislative competence of levying the cess flows from the very same power to levy the tax itself. The phrase used in Article 246A “with respect to” has wide implication and will allow levy of cess also. Power to levy a cess, in any case, can be traced back to Article 270 of the Constitution. However, Entry 97 of List I of Seventh Schedule to the Constitution grants a residuary power to levy a tax to the Union. The Clean Energy Cess which was imposed by the Finance Act, 2010 and GST Compensation Cess are levied on entirely different transactions and both are for entirely different purpose. The Clean Energy Cess was in the nature of a duty of excise on the production of coal and was being F G

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- A collected at the time of removal of raw coal, raw lignite and raw peat from the mine to the factory whereas GST Compensation Cess is imposed on inter-State and intra-State supply of specified goods and services. The Clean Energy Cess was levied and collected for the purposes of financing and promoting clean energy initiatives, funding research in the area of clean energy, for any other purpose relating thereto whereas
- B GST Compensation Cess is collected to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax.

- C 17. The High Court committed an error in prima facie holding that credit of Clean Energy Cess should be allowed to be utilised for paying GST Compensation Cess. The provision of credit and flow of credit is a purely policy decision of the Executive. The Parliament does not lack legislative competence to enact Compensation to States Act, 2017 nor the legislation can be said to be colourable legislation. The Compensation to States Act, 2017 in no manner transgressed Constitution (One Hundred and First Amendment) Act, 2016.
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18. Learned counsel for both the parties have placed reliance on various judgments of this Court in support of their respective submissions which shall be referred to while considering the submissions in detail.

- E 19. From the submissions of the learned counsel for the parties and pleadings following issues arise for consideration:

- (1) Whether the Compensation to States Act, 2017 is beyond the legislative competence of Parliament?
- (2) Whether Compensation to States Act, 2017 violates Constitution (One Hundred and First Amendment) Act, 2016 and is against the objective of Constitution (One Hundred and First Amendment) Act, 2016?
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- (3) Whether the Compensation to States Act, 2017 is a colourable legislation?
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- (4) Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law?
- (5) Whether on the basis of Clean Energy Cess paid by the petitioner till 30th June, 2017, the petitioner is entitled for set off in payment of Compensation to States Cess?

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20. We have considered the submissions of learned counsel for the parties and have perused the records. A

21. First, we need to notice relevant constitutional provisions and the Parliamentary enactments relevant for the issues raised in these cases.

22. Part XII of the Constitution deals with Finance. Article 265 provides that no tax shall be levied or collected except by authority of law. Article 366 contains definitions. Article 366(26A) defines “services” as “services means anything other than goods”. Whereas Article 366 (29A) contains an inclusive definition of “tax on the sale or purchase of goods”. A Bill was introduced in the Lok Sabha namely, the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 on 19.12.2014 proposing constitutional amendments to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. Statement of Objects and Reasons of the Bill are as follows:- B
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“STATEMENT OF OBJECTS AND REASONS

The Constitution is proposed to be amended to introduce the goods and services tax for conferring concurrent taxing powers on the Union as well as the States including Union territory with Legislature to make laws for levying goods and services tax on every transaction of supply of goods or services or both. The goods and services tax shall replace a number of indirect taxes being levied by the Union and the State Governments and is intended to remove cascading effect of taxes and provide for a common national market for goods and services. The proposed Central and State goods and services tax will be levied on all transactions involving supply of goods and services, except those which are kept out of the purview of the goods and services tax. E
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2. The proposed Bill, which seeks further to amend the Constitution, inter alia, provides for— G

- (a) subsuming of various Central indirect taxes and levies such as Central Excise Duty, Additional Excise Duties, Excise Duty levied under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955, Service Tax, Additional Customs H

