**IMPORTANT JUDGMENTS of HON’BLE HIGH COURTS & SUPREME COURT ON PAYMENT OF CESS ON BUILDING OR OTHER CONSTRUCTION WORKS**

**I. Hon’ble Justice N.V. Ramana’s judgment dt: 15-07-2008 in Writ Petition no. 4587 of 2008 and Batch of 383 WPs before the Hon’ble High Court of Andhra Pradesh**

In the above case the hon’ble high court of A.P. answered the following issues.

1. *Whether before implementing the provisions of a statute (Cess Act) and issuance of orders in the impugned Memo, which seeks to implement the provisions of the statute, by way of collection of 1% labour cess from the bills of the petitioners, the Government is under an obligation to issue notice to the petitioners, and whether non-issuance of prior notice, violated the principles of natural justice?*

“The policies of the government, which are reflected and encrypted in the Acts, are enacted by the Parliament and the respective State Legislatures, for the well-being and welfare of the people, and in particular for the benefit of whom such Acts, are enacted. Since the said Acts, which reflect the will of the people, are enacted by the Parliament and the respective State Legislatures, after lengthy deliberations governing the subject, no notice whatsoever is required to be issued to any person, much less to the affected parties, for their implementation. No person, much less the petitioners can expect issuance of any notice for implementation of the provisions of a statute, for the Government by seeking to implement the statute, is seeking to implement the will of the people. When the statute does not specifically provide for issuance of notice, the petitioners cannot claim that before implementing the provisions of the Cess Act, they should be put on notice and give opportunity of hearing. Be that as it may, it is for the Parliament and the respective State Legislatures, which have enacted the respective statutes, to fix the dates of their operation or implementation. The statutes would come into operation from the dates so fixed therein or from the date the Government notifies in the official gazette about their operation.

The Workers Act, which is a Central Act, is a piece of welfare legislation, legislated to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures and for other matters connected therewith or incidental thereto. To realize the objects of the Workers Act, Government of India, simultaneously along with the Workers Act, enacted the Cess Act, which seeks to collect 1% labour cess and remit the same to the Welfare Boards established under Section 18 of the Workers Act. The basic idea of enacting the Cess Act along with the Workers Act, is to augment the resources of the Welfare Boards constituted under the Workers Act, which are entrusted with the job of providing the nature of assistances to the workers engaged in building and other construction works, as provided under Section 22 of the Workers Act. Though the Workers Act and the Cess Act came into force w.e.f. 01.03.1996 and 03.11.1996 respectively, the fact remains, the provisions of the Cess Act, which sought to levy and collect 1% labour cess, was not implemented in the State of Andhra Pradesh because Welfare Boards as provided under Section 18 of the Workers Act, were not constituted. Now that the State Government had constituted the Welfare Boards as provided under Section 18 of the Workers Act, on 30.04.2007, and having amended the Rules, vide G.O. Ms. No. 57, dated 26.06.2007, issued orders in the impugned Memo, directed the officers concerned to collect 1% labour cess from the bills of the petitioners. Since the impugned Memo has been issued by the Government in implementation of the provisions of a statute, no notice whatsoever is required to be issued to any person, much less the petitioners, and more particularly when they are aware of the existence of and coming into force of the Workers and Cess Act, which as stated above, came into force w.e.f. 01.03.1996 and 03.11.1996 respectively. In that view of the matter, the petitioners cannot complain that the Government before implementing the Cess Act and the Memo issued in implementation thereof, was under an obligation to give prior notice, and in the non-issuance of such prior notices, they have violated the principles of natural justice”.

**GIST OF THE JUDGMENT: No Prior notice is required to be issued to the employer before implementing the BOCW Act and the Cess Act and there was no violation of principles of natural justice.** (BOCW Act is referred to as Workers Act.)

