

## Exports with payment of IGST - Compensation cess refund?!

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Manufacturers engaged in sectors such as Pharma, Cement, iron and steel etc., incur considerable cost on procurement of coal for use in production activities (usually for generating electricity for captive consumption) and consequently end up paying compensation cess (“Cess”) on such procurement of coal. Although input tax credit of cess is eligible, the taxpayers have generally been absorbing such cess as part of cost of finished products until the Government vide Circular no. 45/19/2018 – GST dated 30 May 2018 has clarified that refund of cess can be claimed for zero rated supplies made without payment of IGST under Letter of Undertaking (“LUT”). The Circular further clarifies that no refund is permissible where export of goods is made with payment of IGST.

Attempt has been made in this article to analyse whether such a clarification to the effect that refund of cess should not be permissible for exports made with payment of IGST, is in accordance with the CGST Act, 2017 and Goods and Services (Compensation to States) Act, 2017 or *ultra vires* the said legislations.

It would be helpful to examine relevant provisions under the Goods and Services (Compensation to States) Act, 2017 (hereinafter referred to as **Cess Act** for brevity), which are reproduced below:

### Input tax credit of compensation cess

➤ Section 2(g)

*(g) “input tax” in relation to a taxable person, means,—*

*(i) cess charged on any supply of goods or services or both made to him;*

*(ii) cess charged on import of goods and includes the cess payable on reverse charge basis;*

- The term “input tax credit” is not defined under the Cess Act and accordingly resort needs to be made to the CGST Act in light of Section 2(2) of the Cess Act which specifies that words and expressions used and not defined in the Cess Act but defined in the CGST and IGST Acts shall have the meanings respectively assigned to them in those Acts.

- Section 2(63) of the CGST act defines “input tax credit” to mean credit of input tax.
- Therefore, a combined reading of aforementioned provisions makes it clear that compensation cess paid on domestic as well as import procurements qualifies as input tax and therefore credit of such input tax should be eligible.

Now that input tax credit eligibility of cess is clear, we may proceed with analysing eligibility of refund of such cess.

### **Refund of compensation cess**

- Section 9(2) of the Cess Act states that for all purposes of furnishing of returns and claiming refunds, except for the form to be filed, the provisions of the CGST Act and the rules made thereunder, shall, as far as may be, apply in relation to the levy and collection of the cess leviable under section 8 on all taxable supplies of goods or services, as they apply in relation to the levy and collection of central tax on such supplies under the said Act or the rules made thereunder.
- Section 11(1) of the Cess Act states that the provisions of CGST Act, and the rules made thereunder, including those relating to assessment, input tax credit, non-levy, short-levy, interest, appeals, offences and penalties, shall, as far as may be, *mutatis mutandis*, apply, in relation to the levy and collection of the cess leviable under section 8 on the intra-state supply of goods and services, as they apply in relation to the levy and collection of central tax on such **intra-state supplies** under the said Act or the rules made thereunder.

Corresponding provisions can be seen under the IGST Act to cover **inter-state supplies**.

- However, input tax in respect of cess on supply of goods and services leviable under section 8 shall be utilised only towards payment of said cess on supply of goods and services leviable under the said section.
- In view of above provisions, it appears that the provisions of CGST/IGST Act are *mutatis mutandis* applicable to compensation cess.

The above understanding that the provisions of CGST and IGST Acts should be applied *mutatis mutandis* to Cess Act, assumes utmost significance in deriving the eligibility to claim refund of the cess where export of goods is made with payment of IGST.

Refund related provisions under the CGST Act and the rules made thereunder along with impact on cess refund are discussed in ensuing paras.

- Section 54(3) of CGST Act provides that a registered person may claim refund of any unutilised input tax credit at the end of the tax period:

Provided that no refund of unutilised input tax credit shall be allowed in cases other than –

- Zero rated supplies made without payment of tax
- .....

- Proviso to sub-section (3) disentitles the taxpayer to refund of unutilised input tax credit where refund of IGST is claimed on zero rated supplies. The said proviso appears to prevent claiming of dual benefit by the taxpayers under both the options i.e. with payment of IGST as well as refund of unutilised credit, for the same zero-rated turnover.

- Applying this provision *mutatis mutandis* to cess, refund of unutilised credit of cess should be allowed where no cess is paid on export of goods and no refund of such cess is claimed.

- Section 16(3) of the IGST Act provides two options to taxpayers for effecting zero rated supplies viz., with payment of IGST and without payment of IGST under LUT.

- Hence, as this provision is also *mutatis mutandis* applicable to the Cess Act, it will be read that a registered person making zero rated supply shall be eligible to claim refund of cess paid on zero rated supply or refund of unutilised input tax credit of cess.

- A conjoint reading of Section 16 of the IGST Act and Section 54 of the CGST Act as applicable *mutatis mutandis* to the Cess Act implies that where the taxpayer has exported goods without payment of compensation cess, refund of unutilised credit of such cess shall be eligible.

Therefore, it should be possible to view that even if goods are exported with payment of IGST but without payment of cess, such export turnover should be eligible to be considered for determining refund of unutilised credit of compensation cess.

- Circular No. 45/19/2018 – GST dated 30 May 2018 specifies that a registered person making zero rated supply of aluminium products (where cess is not leviable on aluminium products) under bond or LUT may claim refund of unutilized credit including that of compensation cess paid on coal.

Further, a registered person can make zero-rated supply on payment of integrated tax but cannot utilize the credit of the compensation cess paid on coal for payment of integrated tax as input credit of cess can be utilized only for the payment of cess on the outward supplies. In these cases of zero-rated supply on payment of integrated tax, the circular clarifies that refund of compensation cess cannot be claimed.

- On the same lines, Circular No. 79/53/2018 – GST dated 31 December 2018 clarifies that the recomputed amount of eligible refund (of compensation cess) in respect of past periods would not be admissible in respect of consignments exported on payment of IGST.
- Hence, the circulars intend to deny the refund of unutilised compensation cess credit in respect of consignments exported on payment of IGST and thereby appear to be *ultra vires* the CGST Act, IGST Act and the Cess Act in view of no such restriction evident under the said Acts.
- Given that Cess Act is a separate Act and its provisions must be read independently, a view can be taken that the term “mutatis mutandis” only makes the provisions of one law applicable to other law and if the provisions provide two options, different options can be adopted under different laws.
- Needless to mention that litigation from the authorities on the above view is likely and relief may be expected from appellate forums.
- In addition to the discussion in preceding paras from legal perspective, it is pertinent to note that even from a general prudence standpoint as well, adopting a view that cess refund is not admissible where export is made with payment of IGST suffers from lack of fundamental principle of tax administration i.e. the taxpayer is denied both the options of refund, one where goods are exported without payment of cess as no cess is leviable on such goods, and two, no refund of unutilised credit is granted.

Further, the idea of restricting refund of unutilised Cess is meant to ensure dual benefit is not claimed by the taxpayer on single zero-rated turnover. In a situation of export of goods without payment of Cess, refund of unutilised credit should be eligible as no dual benefit is claimed.

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- GST & Indirect Taxes Committee