- A Duty commonly known as Countervailing Duty, Special Additional Duty of Customs, and Central Surcharges and Cesses so far as they relate to the supply of goods and services;
- B (b) subsuming of State Value Added Tax / Sales Tax, Entertainment Tax (other than the tax levied by the local bodies), Central Sales Tax (levied by the Centre and collected by the States), Octroi and Entry tax, Purchase Tax, Luxury tax, Taxes on lottery, betting and gambling; and State cesses and surcharges in so far as they relate to supply of goods and services;
- C (c) dispensing with the concept of ‘declared goods of special importance’ under the Constitution;
- (d) levy of Integrated Goods and Services Tax on inter-State transactions of goods and services;
- D (e) levy of an additional tax on supply of goods, not exceeding one per cent. in the course of inter-State trade or commerce to be collected by the Government of India for a period of two years, and assigned to the States from where the supply originates;
- E (f) conferring concurrent power upon Parliament and the State Legislatures to make laws governing goods and services tax;
- (g) coverage of all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.
- F (h) compensation to the States for loss of revenue arising on account of implementation of the Goods and Services Tax for a period which may extend to five years;
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23. The Constitution (One Hundred and First Amendment) Act, 2016 dated 08.09.2016 was passed to amend the Constitution of India.

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By Constitution (One Hundred and First Amendment) Act, 2016, new Articles 246A, 269A and 279A were inserted. Amendments were also made in Articles 248, 249, 250, 268, 269, 270, 271, 286, 366 and 368. Article 268A was omitted. Amendments were also made in Seventh Schedule of the Constitution in List I and List II. Article 246A and 269A as inserted by Constitution (One Hundred and First Amendment) Act, 2016 is as follows:-

“246A. Special provision with respect to goods and services tax.— (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.”.

269A. Levy and Collection of goods and services tax in course of inter-State trade or commerce.— (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation.—For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article

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A 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

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(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.”.

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24. Article 270 of the constitution as amended by the above Amendment Act is as follows:-

“270. Taxes levied and distributed between the Union and the States.- (1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in Articles 268, 269 and 269A, respectively, surcharge on taxes and duties referred to in Article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2).

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25. Section 18 and Section 19 of the Constitution (One Hundred and First Amendment) Act, 2016 is also relevant, which are to the following effect:-

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“18. Compensation to States for loss of revenue on account of introduction of goods and services tax.— Parliament shall, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for a period of five years.

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19. Transitional provisions.— Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature

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or other competent authority or until expiration of one year from such commencement, whichever is earlier. A

26. At this stage, it is also relevant to notice that in the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014, Clause 18 contain a provision for arrangement for assignment of additional tax on supply of goods to States for two years or such other period recommended by Council, which was to the following effect:- B

“18. Arrangement for assignment of additional tax on supply of goods to States for two years or such other period recommended by Council (1) An additional tax on supply of goods, not exceeding one per cent. in the course of inter-State trade or commerce shall, notwithstanding anything contained in clause (1) of article 269A, be levied and collected by the Government of India for a period of two years or such other period as the Goods and Services Tax Council may recommend, and such tax shall be assigned to the States in the manner provided in clause (2). C D

(2) The net proceeds of additional tax on supply of goods in any financial year, except the proceeds attributable to the Union territories, shall not form part of the Consolidated Fund of India and be deemed to have been assigned to the States from where the supply originates. E

(3) The Government of India may, where it considers necessary in the public interest, exempt such goods from the levy of tax under clause (1).

(4) Parliament may, by law, formulate the principles for determining the place of origin from where supply of goods take place in the course of inter-State trade or commerce.” F

27. Clause 19 contain compensation to States for loss of revenue on account of introduction of goods and services tax. Clause 19 of the Bill is as follows:- G

“19. Compensation to States for loss of revenue on account of introduction of goods and services tax.— Parliament may, by law, on the recommendation of the Goods and Services Tax Council, provide for compensation to the States for loss of revenue H

A arising on account of implementation of the goods and services tax for such period which may extend to five years.”

28. It is, however, to be noticed that Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was passed but Clause 18 of the Bill was not incorporated and Clause 19 found place as Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016. After the aforesaid Constitution Amendment, Parliament enacted Central Goods and Services Tax Act, 2017 (Act No.12 of 2017 dated 12.04.2017) to make a provision for levy and collection of tax on intra State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. On the same day, another enactment namely ‘The Integrated Goods and Services Tax Act, 2017’ (Act No. 13 of 2017 dated 12.04.2017) was enacted to make a provision for levy and collection of tax on inter-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. Another enactment namely ‘The Union Territory Goods and Services Tax Act, 2017’ (Act No. 14 of 2017) was passed on the same day to make a provision for levy and collection of tax on intra-State supply of goods or services or both by the Union territories and for matters connected therewith or incidental thereto. The Fourth Parliamentary enactment, which is subject matter of challenge in the present case was also enacted on the same day, i.e. 12.04.2017, namely ‘The Goods and Services Tax (Compensation to States) Act, 2017’ (Act NO. 15 of 2017) to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016. As the Preamble indicate (Compensation to States) Act, 2017 was enacted in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016. Section 8 of the Compensation to States Act, 2017 provides for levy and collection of Cess, which is as follows:-