1. *Whether the Government by issuance of orders in a Memo, is entitled to collect 1% labour cess from the bills of the petitioners w.e.f. 26.06.2007, i.e. a date much prior to its issuance and after constitution of the Welfare Boards as provided under the statute?*

“As observed in reply to question No.1, Cess Act came into force from 03.11.1995. Though sub-section (1) of Section 3 of the Cess Act, which deals with levy and collection of labour cess, provides that there shall be levy and collection of labour cess at a rate not exceeding two per cent and not less than one per cent of the cost of construction incurred by an employer, as the Central Government may, by notification in the Official Gazette, from time to time specify, the fact remains, the Central Government, through its Ministry of Labour, in exercise of the powers conferred by sub-section (1) of Section 3 of the Building and Construction Workers’ Welfare Cess Act, 1996 and in supersession of the notification of the Government of India in the Ministry of Labour No. S.O. 1767 dated the 17th May, 1996, issued notification on 26.09.1996 specifying a cess for the purpose of the Workers Act, at the rate of 1 per cent, of the cost of construction incurred by an employer. Even though, the State Government, is empowered to levy and collect labour cess at the rate of 1% per cent, as notified by the Centre in the notification from 26.09.1996, the fact remains, the State Government, did not constitute the Welfare Boards as provided under Section 18 of the Workers Act, and they constituted the same only on 30.04.2007. Thereafter, the Government, made amendment to the Rules by issuing G.O. Ms. No. 57, dated 26.06.2007, and sought to collect 1% labour cess from the said date, and accordingly, issued orders in the impugned Memo, directing the officers concerned to collect 1% labour cess from the bills payable to the contractors, from 26.06.2007, and such, direction, in my considered view, cannot be said to be illegal or arbitrary, and more particularly, when the respondents have sought to collect the same only from 26.06.2007, i.e. the date on which they amended the Rules and not from 26.09.1996, the date on which the Central Government issued notification for collection of 1% labour cess from the bills payable to the contractors on the cost of construction incurred by an employer.”

**GIST: collection of cess from 26.06.2007, when the amended state rules came into force, was in order.**

1. *Whether non-mentioning of the levy and collection of 1% labour cess in the agreements/contracts entered into by the petitioners with the respondents, gives the petitioners any legitimate expectation that 1% labour cess in terms of the Cess Act, would not be collected by the respondents from them?*
2. *Whether absence of the clause relating to levy and collection of 1% labour cess in the agreements/contracts, disentitles the respondents from deducting the said 1% labour cess from the bills of the petitioners, which in fact, is sought to be collected in giving effect to the Cess Act?*
3. *Whether by allowing the respondents to collect the said 1% labour cess on the basis of the impugned Memo issued by the Government, amounts to permitting the respondents to alter the terms and conditions of the agreements/contracts, entered into by the petitioners with the respondents?*

“The respondents do not dispute the fact that in some of the agreements/contracts entered into by them with the petitioners prior to 26.06.2007, there is no clause incorporated for levy and collection of 1% labour cess from the bills payable to them, and that levy and collection of 1% labour cess, was not included in the estimates submitted. However, the absence of such a clause relating to levy and collection of 1% labour cess in the agreements/contracts and non-inclusion of the same in the estimates, by itself do not preclude the respondents from levying and collecting the 1% labour cess, which in fact, is sought to be levied and collected by giving effect to the provisions of a statute, which was in force as on the date of the respondents entering into agreements/contracts with the petitioners. No doubt, in the agreements/contracts entered into by the respondents with the petitioners prior to 26.06.2007, the clause relating to levy and collection of cess is absent, but the fact remains, at the time when the petitioners entered into agreements/contracts with the respondents, the Workers Act and the Cess Act, which came into force on w.e.f. 01.03.1996 and 03.11.1996 respectively, were very much in force, and in fact, the petitioners in Clauses No. 69 of the agreements/contracts entered into by them with the respondents, have agreed to comply with all the labour regulations.”

**GIST: Absence of a clause in the agreement between the principal employer and the contractor to collect 1% Cess will not absolve the contractor from the liability of payment of 1% Cess, since the BOCW Act and the Cess Act were in force at the time of entering into contract and there is another clause in the agreement that the contractor will implement all applicable laws.** (Law always prevails over contract)

1. *Whether the respondents are entitled to collect 1% labour cess only after following the procedure contemplated under the Cess Act, in that after filing of returns by the petitioners, making of assessment by the authority, determination of liability of the petitioners, and after issuance of show cause notice as to collection of such determined liability?*

“To consider this question, it is appropriate to refer to the provisions of Section 3 of the Cess Act, which deals with levy and collection of cess.

