The CESS Story—Analysis of Clean Energy, Swachh Bharat, Infrastructure and Krishi Kalyan Cess as Levied by Central Government

The author duo in their article introduces the readers to a discussion on 'cess' and its analysis in the context of two terminologies—tax and fee—and then goes on to describe the four cess, namely, Clean Energy Cess, Swachh Bharat Cess, Infrastructure Cess and Krishi Kalyan Cess. While analysing the four cess levied by the Central Government, the author duo also reflects on the rationale behind them in an interesting manner. Read on to know more about the story of the four cess of our Central Government...

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What is a CESS?

The term 'Cess' in general refers to a type of tax. One can say it as an alternative term for a tax and the term 'cess' is used in countries like Britain, Ireland and Scotland as 'tax'.

The Supreme Court in *Shinde Brothers vs. Deputy Commissioner—AIR 1967 SC 1512* has held that "the

Fees confer a capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest.

word cess means a tax and is generally used when the levy is for some special administrative expense". Further, Supreme Court observed that "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".

It appears that the term 'cess' has its origin to the practice of Irish farmers, as those who have the most successful yield pay the most tax on their crop to the Government (cess for assess) and the term 'cess' has been derived from the mistaken connection with the word 'census'.

In India, there is no statutory definition of the term 'cess' and in India, cess is generally referred with the qualifying word prefixed, to any taxation, such as education cess, health cess, irrigation-cess, etc.

As regard the meaning and definition of the term 'cess', the Supreme Court in *M/s Guruswamy and Co. vs. State of Mysore AIR 1967 SC 1512* observed that "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 same 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."

On similar lines, the Supreme Court in *State of West Bengal vs. Kesoram Industries Ltd AIR 2005 SC 1646*, it was held that 'Cess' is a tax and is generally used when the levy is for some special administrative expense, suggested by the name of cess, such as health cess, education cess, road cess etc.

Whether 'CESS' be Termed as Tax or Fee?

It is relevant to note that 'cess' is generally referred as 'tax', however, depending on the fact that whether the levy of 'cess' is in the nature of 'common burden' or is there any special benefit involving 'quid pro quo'. The former is a tax and latter would be a fee.

Meaning of terms 'Tax' and 'Fee'

The term 'tax' could be understood from the definition of the term 'taxation' as defined in Article 366(28) wherein the 'taxation' includes the imposition of any tax or impost, whether general or local or special, and "tax' shall be construed accordingly. It is clear that the term 'tax' is generally understood to mean imposition of tax or impost, whether it is for general or local or special.

The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden while a fee is a payment for a special benefit or privilege. Fees confer a capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. It is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action. [See *Commissioner Hindu Religious Endowments vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282*]

It is clear from the above that the term 'fee' is a sort of return or consideration for the services rendered and it is absolutely necessary that the levy of fees should on the face of the legislative provision be correlated to the expenses incurred by Government in rendering the services. If the money thus collected by the Government is set apart and appropriated specifically for the performance of such work and the same is not merged in the public revenues for the benefit of the general public, such amount collected/ imposed could be termed as fees and not a tax.

Further, the Supreme Court in the case of *Vijaylakshmi Rice Mills vs. Commercial Tax Officers, Palakol-2006 (201) E.L.T. 329 (S.C.)*, dealt with the meaning of the terms 'tax' and 'fee' and it was held that 'Tax' is compulsory exaction of money for public purposes by State, whereas the 'Fee' is charge for special service rendered by governmental agency where 'Quid pro quo' is necessary. This view was reiterated by the Supreme Court in *State of Bihar vs. Shree Baidyanath Ayurveda Bhavan P. Ltd. - 2005 (191) E.L.T. 3 (S.C.)* with regard to 'license fee' which has a regulatory character and therefore quid pro

quo of rendering of service by State, as in case of a compensatory fee, was not required.

Further, it is relevant to note that the Constitution Bench of Supreme Court in *Jindal Stainless Ltd. and Anr. vs. State of Haryana and Ors. [(2006) 7 SCC 241]* has held that the 'Tax' is levied as a part of common burden. The basis of a tax is the ability or the capacity of the tax payer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden.

The Supreme Court in *State of West Bengal vs. Kesoram Industries Ltd AIR 2005 SC 1646*, held that depending on the context and purpose of levy, the 'cess' may not be a tax but a fee. In the above context, it was held that levying a cess on the said royalty is not a tax on tax since royalty on mines is not, per se, a tax or fee and it is only a return on the usage of mines. It would be noted that this matter now stands referred to a Larger Bench of 11 judges.

