



ELP Litigation: Update



SUPREME COURT HOLDS THAT BOCWW CESS IS PAYABLE ONLY IN RESPECT OF COST OF CONSTRUCTION AND NOT ON SUPPLY OR ERECTION SCOPE OF WORKS

Uttar Pradesh Power Transmission Corporation Ltd. & Anr. v. CG Power and Industrial Solutions Limited & Anr

INTRODUCTION

- In the infrastructure sector or the construction industry, the responsibility of bearing taxes, duties, levies and cesses is generally thrust upon the contractor. One such cess is the Building and other Construction Workers' Welfare Cess (**BOCWW Cess**). Introduced in 1996, through the Building and Other Construction Workers (Regulation of Employment and Condition of Service) Act, 1996 (**BOCW Act**) and Building and Other Construction Workers' Welfare Cess Act, 1996 (**BOCWW Cess Act**), the BOCWW Cess is to be levied on the cost of construction as amply stated in the Preamble of the BOCWW Cess Act and Section 3 thereof¹. This basic premise was supported by the Rules promulgated under the said statute. Rule 3 specifies that the 'cost of construction' shall include all expenditure incurred by an employer in connection with the building or other construction work. However, controversy arose as the High Courts adopted varying interpretations of 'cost of construction'.
- Recently, in *Uttar Pradesh Power Transmission Corporation Ltd. & Anr. v. CG Power and Industrial Solutions Limited & Anr.*² (**UPPTCL**), the Supreme Court (**SC**) has finally put this controversy to rest and held that BOCWW Cess is to be levied only on construction, repair, demolition or maintenance of and/or in relation to a building or any other work of construction. The SC has further clarified that supply contracts and/or activities viz. installation and erection of equipment which do not involve construction work are not amenable to BOCWW Cess.

¹ "3. Levy and collection of cess.—

(1) There shall be levied and collected a cess for the purposes of the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (27 of 1996), at such rate not exceeding two per cent. but 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."

² Judgement dated 12 May 2021 in Special Leave Petition (C) No. 8630 of 2020.

HIGH COURT VIEWS

- The Andhra Pradesh High Court in *Cormandel Prestcrete (P) Ltd. v. State of Andhra Pradesh & Ors.*³ had held that the BOCWW Cess was to be computed on 'cost of construction'⁴ i.e. all expenses incurred by the employer in connection with the building or other construction work and not on the entire value of the work. However, in 2012, the Madhya Pradesh High Court in two distinct judgments - (i) *G.V.P.R. Engineers Limited v. State of M.P. and Ors.*⁵ and (ii) *Technical Associates Ltd. v. Asst. Labour Commissioner, Jabalpur and Ors.*⁶ (**Technical Associates**) held that the 'cost of construction' cannot not be divided into separate parts viz. supply portion and erection portion, and the cess would thus be calculated on the total cost of construction.
- The decision in *Technical Associates* has been pending appeal before the SC since 2013.⁷ Notwithstanding that in 2016, the SC did have another opportunity to settle this controversy. In *Lanco Anpara Power Limited v. State of Uttar Pradesh*⁸ (**Lanco Anpara**) questions were raised regarding the computation of BOCWW Cess on the total cost of work. However, the SC chose not to deal with the said issue and instead left the question open for the parties to raise before concerned authorities.

DECISION IN UPPTCL

- In *UPPTCL*, the Appellant (**Owner**) had entered into a Framework Agreement with the Respondent (**Contractor**) for the construction of a power substation. A detailed order was placed by the Owner on the Contractor which split the scope of work into four separate contracts (**Contracts**) for (i) Supply and Delivery, (ii) Handling, Erection, Testing and Commissioning Works, (iii) Civil Works and (iv) Operation & Maintenance.
- Under the provisions of the Contracts, the duty to pay BOCWW Cess was on the Contractor and the Owner did not have the right to deduct the same from sums payable to the Contractor. While the Owner did not deduct the BOCWW Cess from the running bills, it sought to invoke the Bank Guarantee and deduct the BOCWW Cess on the value of the total scope of work, i.e. inclusive of supply, delivery, handling, erection, testing, commissioning. Importantly, the Owner was spurred into action not by any order for levy and assessment of the BOCWW Cess by the concerned authorities but by the report of the Comptroller and Auditor General. Aggrieved, the Contractor preferred a writ before the Allahabad High Court. The Allahabad High Court ruled in favor of the Contractor and held that that in the absence of any order for levy and assessment, no BOCWW Cess could be deducted from monies owed to the Contractor. Against the said order of the Allahabad High Court, the Owner then preferred an appeal by way of Special Leave to the SC. The SC in *UPPTCL* dismissed the said appeal and upheld the decision of the Allahabad High Court and *inter alia* held as follows:

1. Exclusion of supply and erection scope of works

As per the SC, there could be no doubt that BOCWW Cess was payable only in respect of the third Contract, which covered all civil works. The first and second contracts, which covered all works other than civil works, and did not involve any construction, did not attract the BOCWW Cess Act.

Relying upon the statutory scheme of the BOCW Act as well as the BOCWW Cess Act as discussed in *Dewan Chand Builders and Contractors v. Union of India*⁹ and *Lanco Anpara*, the SC concluded that the BOCW Act did not apply in respect of a supply contract. Also, as far as the first, second and fourth Contracts were concerned, the SC

³ (2011) 6 ALD 247

⁴Rule 3 of BOCW Welfare Cess Rules 1998 states

" 3. Levy of Cess:-

For the purpose of levy of cess under Sub-sec (1) of Sec. 3 of the Act, cost of construction shall include all expenditure incurred by an employer in connection with the building or other construction work but shall not include—

—cost of land;

—any compensation paid or payable to a worker or his kin under the Worker's Compensation Act, 1923."

