



## NITYA'S INSIGHT | Issue 12 |

The Building and Other Construction Workers' Welfare Cess Act, 1996

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## 1. Background

The building and other construction works are characterized by an inherent risk to the life and limb of the workers. The construction work is characterized by its casual nature, temporary relationship between an employer and employee, uncertain working hours, lack of basic amenities and inadequacy of welfare facilities.

In view thereof, the Parliament enacted the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 ('the BOCW Act') and the Building and Other Construction Workers' Welfare Cess Act, 1996 ('the Welfare Cess Act') read with the Building and Other Construction Workers' Welfare Cess Rules, 1998 ('the Welfare Cess Rules'). The Welfare Cess Act intends to levy Cess for the welfare of workers engaged in building and other construction work.

In this update, we have discussed the salient features of the BOCW Act, the Welfare Cess Act and the Welfare Cess Rules.

## 2. Scope and Applicability

- The BOCW Act applies to every establishment which employs or had employed on any day of the preceding 12 months, 10 or more building workers in any building or other construction work.
- Section 3 of the Welfare Cess Act (charging section) provides as follows:
  - Cess is levied and collected from 'employer' in relation to a building or other construction work
  - Cess is collected on the 'cost of construction' incurred by an employer
  - Cess is collected and levied at the rate of 1 percent

### 'Employer'

- The BOCW Act gives a wide definition to the term 'employer' to include project owner and contractor. 'Contractor' is defined to include sub-contractor as well. Thus, project owner, contractor and sub-contractor are covered within the definition of employer.
- As held by the Delhi High Court in the case of **Builders Association of India v. Union of India and Another (reported in 2007 INDLAW DEL 533)**, the authorities would approach contractor at the first instance for collection of the Cess. The Cess would be collected from the project owner if the same cannot be collected from the contractor or sub-contractor for any reason.

### 'Building and other construction work'

- '**Building or other construction work**' has been given a wide meaning and includes construction, alteration, repairs, maintenance or demolition of or in relation to buildings etc. The definition is reproduced as under:

*"building or other construction work" means the construction, alteration, repairs, maintenance or demolition, of or, in relation to, **buildings, streets, roads, railways, tramways, airfields, irrigation, drainage, embankment and navigation works, flood control works (including storm water drainage works), generation, transmission and***

***distribution of power, waterworks (including channels for distribution of water), oil and gas installations, electric lines, wireless, radio, television, telephone, telegraph and overseas communications, dams, canals, reservoirs, watercourses, tunnels, bridges, viaducts, aqueducts, pipelines, towers, cooling towers, transmission towers and such other work as may be specified in this behalf by the appropriate Government, by notification but does not include any building or any construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), apply;”***

- The term ‘building’ is not defined in the BOCW Act or the Welfare Cess Act or the Welfare Cess Rules. It is notable that the word ‘building’ under common parlance would mean a structure with a roof and walls. Further, this would cover any permanent or temporary structure / construction of whatever kind of nature covering a space of land for use not only as a dwelling. There are instances where even swimming pool has been treated as building by the Courts. Thus, the scope of building for the purpose of the BOCW Act is very wide and would cover most of the industrial construction activities within its ambit.
- ‘Building and other construction work’ as defined under the BOCW Act specifically excludes any building or any construction work to which the provisions of the Factories Act, 1948 or the Mines Act, 1952, apply. Consequently, Cess is not leviable after the registration under the Factories Act, 1948 is obtained. This exemption is not available during the period for which the application for registration is made and registration is granted.
- It is pertinent to note that the Factories Act, 1948 is not applicable on standalone premises like offices, warehouses, marketing office etc. Thus, Cess would apply on construction activity of these premises provided other conditions of applicability are also satisfied.

#### **‘Cost of construction’**

- Rule 3 of the Welfare Cess Rules provides that the ‘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 and any compensation paid or payable to a worker or his kin under the Workmen’s Compensation Act, 1923.
- In the case of ***G.V. P. R Engineers Limited v. State of Madhya Pradesh and Ors., 2012 (3) MPLJ 637 and Technical Association v. Assistant Commissioner, Writ Petition No. 3956/2009***, the High Court held that for the purpose of levy of Cess, cost of construction cannot be segregated into supply portion and erection portion where construction contract comprises of supply of material, erection and civil works. The Court also held that Rule 3 of the Welfare Cess Rules excludes only cost of land and had there been intention to exclude supply portion, it would have been stated so in the Rule.
- It is pertinent to refer to the case of ***Government of Andhra Pradesh and Ors. v. Lakamsani Samba Siva Rao and Ors., 2016 (2) ALT 84***, wherein two separate agreements were entered for construction / erection and commissioning of blast furnace and crane. The High Court firstly held that blast furnace and crane shall constitute a building in the definition of ‘Building or other construction work’. The Court further held that even though two agreements were executed, the work undertaken by the contractor cannot be separated. It was like a composite contract for construction, erection and commissioning. Thus, Cess shall be levied on the total cost of blast furnace and cranes along with construction / erection and commissioning cost.

**NITYA's comments** – Legally, cost of all industrial construction, expansion, renovation and repair (excluding factories registered under the Factories Act, 1948) would attract Cess which is not creditable or refundable. In many cases, cost of Cess is not factored in project cost nor Cess is actually paid.

### 3. Methodology of collection of Cess

- Cess needs to be paid to the Cess collector within 30 days of completion of the construction work or within 30 days on which assessment of Cess payable is finalized, whichever is earlier.
- For building or other construction work of a Government or of a public sector undertaking, Cess is collected by way of deduction at source (deduction of Cess payable from the bills paid for such works).
- Cess is collected by way of advance collection through local authority where an approval of such building or other construction work is required by local authority.
- Where duration of a project is more than one year, Cess is payable within thirty days of completion of one year from the date of commencement of work and every year thereafter on the cost of construction incurred during the relevant period.
- Within 30 days of payment of Cess, information has to be furnished to the assessing officer.

### 4. Implications for non-compliance

- If an 'employer' fails to pay Cess, such 'employer' shall be liable to pay interest on the amount to be paid at the rate of two percent for every month from the date on which such payment is due till such amount is actually paid.
- If Cess is not paid within the date specified in order of assessment, the assessing authority may impose a penalty up to the amount of Cess on the employer.
- There is no limitation period prescribed for raising a demand under the BOCW Act or Welfare Cess Act or the Welfare Cess Rules.





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