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

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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: A

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. B

(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: C

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: D

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. E

29. Section 12(1) empowers the Central Government to make rules for carrying out the provisions of the Act on the recommendation of the Council. The Council is defined in Section 2(e) of the Act as “Council means the Goods and Services Tax Council constituted under the provision of Article 279A of the Constitution”. The Schedule of the Act read with Section 8 contains description of supply of goods or services in column 2; Tariff item, heading, sub-heading, Chapter or supply of goods or services, as the case may be, in column 3 and the maximum rate at which goods and services tax compensation cess may be collected in column 4. The Central Government, in exercise of power under Section F G H

A 12, has framed the rules namely “The Central Goods and Services Tax Rules, 2017”.

30. Parliament enacted the Taxation Laws (Amendment) Act, 2017 dated 04.05.2017 to amend the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Sales Tax Act, 1956, the Finance Act, 2001 and the Finance Act, 2005 and to repeal certain enactments.

31. By Taxation Laws (Amendment) Act, 2017, the Finance Act, 2010, Chapter VII has been repealed. The Finance Act, 2010, Chapter VII provided for levy of Clean Energy Cess, which stood repealed.

C 32. We now proceed to consider the issues as noted above.

Whether the Compensation to States Act, 2017 is beyond the legislative competence of Parliament? (Issue No.1)

D 33. The petitioners have challenged the legislative competence of Parliament to enact Compensation to states Act, 2017. The petitioners submits that impugned legislation has transgressed the limits of its power granted under the Constitution. It is contended that although the impugned legislation is described as for purpose of giving compensation to States by Centres to States for loss of revenue but in fact it impose tax (termed as cess), hence in pith and substance the legislation does not belong to the subject falling within the limits of its power but is outside it.

E 34. Part XI of the Constitution deals with the relation between the Union and the States, Chapter I of which deals with “Legislative Relations”. Article 245 deals with “Distribution of Legislative Powers”. The Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in Seventh Schedule of the Constitution. The Parliament, and subject to Clause(1) of Article 246, the Legislature of a State also have power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule. Article 248 deals with residuary power of Legislation in following manner:-

G **Article 248 – Residuary powers of legislation**—(1) *Subject to article 246A, Parliament has exclusive power to make any law with respect to a matter not enumerated in the Concurrent List or State List.*

H (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

35. Article 246A as noticed above provides that “notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause(2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State”. In the present case, we are concerned with a cess imposed by Compensation to States Act, 2017. The Act by Section 8 levies and authorizes collection of cess. We need to first examine nature of cess. Cess has been defined in Black’s Law Dictionary, Tenth Edition as “An assessment or tax.”

36. P. Ramanatha Aiyar, Advanced Law Lexicon, 3rd Edition defines cess as follows:-

“Cess” is “An assessment tax; levy; specifically: (a) A rate or local tax.....(b) In Scotland, the land tax. (c) in India, a tax for a special object; as, a road cess”. (Webster)

The word “cess” is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which is an increment. Guruswamy and Co. v. State of Mysore, AIR 1967 SC 1512, per dissenting judge and India Cement Ltd. v. State of T.N., AIR 1990 SC 85.

The word ‘cess’ means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. Shinde Brothers v. Hy. Commissioner, Raichur, AIR 1967 SC 1512, 1525.”

37. This Court had considered the expression “cess” in **Shinde Brothers Etc. Vs. Deputy Commissioner, Raichur & Others Etc., AIR 1967 SC 1512**, Justice M. Hidayatullah, as he then was in his dissenting opinion has defined the cess (“no contrary opinion was expressed by majority in that regard”) in paragraph 39, which is to the following effect:-

“39. Now the health cess is first assailed on the ground that there is no entry “health cess” as such in the legislative entries. The

A word “cess” is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment. By Schedule A(1) read with Section 3 of the Act, it is collected as an additional levy with a tax, which, as described in Schedule A, is undoubtedly one within the powers of the State Legislature and has been so even prior to the Constitution.....”