A reading of the above provision, would make it clear that under sub-section (1) of Section 3 of the Cess Act, cess not exceeding 2 per cent and not less than 1 per cent is leviable on the cost of construction incurred by an employer, and under sub-section (2) thereof, such labour cess can be deducted at source or by way of advance collection, while the proceeds of the labour cess so collected, shall under sub-section (3) be paid or remitted to the Welfare Board, and while sub-section (4) states that notwithstanding anything contained in sub-sections (1) and (2) the labour cess leviable under the Act, including payment of such labour cess in advance may, subject to final assessment to be made, be collected at a uniform rate or rates, as may be prescribed on the basis of the quantum of the building or other construction work involved. A collective reading of the above sub-clauses, would indicate that the respondents are entitled to collect the 1% labour cess at source, which shall be subject to final assessment. The fact, that the labour cess deducted at source is subject to final assessment, is evident from the fact that Section 4 of the Cess Act, requires the employer to file returns, and under Section 5 thereof, the authority shall make assessment and pass an order determining the liability, and any person, aggrieved by the assessment, can prefer an appeal under Section 11 of the Cess Act read with Rule 14 made thereunder. If in the assessment, it is found that the labour cess deducted at source, is in excess of what was to be collected, then the excess so collected, shall be returned to the assessee as per Rule 13 of the Rules, and if it is found that the labour cess collected at source, is less than what was required to be collected, then the same as per Rule 13 of the Rules, would be collected from the asseseee. This procedure contemplated under the Cess Act and the Rules, clearly shows that deduction of labour cess or by way of advance at a uniform rate is permissible without a prior assessment, and such collection of labour cess at source, without prior assessment, cannot be said to be illegal and more so when the labour cess so collected, is subject to adjustability upon final assessment and fixation of liability. In that view of the matter, it has to be held that the contention of the petitioners that the respondents are not entitled to collect 1% labour cess unless they follow the procedure contemplated under the Cess Act, namely after filing of returns by the petitioners, followed by assessment by the authority, determination of liability of the petitioners, and calling upon them to show cause as to why the amount determined should not be collected, is bereft of any merit.”

**GIST: Collection of Cess at source without notice and before assessment without fixing specific liability is permissible under the Cess Act and Rules, since the Act provides for notice and assessment, following deduction at source.**

1. *Whether the respondents, while collecting 1% labour cess from the bills of the petitioners in terms of the Cess Act, should collect the same only taking into consideration the cost of the construction, but not the entire value of the work, and whether the element of profit should be excluded while deducting the 1% labour cess?*

“Both Section 3 of the Cess Act and Rule 3 of the Rules made thereunder, as also the notification dated 26.09.1996, issued by the Central Government, provide for collection of 1% labour cess on the cost of construction incurred by an employer. Rule 3 of the Rules defines “the cost of construction”.

From the above, definition of “cost of construction”, it is clear that it includes all expenditure incurred by an employer in connection with the building or other construction work, and it excludes the cost of land, and any compensation paid or payable to a worker or his kin under the Workmen’s Compensation Act, 1923. Thus, it is clear that the labour cess sought to be collected is not on the entire value of the work, but only on the cost of construction, which is as provided in Section 3 of the Cess Act and Rule 3 of the Rules made there under, as also the notification dated 26.09.1996, issued by the Central Government. Therefore, it has to be held that the respondents while levying and collecting the labour cess, have to collect the same on the cost of the construction incurred by an employer and not the entire value of the work. Accordingly, this question is answered.”

**GIST: Cess should be calculated only on the cost incurred in connection with the building or other construction work but not on the value of the construction.**

With the above observations the Hon’ble High Court dismissed the batch of 383 writ petitions.

**II. Judgment dt: 18-11-2011 of the Hon’ble Supreme Court of India in Special Leave to Appeal (Civil) No. 1832 of 2008, between M/s Dewan Chand Builders & Contractors Vs Union of India & Others.**

*The hon’ble Supreme court decided in the above case, Constitutional Validity of the Cess Act and also whether Cess is “Fee” or “Tax”*

“The Hon’ble High Court of Delhi held that, The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short “the BOCW Act”); The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Central Rules, 1998, (for short the “1998 Central Rules”); The Building and Other Construction Workers Welfare Cess Act, 1996 (for short “the Cess Act”) and The Building and Other Construction Workers Welfare Cess Rules, 1998 (for short “the Cess Rules”) are constitutionally valid and within the competence of the Parliament as the levy under the impugned enactments is a “fee”, referable to Entry 97 of List-I of the Seventh Schedule of the Constitution of India”.