It is relevant to note that 'cess' levied could be in the nature of 'tax' or 'fee' depending on whether there is any quid pro quo involved. The Supreme Court in *Dewan Chand Builders and Contractors vs. UOI 2011 (274) ELT 161*, held that the classic distinction between the term 'tax' and 'fees' is that there is a quid pro quo, which though not with arithmetical exactitude, would suffice to uphold the levy as a fee. In this case, where the welfare cess legislation in respect of construction workers were sought to be struck down as being a tax on land and buildings and being beyond the Union's legislative competence, Supreme Court negatived it by holding that the nexus was established between payer of Cess and services rendered for industry, thereby satisfying element of quid pro quo in the scheme and therefore the levy of cess was a 'fee' and not a tax.

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In the context of the term 'cess', it is relevant to note that Article 270 of Constitution of India provides that all taxes and duties along with 'cess' levied for specific purposes under any law made by the Parliament (other than those mentioned in Article 268) shall be levied and collected by the Government of India and such sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law. In India, the Government has been levying various 'cesses' for various purposes like 'education', 'clean energy', 'clean India' etc and it appears that the Government of India is increasing levying certain 'cesses' to collect the amount for specific purposes rather than collecting them by way of 'taxes' which will go to 'common fund'.

Analysis of various Cesses imposed by Central Government:

A. Clean Energy Cess

'Clean Energy Cess' was introduced in the year 2010 vide Finance Act, 2010 which imposed the 'Clean Energy Cess' on coal, lignite and peat produced from coal mines in India.

Clean Energy Cess is a kind of carbon tax and is levied in India as a duty of excise under Section 83 (3) of Finance Act, 2010 on Coal, Lignite and Peat (goods specified in the Tenth Schedule to the Finance Act, 2010) in order to finance and promote clean environment initiatives, funding research in the area of clean environment or for any such related purposes. The imposition of 'clean energy cess' is a step towards taking initiatives for 'clean energy' and demonstrates India's commitment in tackling 'climate change'.

It is relevant to note that in India carbon taxes are levied only on coal and its variants - lignite and peat. Even though many countries have had introduced the carbon taxes not only on coal but also on other fossil fuels like petroleum, natural gas etc., in recent years, number of countries have reduced the carbon taxes or postponed the imposition of such taxes. In any case, subsequent to the global financial crisis of 2008, many countries have either abolished or reduced or postponed their decisions on such carbon taxes.

It is relevant to note that the levy of 'clean energy cess' has been brought into effect from 1st July 2010 vide Notification No.1/2010-CEC dated 22.06.2010 issued under Section 83(2) of Finance Act, 2010.

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It is also relevant to note that as Clean Energy Cess is levied as a duty of excise, it would also apply to imported coal, including washed coal under Section 3(1) of the Customs Tariff Act in the form of additional duty of customs (CVD).

As 'Clean Energy Cess' has been levied as a duty of excise, sub-section (7) of Section 83 of Finance Act, 2010 provides that the Central Government may, by notification in the Official Gazette, declare that any of the provisions of the Central Excise Act, 1944, relating to levy of, and exemption from duty of excise, refund, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary, be applicable in respect of clean energy cess. This has been notified vide Notification No.2/2010-CEC dated 22.06.2010.

The rate of 'clean energy cess' levied vide Section 83(3) of Finance Act, 2010 read with Tenth Schedule to Finance Act, 2010 is specified as under:

Sl. No.	Chapter, heading, sub-heading or tariff item	Description of goods	Rate
(1)	(2)	(3)	(4)
1.	2701	Coal; briquettes, ovoids and similar solid fuels manufactured from coal	₹100 per tonne
2.	2702	Lignite, whether or not agglomerated, excluding jet	₹100 per tonne
3.	2703	Peat (including peat litter), whether or not agglomerated	₹100 per tonne

Government had granted partial exemption on 'clean energy cess' vide Notification No. 3/2010-CEC dated 22.06.2010 wherein the rate of 'clean energy cess' was reduced to ₹50 per tonne. However, the rate of cess was increased by the Government to ₹200 per tonne vide Notification No. 1/2015-CEC dated 1.3.2015.

Further, it is relevant to note that Government has notified an exemption for all goods falling under tariff heading 2701, 2702 and 2703 other than raw coal, raw lignite and raw peat vide Notification No.4/2010-CEC dated 22.06.2010. Effectively, 'clean energy cess' is leviable only on raw coal, raw lignite and raw peat.

As regards the notified goods which are subject to 'clean energy cess', the Government has granted specific exemption to notified goods which are produced in the State of Meghalaya vide Notification No.5/2010-CEC dated 22.06.2010.