38. In the Constitution Bench judgment of this Court in **India Cement Ltd. & Others Vs. State of Tamil Nadu & Others, (1990) 1 SCC 12**, the above definition given by Hidayatullah, J. was quoted with approval in Para 19, which is quoted as below:-=

D “19. Here, we are concerned with cess on royalty. One can have an idea as to what cess is, from the observations of Hidayatullah, J., as the learned Chief Justice then was, in *Guruswamy & Co. v. State of Mysore*⁹ where at page 571, the learned Judge observed :

E “The word ‘cess’ is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road cess etc.) indicates. When levied as an increment to an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment.”

F 39. The meaning of “cess” as noticed above was again reiterated by a Two Judge Bench judgment of this Court in **Vijayalashmi Rice Mill & Others Vs. Commercial Tax Officers, Palakol & Others, (2006) 6 SCC 763**, in paragraph 13, following has been laid down:-

G “13. Hence ordinarily a cess is also a tax, but is a special kind of tax. Generally tax raises revenue which can be used generally for any purpose by the State. For instance, the income tax or excise tax or sales tax are taxes which generate revenue which

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can be utilised by the Union or the State Governments for any purpose e.g. for payment of salary to the members of the armed forces or civil servants, police, etc. or for development programmes, etc. However, cess is a tax which generates revenue which is utilised for a specific purpose. For instance, health cess raises revenue which is utilised for health purposes e.g. building hospitals, giving medicines to the poor, etc. Similarly, education cess raises revenue which is used for building schools or other educational purposes.”

40. The expression “cess” as held above means a tax levied for some special purpose, which may be levied as an increment to an existing tax. The Scheme of Compensation to States Act, 2017 as noticed above indicate that the cess is with respect to goods and services tax. There are more than one reason to uphold the legislative competence of Parliament to enact the Compensation to States Act, 2017. Constitution Bench of this Court in **Union of India Vs. Harbhajan Singh Dhillon, (1971) 2 SCC 779** held that only question to be asked while examining the legislative competence of Parliament with regard to a particular enactment is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III”. In Para 21, the Constitution Bench laid down following:-

“21. It seems to us that the function of Article 246(1), read with Entries 1-96, List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly we do not interpret the words “any other matter” occurring in Entry 97, List I, to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words “any other matter” had to be used because Entry 97, List I follows Entries 1-96, List I. It is true that the field of legislation is demarcated by Entries 1-96, List I, but demarcation does not mean that if Entry 97, List I confers additional powers, we should refuse to give effect to it. At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is: Is the matter

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A sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.”

B 41. When we pose the above question in context of impugned legislation, i.e. Compensation to States Act, 2017, we do not find any entry in List II or List III of Seventh Schedule, which may refer to levying of cess in question. Article 248 read with Articles 246 and 246A clearly indicate that residuary power of legislation is with the Parliament.
C In the present case, we may notice that no contention has been raised before us that the subject matter of legislation was within the competence of State Legislature, and that the Parliament had no competence to legislate. Applying the **H.S. Dhillon’s test (supra)**, we do not find any lack of legislative competence in the Parliament.

D 42. Learned counsel for the petitioner relied on two decisions of this Court namely **Hoechst Pharmaceuticals Ltd. & Others Vs. State of Bihar & Others, (1983) 4 SCC 45** and **M.P.V. Sundararamier & Co. Vs. State of A.P. & Others, AIR 1958 SC 468** to contend that taxation is a distinct matter for purposes of legislative competence and the power to tax cannot be deduced from a general legislative entry as
E an ancillary power. He submits that State Compensation Cess being not covered by any taxing entry, the legislation is beyond the competence of Parliament. We may first notice the proposition, which has been laid down by this court in **Hoechst Pharmaceuticals Ltd. (supra)**. This
F Court in the above case had occasion to examine Bihar Finance Act, 1981, by which surcharge was levied on certain dealers selling essential commodities such as drugs. Challenge to the legislative competence of the State was raised. In the above context, this Court had observed that taxation is considered to be a distinct matter for purposes of legislative competence. In paragraphs 74, 75 and 76, following was laid down:-

G “74. It is equally well settled that the various entries in the three Lists are not ‘powers’ of legislation, but ‘fields’ of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary
H power. Further, the element of tax does not directly flow from the

power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control. A

75. "Legislative relations between the Union and the States inter se with reference to the three Lists in Schedule VII cannot be understood fully without examining the general features disclosed by the entries contained in those Lists": Seervai in his Constitutional Law of India, 3rd Edn., Vol. 1 at pp. 81-82. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation. B C D

76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. In *M.P.V. Sundararamier & Co. v. State of A.P.*⁴³ this court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relating to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section E F G

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A 5 of the Act and para 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.”