On appeal against the said order of the Hon’ble High Court of Delhi, The Hon’ble Supreme Court of India dismissed the appeal and held as follows:

“…. the inevitable conclusion is that in the instant case there does exist a reasonable nexus between the payer of the Cess and the services rendered for that industry and therefore, the said levy cannot be assailed on the ground that being in the nature of a ‘tax’, it was beyond the legislative competence of Parliament.

Having reached the conclusion that the levy by the impugned Act is in effect a ‘fee’ and not a ‘tax’, we deem it unnecessary to deal with the second limb of the challenge, viz. the impost is a tax on “lands and buildings”, covered by Entry 49 in List II of the Seventh Schedule.

In view of the afore going discussion, we do not find any infirmity in the conclusions arrived at by the High Court while upholding the validity of the impugned Acts. All the appeals, being bereft of any merit are dismissed with costs, quantified at Rs. 25,000/- in each set of appeals”.

**GIST: In the above case the Hon’ble Supreme Court held that collection of Cess is in consonance with the constitution and that “cess” is not “tax” but similar to “fee”.**

1. **Common Judgment, dt: 06-08-2015 by the Divisional Bench of the Hon’ble High Court of Andhra Pradesh on Common Appeal filed by the Labour Department, Government of Andhra Pradesh:**

*Vide above judgment the hon’ble high court decided the applicability of BOCW Act and Cess Act to the factories under construction and expansion.*

“....To support the view, take a case of an ordinary contractor, who may enter into an agreement with the principal employer of the similar nature, as entered in the instant case, whereby principal employer would not have any responsibility to extend any benefits under Act of 1948 and at the same time, if the contractor also does not extend any benefits to his workers/employees as contemplated under the said Act, the workers/employees working in the premises of factory for construction or raising any building structures would stand deprived of the benefits of either of the Acts. In a given case, a contractor, like the one in the present case, behind the back of a company, may outsource labour for doing only civil work and if the sub-contractor is not extending any benefits to his workers, such workers also would stand excluded from the benefits of both the Acts. Contracting out of the beneficial provisions would thereby stand encouraged depriving workmen/employees for whose benefit Act of 1948 and Act Nos.27 and 28 were enacted and brought into force. In the circumstances, on this count also, the question framed by us deserves to be answered against the contractors”

“Thus, we hold that blast furnace and cranes are covered by the definition of ‘building or other construction work’ and that the workers / employees engaged / employed by the contractors for construction of the same are covered by the provisions of Act No.27. Thus, the questions framed by us stand answered against the appellant-contractors.”

“In the result, the appeals are allowed and the judgment and order passed by the learned single Judge in the batch of writ petitions is set aside. In view thereof, the writ petitions also stand disposed of in terms of this judgment. No order as to costs.”

**GIST: the Hon’ble High Court while observing that a factory under construction or expansion is construction activity, allowed the appeals filed by the Labour dept, Govt of A.P. and set aside the orders of the single Judge in a batch of WPs filed by L&T and other contractors of Rashtriya Ispat Nigam Ltd and other similar WPs.** (in the absence of such interpretation, the workers engaged in building or other construction activity of a factory would be deprived of the security, welfare, health measures and service conditions provided under both Factories Act as well as the BOCW Act, which was not the intention of the legislature.)

**IV. Judgment dt: 18-10-2016 of the Hon’ble Supreme Court of India, in Civil Appeal No. 6223 of 2016 between Lanco Anpara Power Ltd. vs State of Uttar Pradesh & Others:**

*In the above case hon’ble Supreme Court decided the applicability of BOCW Act and Cess Act, to the factories under construction*.

“It is stated at the cost of repetition that construction workers are not covered by the Factories Act and, therefore, welfare measures specifically provided for such workers under the BOCW Act and Welfare Cess Act cannot be denied”.

“We, thus, hold that all these appeals are bereft of any merit. Accordingly, these appeals, along with the writ petitions filed before this Court as also those which are the subject matter of the transfer petition and transfer cases, are dismissed with cost. We, however, make it clear that insofar as objection to the calculation of Cess as contained in the show cause notices is concerned, it would be open to the appellants to agitate the same before the adjudicating authorities”.

**GIST: The BOCW Act and Cess Act are applicable to the factories under construction.**

NOTE: The website of the labour dept may be visited for full text of judgments in the above cases and also certain other cases decided by the hon’ble high courts and supreme court on the issues related to cess.