For the purpose of 'collection and assessment' of clean energy cess, the Government has notified Clean Energy Cess Rules, 2010 vide Notification No.6/2010-CEC dated 22.06.2010 which provides for registration, payment of cess, assessment of cess, manner of payment etc as regards levy of 'clean energy cess'.

Usage of Clean Energy Cess Collected

The amount collected by the Government by way of 'clean energy cess' is being used for the National Clean Energy Fund (NCEF) for funding research and innovative projects in clean energy technologies or renewable energy sources to reduce dependence on fossil fuels.

National Clean Energy Fund (NCEF) is a fund created in 2010-11 (announced in Union Budget 2010) for using the carbon tax. Thus, projects aiming at reduction of emissions with innovative technologies from different sectors get considered under this funding mechanism.

The usage of the fund collected as 'clean energy cess' is used for any project/scheme relating to Innovative methods to adopt to Clean Energy technology and Research & Development are eligible for funding under the NCEF.

An indicative list of such projects is as follows:

- Projects supporting the development and demonstration of integrated community energy solutions, smart grid technology renewable applications with solar, wind, tidal and geothermal energy;
- Projects in critical renewable energy infrastructure areas such as Silicon Manufacturing;

- Projects which result in replacing existing technology in energy generation with more environmentally sustainable approach;
- Projects related to environment management, particularly in the geographical areas surrounding the energy sector projects;
- Renewable/Alternate Energy- includes advanced solar technologies, geothermal energy, bio-fuels from cellulosic biomass/algae/any waste, offshore Marine Technologies (Wind, Wave & Tidal) & Onshore wind energy technologies, Hydrogen & fuel cells.
- Clean Fossil Energy- include power, oil, gas and coal technologies including coal gasification, shale oil/gas, lignite/Coal Bed Methane, advanced turbine and technology for IGCC power plants, methane hydrates, enhanced recovery from unconventional resources and fossil energy advanced research, carbon capture and sequestration as also carbon capture and reformation.
- Basic Energy Sciences - include energy storage for hybrid and plug-in electric vehicles, solid state lighting, catalysis, biological and environmental research, advanced computing, high energy and nuclear physics etc.
- The Fund may also support pilot & demonstration projects for commercialization in the relevant field.
- Mission projects identified in the National Action Plan on Climate Change (NAPCC) and projects relating to R&D to replace existing technologies with more environment friendly ones under National Mission on Strategic Knowledge for Climate Change (NMSKCC).
- The projects relating to creation of power evacuation infrastructure for renewables.

[Source: www.arthapedia.in]

B. Swachh Bharat Cess

Swachh Bharat Cess (SBC) was introduced vide Section 119 of the Finance Act, 2015 on all or selected taxable services. The monies collected as Swachh Bharat Cess shall be utilised financing and promoting Swachh Bharat initiatives (Clean India campaign).

It is relevant to note that 'Swachh Bharat Cess was notified with effect from 15.11.2015 vide Notification No. 21/2015-S.T., dated 6.11.2015. In terms of Notification No. 22/2015-S.T., dated 6.11.2015, effective rate of (SBC) would be @ 0.5% on value of all taxable services. It shall be noted that this cess shall be leviable in addition to any other cess or service tax leviable under Chapter V of Finance Act, 1994 and value for the purpose of computation and this cess shall be determined in terms of Section 67 of Finance Act, 1994 read with rules issued under the said section.

Exemption and Abatement: Further, where any service is exempted from service tax by way of issue of a notification, SBC would also be exempt on such services. Similarly, part of the value of service is exempt (in terms of Notification No. 26/2012-ST dt. 20.06.2012), SBC shall be levied only on the portion which is liable to service tax.

Reverse charge: It shall be noted that in case of reverse charge or joint charge, the Swachh Bharat Cess shall be computed on the value of taxable services on which such person is liable to pay service tax in terms of the Notification 30/2012 ST dt. 20.06.2012. For instance, in case of a works contact services provided by an individual to a company, the company would be liable to pay 50% of the total SBC under reverse charge and balance 50% shall be liable to be paid by the service provider under forward charge.

Exemption to SEZ and Rebate: In terms of the amendment to Notification No. 12/2013-ST, dt 1.7.2013 vide, Notification No. 2/2016-S.T., dated 3-2-2016, SBC on services to SEZ developer or SEZ unit would be either exempt ab *initio* or would be eligible for refund. Similarly, SBC paid on services exported outside Indie would be eligible for rebate in terms of Notification No. 39/2012-ST dt 2.06.2012.