B 43. Levy of surcharge was upheld referring to Entry 52 of List II of Seventh Schedule. Following was laid down in paragraph 90:-

C “90. The decision in Fernandez case, AIR 1957 SC 657 is therefore clearly an authority for the proposition that the State Legislature notwithstanding Article 286 of the Constitution while making a law under Entry 54 of List II of the Seventh Schedule can, for purposes of the registration of a dealer and submission of returns of sales tax, include the transactions covered by Article 286 of the Constitution. That being so, the constitutional validity of sub-section (1) of Section 5 of the Act which provides for the classification of dealers whose gross turnover during a year exceeds Rs 5 lakhs for the purpose of levy of surcharge, in addition to the tax payable by him, is not assailable. So long as sales in the course of inter-State trade and commerce or sales outside the territory of India are not taxed, there is nothing to prevent the State Legislature while making a law for the levy of a surcharge under Entry 54 of List II of the Seventh Schedule to take into account the total turnover of the dealer within the State and provide, as has been done by sub-section (1) of Section 5 of the Act, that if the gross turnover of such dealer exceeds Rs 5 lakhs in a year, he shall, in addition to the tax, also pay a surcharge at such rate not exceeding 10 per centum of the tax as may be provided. The liability to pay a surcharge is not on the gross turnover including the transactions covered by Article 286 but is only on inside sales and the surcharge is sought to be levied on dealers who have a position of economic superiority.....”

G 44. In **M.P.V. Sundararamier (supra)** this Court also laid down that the tax cannot be levied under general entry. The present is a case where cess in question is levied in respect of goods and services tax, the

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definition of cess as given in Compensation to States Act, 2017 in Section 2(c) states “cess means the goods and services tax compensation cess levied under section 8”. The judgment of this Court relied by petitioner in **Hoechst Pharmaceuticals Ltd. (supra)** and **M.P.V. Sundararamier (supra)** is not applicable to the present case. A

45. Entry 97 of List I also lead to the same conclusion, for reference, which is quoted as below:- B

“97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.”

46. Article 270 of the Constitution, both as it existed prior to Constitution (One Hundred and First Amendment) Act, 2016 and subsequent to Constitution (One Hundred and First Amendment) Act, 2016 uses the expression “any cess levied for specific purposes under any law made by Parliament”. Article 270(1) as existed prior to Constitution (One Hundred and First Amendment) Act, 2016, is as follows:- C
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“**Art.270.**(1) All taxes and duties referred to in the Union list, except the duties and taxes referred to in Arts. 268, 268A and 269 respectively, surcharge on taxes and duties referred to in Art. 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2).” E

47. After Constitution (One Hundred and First Amendment) Act, 2016, as per Article 270, Parliament can levy cess for a specific purpose under a law made by it. Article 270, thus, specifically empowers Parliament to levy any cess by law. Lastly, Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016 expressly empowers Parliament shall, “by law” on the recommendation of the Goods and Services Tax Council, provide for compensation to the states for loss of revenue arising on account of implementation of the goods and services tax....” When Constitution provision empowers the Parliament to provide for Compensation to the States for loss of revenue by law, the expression “law” used therein is of wide import which includes levy of any cess for the above purpose. We, thus, do not find any merit in the submission of the learned counsel for the petitioner that Parliament has no legislative competence to enact the Compensation to States Act, 2017. F
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A Answer to **Issue No.1** is,thus, as follows:

The Compensation to States Act, 2017 is not beyond the legislative competence of the Parliament.

Issue No.2 and Issue No.3

B 48. We now come to Issue No.2 and Issue No.3, which, being interconnected, are taken up together.