⁵ (2012) 3 MP LJ 637

⁶ 2012 (3) MPLJ 475. See also *Abhijeet Hazaribagh Toll Road v. Union of India and Ors.*, WP(C) 4202 of 2012, decided on 10 April 2014, Jharkhand High Court

⁷ SLP (C) No. 008256/2013

⁸ (2016) 10 SCC 329

⁹ (2012) 1 SCC 101

observed that the Contractor was neither the ‘contractor’ defined in terms of Section 2(1)(g)¹⁰ of the BOCW Act nor ‘employer’ as defined in Section 2(1)(i)(iii)¹¹ of the BOCW Act. Thus, the Contractor was not liable to pay the BOCWW Cess for the first, second and fourth Contracts.

The SC in fact went a step ahead and clarified that the condition precedent for imposition of BOCWW Cess was the construction, repair, demolition or maintenance of and/or in relation to a building or any other work of construction. Mere installation and/or erection which did not involve construction work are not amenable to levy of BOCWW Cess.

2. No realization of Cess prior to assessment

Importantly, the SC observed that neither intimation/information was given nor any return was filed with the Assessing Officer under the BOCWW Cess Act or the Inspector under the BOCW Act in respect of the first and second Contracts, by the Owner or the Contractor. Thus, in absence of any adjudication, it was impermissible for the Owner to realize the BOCWW Cess. The SC observed that the BOCWW Cess Act and/or statutory rules framed thereunder prescribed the mode and manner of recovery of outstanding BOCWW Cess in a particular manner¹², and thus any recovery of BOCWW Cess must be made as per that manner alone.

3. Existence of an arbitration clause does not debar the court from entertaining a writ petition.

Even though there was an arbitration clause in the Contracts, the Owner never opposed the writ petition on the ground of existence of an arbitration clause. Without prejudice to the aforesaid, the SC observed that the existence of an arbitration clause did not debar the court from entertaining a writ petition. By placing reliance upon *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors.*¹³ and *Pimpri Chinchwad Municipal Corporation & Ors. v. Gayatri Construction Company & Ors.*¹⁴, SC held that High Courts may entertain a writ petition, notwithstanding the availability of an alternative remedy, particularly in cases where (1) the writ petition seeks enforcement of a fundamental right; (ii) there is failure of principles of natural justice or (iii) where the impugned orders or proceedings are wholly without jurisdiction or (iv) the vires of an Act is under challenge. The SC also placed reliance upon the case in *Harbanslal Sahnia and Ors. v. Indian Oil Corporation Ltd.*¹⁵ in support of its finding.

- Noting that it was now well-settled law that relief under Article 226 of the Constitution may be granted in a case arising out of contract, the SC concluded that for the reasons mentioned above, the Owner had acted in excess of its powers and thus the judgment of the Allahabad High Court allowing the writ petition did not warrant any interference.

Analysis and Comments

The decision temporarily settles the debate that was already pending before the SC by categorically ruling that ‘cost of construction’ cannot include cost of activities such as design, engineering, supply, maintenance, etc.

However, it cannot be lost sight of the fact that in the present case, there were four different Contracts with only one agreement distinctly dealing with construction. In the industry, often the scope of construction work may be part of a composite lumpsum contract or may be shown as an independent milestone in a composite contract for the purposes of pricing, invoicing and payment. In our view, the present decision ought to cover the latter on account of sheer divisibility of scope of construction work even if bundled into one composite contract. It remains to be seen whether the reasons for exclusion of supply and erection aspects from BOCWW Cess as given by the SC in the present

¹⁰ Pertinently, Section 2(1)(g) of the BOCW Act defines a ‘contractor’ to mean “a person who undertakes to produce a given result for any establishment, other than a mere supply of goods or articles of manufacture, by the employment of building workers or who supplies building workers for any work of the establishment, and includes a sub-contractor”

¹¹ Pertinently, Section 2(1)(i)(iii) of the BOCW Act defines an ‘employer’, in relation to an establishment as “the owner thereof, and includes—

...

(iii) in relation to a building or other construction work carried on by or through a contractor, or by the employment of building workers supplied by a contractor, the contractor”

¹² Please see Sections 8 and 9 of the BOCWW Cess Act.

¹³ AIR 1999 SC 22

¹⁴ (2008) 8 SCC 172

¹⁵ (2003) 2 SCC 107

judgement would also apply to composite EPC and LSTK contracts where the supply/erection portion may not be as clearly divisible from the construction scope of works as was the case in the present judgement. It would indeed be interesting to see what the three-judge bench of the SC would hold in this respect as and when it decides the SLP preferred against Technical Associates.

Importantly, the present decision gives contractors some much needed breathing room since in the absence of a contractual provision permitting the owners to deduct the BOCWW Cess at source, the owners may no longer resort to deduction without formal assessment by the relevant authorities. It also potentially arms the contractors with writ remedy in similar situations despite the existence of an arbitration clause. Contractors that are already facing a cash-crunch during these difficult times can potentially utilize this decision to analyze and take appropriate steps under their respective contracts to ensure that the owner does not unnecessarily deduct any amount towards the BOCWW Cess or withhold payment of running bills; at the very least not on the entire contract value.

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