Cenvat Credit: It is to be noted that vide Notification No. 2/2016-C.E. (N.T.), dt 3.2.2016, Rule 3(4) of Cenvat Credit Rules, 2004 has been amended to provide that CENVAT credit shall not be utilised for the purpose of payment of SBC.

However, on the on the issue of availment of credit of SBC, there is no restriction under the Cenvat Credit Rules, 2004. In this connection, a view could be taken that credit of SBC could be availed on the ground that SBC is collected as service tax and all the provisions including rules issued thereunder would be applicable to SBC also. This view is supported by the decision of the High

Court of Karnataka in the case of *Shree Renuka Sugars Ltd. reported in 2014 (302) E.L.T. 33 (Kar.)*, which dealt with a similar issue in relation to sugar cess levied under Sugar Cess Act, 1982.

Administration: The provisions of Chapter V of Finance Act, 1994 relating to refunds and exemptions from tax, interest and imposition of penalty shall, as far as be, apply in relation to the levy and collection of the Swachh Bharat Cess on taxable services.

C. Infrastructure Cess

'Infrastructure Cess' is the new cess levied vide Finance Act, 2016 wherein Section 162 under Chapter VII imposes levy of Infrastructure Cess on all goods specified in Eleventh Schedule to be effective from 1.3.2016.

It should be noted that even though Finance Act, 2016 has received Presidential Assent on 14.05.2016, the levy of 'Infrastructure Cess' has come into effect from 1st March 2016 vide Provisional Collection of Taxes Act, 1931 as declared in Finance Bill 2016.

It is provided in sub-section (1) of Section 162 that as regards the goods specified in the Eleventh Schedule, which are being the goods manufactured or produced, there shall be levied and collected for the purposes of the Union, a duty of excise, to be called the Infrastructure Cess, at the rates specified in the said Schedule for the purposes of financing infrastructure projects.

Further, it is provided in Sub-section (2) of Section 162 that 'Infrastructure Cess' shall be in addition to any other duties of excise chargeable on such goods under the Central Excise Act, 1944 or any other law for the time being in force.

Sub-section (3) of Clause 162 provides that the provisions of the Central Excise Act, 1944 and the rules made thereunder, including those relating to assessment, non-levy, short-levy, refunds, interest, appeals, offences and penalties, shall, as far as may be, apply in relation to the levy and collection of 'Infrastructure Cess' in respect of the goods specified in the Eleventh Schedule as they apply in relation to the levy and collection of the duties of excise on such goods under the said Act or the rules, as the case may be.

It is relevant to note that Sub-section (4) of Section 162 specifically provides that 'Infrastructure Cess' shall be for the purposes of the Union and the proceeds thereof shall not be distributed among the States. Therefore, notwithstanding the fact that 'Infrastructure Cess' is being collected as duties of excise, the same would be exclusively for the Union Government and shall be available for the States.

As regards the rate of 'Infrastructure Cess', the Eleventh Schedule to Finance Act, 2016 specifies the goods which are subjected to 'Infrastructure Cess' which are "All goods falling under heading 8703 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)" and rate of 'Infrastructure Cess' specified is at the rate of 4%.

In view of the above, the 'Infrastructure Cess' shall be levied on all goods falling under heading 8703 – "Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars" as duty of excise at the rate of 4%.

However, an exemption has been given to ambulances, electric vehicles, three wheeled vehicles, hybrid vehicles, taxis. Smaller petrol vehicles will be charged 1% and smaller diesel vehicles 2.5%. [Refer Notification No. 1/2016-Infrastructure Cess, dated 1.3.2016]

As regards utilisation of cenvat credit for payment of this cess, the provisions of Cenvat Credit Rules, 2004 has been amended so as to insert a proviso to Rule 3(4) to provide that Cenvat credit shall not be utilised for payment of 'Infrastructure Cess'. It would be worthwhile to note that since this is a new cess the same would apply only to goods manufactured after the coming into force of this cess as per the ratio of the decision of the Supreme Court in *CCE vs Vazir Sultan Tobacco co.Ltd 1996 (83) ELT 3 (SC).*

D. Krishi Kalyan Cess

Finance Act, 2016 vide Section 161 provides for levy a new cess by name Krishi Kalyan Cess with effect from 1.6.2016. This cess would be in the nature of service tax and would be at the rate of 0.5% on all or select taxable services.

In terms of the statutory provisions, this cess would be utilised for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.