C 49. The next attack on Compensation to States Act, 2017 is on the ground that the Act transgresses the mandate of Constitution (One Hundred and First Amendment) Act, 2016. It is submitted that Constitution (One Hundred and First Amendment) Act, 2016 does not permit levy of cess on supply of goods or services on which Goods and Services Tax has been levied. Elaborating the submission, it is contended that the clear objective of Constitution (One Hundred and First Amendment) Act, 2016 was to subsume various Central and States Taxes, Central and States surcharges and cesses, so far as, they relate to supply of goods and services. When all taxes, surcharges and cesses were subsumed in by Goods and Services Tax, imposition of compensation to States cess clearly falls foul to the Constitution (One Hundred and First Amendment) Act, 2016. The Statements of Objects and Reasons of Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014, as noticed above, was to subsume various Central Indirect Taxes and levy of Service Tax, Additional Customs Duty, Special Additional Duty of Customs, Central Surcharges and Cesses so far as they relate to the supply of goods and services.

D 50. One of the objectives as noticed in Statements of Objects and Reasons was “conferring concurrent taxing powers upon Parliament and the State Legislature to make laws for levying goods and services tax”. Article 246A sub-article(1) empowers the Parliament to “make laws with respect to goods and services tax”. The word “with respect to” is word of expansion. Similar expressions namely, “pertaining to”, “in relation to” came to be considered before this Court in **M/s. Doypack Systems Pvt. Ltd. Vs. Union of India & Others, (1988) 2 SCC 299**, where this Court held that the above expressions are used in the expansive sense. Following has been laid down in paragraphs 48 and 49:-

E “48.....The expressions “pertaining to”, “in relation to” and “arising out of”, used in the deeming provision, are used in

the expansive sense, as per decisions of courts, meanings found in standard dictionaries, and the principles of broad and liberal interpretation in consonance with Article 39(b) and (c) of the Constitution. A

49. The words “arising out of” have been used in the sense that it comprises purchase of shares and lands from income arising out of the Kanpur undertaking. We are of the opinion that the words “pertaining to” and “in relation to” have the same wide meaning and have been used interchangeably for among other reasons, which may include avoidance of repetition of the same phrase in the same clause or sentence, a method followed in good drafting. The word “pertain” is synonymous with the word “relate”, see *Corpus Juris Secundum*, Volume 17, page 693.” B C

51. Learned counsel for the petitioner has placed reliance on judgment of this Court in **Dewan Chand Builders and Contractors Vs. Union of India and Others, (2012) 1 SCC 101**. The Parliament had enacted Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Act, 1996 and Building and Other Construction Workers Welfare Cess Act, 1996. The constitutional validity and competence of Parliament was challenged before the Delhi High Court. Delhi High Court upheld the validity of Building and Other Construction Workers’ (Regulation of Employment and Conditions of Service) Central Rules, 1998 holding the levy under the impugned enactment as a fee referable to Entry 97 of List I of Seventh Schedule of the Constitution. Before this Court, it was contended that cess in question was a tax and not a cess since no element of quid pro quo exists and if it is a tax, then it is a tax on “lands and buildings” falling within the ambit of Schedule VII List II Entry 49. Argument was noticed in paragraph 23 to the following effect:- D E F

“23. It is evident from the contentions raised on behalf of the appellant that there is a two-pronged attack on the legislative competence of Parliament to enact the Cess Act: (i) it is a “tax” and not a “cess” because no element of quid pro quo exists between the payer of the cess and the beneficiary, and (ii) if it is a “tax” then it is a tax on “lands and buildings” falling within the ambit of Schedule VII List II Entry 49 (the State List), ousting the legislative competence of Parliament.” G

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A 52. This Court noticed the distinction between fee and tax and referred to earlier judgments including judgment of this Court in **Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282**. This Court upheld the cess as fee and not tax. In paragraph 31, reasons for upholding levy as fee has been given by this Court, which is to the following effect:-

B “31. There is no doubt in our mind that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose the enactment seeks to achieve i.e. to augment the Welfare Fund under the BOCW Act. The levy of cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the principle laid down in the aforesaid decisions of this Court, it is clear that the said levy is a “fee” and not “tax”. The said fund is set apart and appropriated specifically for the performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the cess and the purpose for which it is levied gets established, satisfying the element of quid pro quo in the scheme. With these features of the Cess Act in view, the subject levy has to be construed as “fee” and not a “tax”. Thus, we uphold and affirm the finding of the High Court on the issue.”

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F 53. The above judgment has no application in the facts of the case. The case of the Union is not that cess is a fee. Rather contention is that it is increment to the goods and services tax. We having already held that State compensation cess is “with respect to” goods and services tax, it is a tax.

G 54. Learned counsel for the petitioner has further relied on certain decisions on distinction between tax and fee. But the levy of cess, in the present case, not even claimed as fee, it is not necessary to refer to above cases which reiterate the well established principles emanating from **Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (supra)**.

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55. The expression used in Article 246A is “power to make laws with respect to goods and services tax”. The power to make law, thus, is not general power related to a general entry rather it specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied.

56. Learned counsel for the petitioner has referred to Section 18 of the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014, where an additional tax on supply of goods not exceeding one per cent was contemplated, which did not find place in Constitution (One Hundred and First Amendment) Act, 2016. He submits that the additional tax, which was proposed by the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014 was not allowed to find place in Constitution (One Hundred and First Amendment) Act, 2016, it is to be accepted that Constitution Amendment did not contemplate levy of additional tax on services and goods tax. The above submission in so far as not continuing an additional tax on supply of goods in the Constitution (One Hundred and First Amendment) Act is concerned, the submission of the learned counsel for the petitioner is correct that additional tax, which was contemplated by Clause 18 of the Bill did not find place in Constitution Amendment Act. Further, Clause 19 of the Bill find place as Section 18 of the Constitution (One Hundred and First Amendment) Act, 2016. Thus, power of Parliament to make law providing for compensation to the States for loss of revenue was expressly included by constitutional provision.

57. Further, the Preamble of Compensation to States Act, 2017 expressly mentions the Act to provide for compensation to the States for the loss of revenue arising on account of implementation of the goods and services Tax in pursuance of the provisions of the Constitution (One Hundred and First Amendment) Act, 2016. Thus, the Compensation to States Act, 2017 has been enacted under the express Constitution (One Hundred and First Amendment) Act, 2016. We, thus, also do not find any force in the submission of the learned counsel for the petitioner that

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- A Compensation to States Act, 2017 transgresses the Constitution (One Hundred and First Amendment) Act, 2016.

58. Due to above reasons, we do not find any substance in the submission of the petitioner that Compensation to States Act, 2017 is a colourable legislation. We having held that Parliament has full legislative competence to enact the Act and the Act having been enacted to implement the Constitution (One Hundred and First Amendment) Act and the object being clearly to fulfill the Constitution (One Hundred and First Amendment) Act's objective, we reject the submission of the petitioner that Compensation to States Act, 2017 is a colourable legislation. We, thus, answer Issue No.2 and Issue No. 3 in following manner:-

- C **Ans. 2** - The Compensation to States Act, 2017 does not violate Constitution (One Hundred and First Amendment) Act, 2016 nor is against the objective of Constitution (One Hundred and First Amendment) Act, 2016.
- D **Ans.3** - The Compensation to States Act is not a colourable legislation.

Whether levy of Compensation to States Cess and GST on the same taxing event is permissible in law? (Issue No.4)

- E 59. The petitioner elaborating his contention submits that as per Section 8 of impugned legislation there shall be levied a cess on intra-State supply of goods and services as provided in Section 9 of the CGST Act whereas CGST Act has been enacted to levy tax as provided under Article 246A of the Constitution. This is also true in respect of the cesses imposed on inter-State supplies of goods and services covered by Section 5 of IGST Act, 2017. Therefore, on the same very transaction there cannot be two levies, one under CGST Act and another under impugned legislation as it would amount to double taxation as levy is on the same taxable event and same subject. Thus, there is an overlapping on law which is not permissible. The petitioner contends that goods and services tax being already imposed by three enactments of 2017 as noticed above
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- G imposition of States Compensation Cess is levied on the same taxing event and has overlapping effect.

60. The principle is well settled that two taxes/imposts which are separate and distinct imposts and on two different aspects of a transaction are permissible as "in law there is no overlapping".