On the administrative side, this Cess would be levied, collected and administered in the same manner as that of administration of service tax collection, recovery etc. Clause 161 of Finance Act, 2016 provides that the statutory provisions relating to service tax [Chapter V of the Finance Act, 1994]

and the rules made thereunder, including those relating to refunds and exemptions from tax, interest and imposition of penalty shall, be applicable to Krishi Kalyan Cess on taxable services.

Consequent to enactment of Finance Act, 2016 on 14.05.2016, wherein the levy of Krishi Kalyan Cess has come into effect from 1st June 2016, the following notifications have been issued:

1. Notification No.27/2016-ST provides that 'reverse charge' under Notification No.30/2012-ST would be applicable for KKC as well.
2. Notification No.28/2016-ST provides that all exemption applicable for 'service tax' would also be applicable for KKC. Further, all abatements provided under Notification No.26/2012-ST would also be applicable for KKC.
3. Notification No. 29/2016-ST: Rebate on input/ input services on 'export of services' under Notification No.39/2012-ST would be available for KKC also.
4. Notification No.30/2016-ST: Amends Notification No. 12/2013-ST which grants exemption to services provided in SEZ unit or Developer–to include KKC. [There is also another amendment of clause (b) which is not relevant to KKC].
5. Notification No.31/2016-ST: Service Tax Rules, 1994 is amended–Rule 6: sub-rule (7D) is amended to include KKC and new Sub-rule (7E) is inserted to include KKC in all 'optional schemes' with special rates for various sectors specified in various sub-rules of Rule 6.

As regards availment or utlisation of credit Krishi Kalyan cess or utilisation of other credits for payment of Krishi Kalyan Cess, the provisions relating to Cenvat Credit Rules, 2004 have been amended vide Notification No. 28/2016-CE(NT) dated 26.05.2016 which are summarised as follows:

1. Rule 3 of CCR, 2004 has been amended to insert Sub-rule (1a) which provides that 'provider of output services' shall be allowed to take cenvat credit on KKC. There is no provision enabling the 'manufacturer' to avail cenvat credit on KKC.
2. Further, a proviso is inserted in sub-rule (4) of Rule 3 to provide that 'cenvat credit on any duty' shall not be utilised for payment of KKC.
3. Further, Rule 3 (7) is amended to insert new clause (d) to provide that Cenvat credit on KKC shall be utilised only towards payment of KKC

Point of Taxation of KKC

As KKC is being levied vide Section 161 contained in Chapter VI of Finance Act, 2016, wherein it is specifically provided that the provisions of this Chapter shall come into force from 1st June 2006. Accordingly, there is no doubt regarding the fact that KKC is a new levy which is in termed as 'service tax'.

In the above context, the question to be examined as to whether KKC is payable even on the amount outstanding from the customers (Debtors) as on 1st June 2016 as per Rule 5 of Point of Taxation Rules, 2011 wherein Explanation 1 provides that this Rule shall apply mutatis mutandis in case of new levy of service.

It should be noted that where the service has been provided prior to 1.6.2016 and the invoice has also been raised, then the service having been rendered prior to 1.6.2016 and accordingly, there is no question of subjecting the very same transaction to levy of KKC by invoking Rule 5 of Point of Taxation Rules, 2011. In this regard, reference can be made to the decision of Supreme Court in Collector v. Vazir Sultan Tobacco Co. Ltd. - 1996 (83) E.L.T. 3 (S.C.) where in the context of dutiability of goods manufactured prior to levy of duty but cleared thereafter, it was held that such goods are not liable to excise duty as the levy is not there at the time when the goods are manufactured or produced in India, it cannot be levied at the stage of removal of the said goods. The idea of collection at the stage of removal is devised for the sake of convenience. It should be noted that the ratio of the above decision will squarely apply in the present case as regards levy of KKC on the services with effect from, 1.6.2016. What was not subjected to levy of KKC during the period prior to 1.6.2016 cannot be subjected to levy of KKC by invoking Rule 5 of Point of Taxation Rules, 2011.

Further, it is interesting to note that Explanation 1 to Rule 5 was amended with effect from 1.3.2016 (vide Notification No.10/2016-ST dated 1.3.2016) under the provisions of Section 67A(2) of Finance Act, 1994 even though the said provision of Section 67A(2) was inserted vide Finance Act, 2016 with effect from, 14.05.2016 only. Therefore, it appears that the amendment made to Rule 5 of Point of Taxation Rules, 2011 has no legal basis as the enabling provision in Section 67A(2) has come into effect only from 14.5.2016. Further, it must be noted that Section 67A(1) still stands in the statute book and the said rules are ultra vires this provision. ■