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61. A Constitution Bench of this Court in *Federation of Hotel & Restaurant Associate of India, Etc. Vs. Union of India and others, (1989) 3 SCC 634*, held that a law with respect to a subject might incidentally affect another subject in some way, but that is not the same thing. There might be overlapping but the overlapping must be in law. The fact that there is an overlapping does not detract from the distinctiveness of the aspects. Therefore, if the taxes are separate and distinct imposts and levied on the different aspects, then there is no overlapping in law. Following was laid down in paragraph 31:

“31. Indeed, the law ‘with respect to’ a subject might incidentally ‘affect’ another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects, Lord Simonds in Governor General in Council v. Province of Madras [1945] FCR 179 P.C. at 193, in the context of concepts of Duties of Excise and Tax on Sale of Goods said:

“...The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale....”

62. Justice Krishna Iyer in *Avinder Singh and others Vs. State of Punjab and others, (1979) 1 SCC 137*, laid down that if on the same subject-matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure unless there are some other prohibitions. In the above case Government of Punjab had issued a notification under Section 90(4) of the Punjab Municipal Corporation Act, 1976 imposing tax at the rate of Rupee 1 per bottle on Indian made Foreign Liquor within the Municipal Corporation of Ludhiana. One of the contentions raised was that tax imposed is on sale, hence, beyond Government power. In paragraph 4 following was laid down:

A “4.....A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but have been mentioned out of courtesy to counsel. The last one, for instance, deserve the least attention. There is nothing in Article 265 of the Constitution from which one can spin out the constitutional vice called double taxation. (Bad economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in **Wester India Theatres (AIR 1954 Bom 261)**. Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is : Rest in peace and don't be re-born ! If on the same subject-matter the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist.”

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D 63. Goods and Services Tax imposed under the 2017 Acts as noticed above and levy of cess on such intra-State supply of goods and services or both as provided under Section 9 of the CGST Act and such supply of goods and services or both as part of Section 5 of CGST Act is, thus, two separate imposts in law and are not prohibited by any law so as to declare it invalid.

E 64. We, thus, do not find any substance in the submission that levy of Compensation to States Cess on same taxable event is not permissible.

We, thus, answer **Issue No.4** in the following manner:

Levy of Compensation to States Cess is an increment to goods and services tax which is permissible in law.

F **Issue No. 5**

G 65. The last submission of the petitioner is that he having paid Clean Energy Cess till 30.06.2017 on the stocks of coal, he is at least entitled to set off in payment of Compensation to States Cess. As noticed above Clean Energy Cess was imposed under the Finance Act, 2010. The Clean Energy Cess and the States Compensation Cess are collected for wholly different purposes. As per sub-section (3) of Section 83 of the Finance Act, 2010, the Clean Energy Cess was levied and collected for the purposes of financing and promoting clean energy initiatives, funding research in the area of clean energy or for any other purpose

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relating thereto whereas States Compensation Cess is collected to A
“provide for compensation to the States for the loss of revenue arising
on account of implementation of the goods and services tax”.

66. The distribution between the Union and States of the Clean B
Energy Cess and GST Compensation Cess so collected are also different.
Under Section 83(6) of the Finance Act, 2010 the Clean Energy Cess
was to be used for the purposes of the Union and not to be distributed to
the States whereas States Compensation Cess has to be wholly distributed
amongst the States to compensate the States.

67. The petitioner’s submission that the petitioner should be given C
the credit to the extent of payment of Clean Energy Cess upto 30.06.2017
also cannot be accepted. The Clean Energy Cess and States
Compensation Cess are entirely different from each other, payment of
Clean Energy Cess was for different purpose and has no bearing or
connection with States Compensation Cess. Giving credit or set off in
the payment is legislative policy which had to be reflected in the legislative D
scheme. Compensation to States Act, 2017 or Rules framed thereunder
does not indicate giving of any credit or set off of the Clean Energy
Cess already paid till 30.06.2017. Thus, claim of the petitioner that he is
entitled for set off in payment of Compensation to States Cess to the
extent he had already paid Clean Energy Cess cannot be accepted.

We, thus, answer **Issue No.5** in the following manner: E

The petitioner is not entitled for any set off of payments made
towards Clean Energy Cess in payment of Compensations to States
Cess.

68. In view of the foregoing discussions, we do not find any merit F
in the writ petition. The writ petition is dismissed. The transferred case
is accordingly dismissed. Both the civil appeals are allowed. Parties shall
bear their own costs.