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Essentiality Certificates under Customs and GST laws: Need for synchronization

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Introduction:

Petroleum is an indispensable commodity for the fulfilment of daily human needs. Not only does the petroleum industry act as a nodal industry for other industries like textile, automobile etc., petroleum has deep-rooted impact on the inflation rate and economic growth of a country. This is why government intervention becomes necessary in regulating the operations of this sector. Special tax exemptions and concessions for the sector are allowed from time to time, in order to maintain economic stability in the country.

This article discusses about certain amendments introduced in the exemptions and concessions available under Customs and GST laws in respect of goods involved in petroleum operations. It also underlines amendments introduced in one law and shadowing the other.

Position prior to the amendment

Since the pre-GST regime, companies undertaking various petroleum operations have been availing exemptions available in the then existing Central Excise and Customs laws[1]. Post the implementation of the GST regime on 1 July 2017, the above benefits were made available in a new scheme.

Exemption from Basic Customs Duty ('**BCD**') and concessional rate of (5%) Integrated Goods and Services Tax ('**IGST**') was allowed on import of specified goods.[2] Also, concessional GST rate[3] was prescribed in case of supply of said imported goods under GST law (i.e. procurements or stock transfers qualifying as supply).[4]

Broadly speaking, the conditions attached to the relevant entries in the both notifications, *inter alia*, state that the goods should match the description of the goods specified in the notifications and an essentiality certificate ('**EC**') is obtained from the Directorate-General of Hydrocarbons ('**DGH**') to the effect that the goods are required for the specified petroleum operations.

Thus, there was a requirement of EC for claiming a benefit on two supplies involved in respect of the same goods, one at the time of import (benefit availed under Customs law) and

[1] The respective exemptions were available under S.No. 357A of Customs Notification No. 12/2012-Cus, read with condition no. 48 therein on import of specified goods, and under S.No. 336 of Notification No. 12/2012-CE, read with condition no. 41 therein on procurement of domestically manufactured goods, if such domestic procurements were under International Competitive Bidding (ICB).

[2] S.No. 404 of Customs Notification No. 50/2017-Cus., read with condition no. 48 therein and List 33 of the said notification

[3] Recently, please note that *vide* Notification No. 08/2022-Central Tax (Rate), dated 13 July 2022 w.e.f. 18 July 2022, the GST rate for such goods has been increased from 5% to 12%. The suppliers must charge 12% GST and obtain EC from DGH, along with ensuring compliance with other conditions.

[4] CGST Rate Notification No.3/2017, read with condition given therein, and list annexed to the said notification) ('**GST Rate Notification**')

another during the course of domestic supply (benefit availed under GST law).

Relevance of Essentiality Certificates

Issuance of ECs by the DGH is based on the fact, i.e., whether the goods in question are required for the petroleum operations. DGH is the specified independent authority empowered to certify that the goods would be used for the intended purpose, basis which the benefit is allowed.

It must be borne in mind that the availability of EC only ensures the applicability of exemption/concessional rate under respective laws and the same does not in any way alter the applicability of charging provisions under Customs law or GST law or both, as applicable.

Amendment in Customs law

Vide Notification No. 2/2022-Customs, dated 1 February 2022, S.No. 404 of Notification No. 50/2017-Cus. has been modified, along with the amendments introduced in condition no. 48 and List 33 of the said notification ('**New Customs Entry**').

The New Customs Entry (along with the modified conditions) has removed the requirement of obtaining an EC from DGH for availing exemption from BCD and concessional IGST rate on import of specified goods. Instead, the same can be obtained on the basis of certificate of a specified person- Licensee, Lessee and Contractor. The same have been broadly defined in the said notification as-

- Licensee means a person authorised to prospect for mineral oils in pursuance of a *petroleum exploration license* granted under the Petroleum and Natural Gas Rules, 1959
- Lessee means a person authorised to mine oils in pursuance of a *petroleum mining lease* granted under the Petroleum and Natural Gas Rules, 1959
- Contractor means a company or a consortium of companies with which the Central Government has entered into an agreement in connection with petroleum operations (consisting of prospecting for or extraction or production of mineral oils)

However, till date, there is no such change under the GST Rate Notification.

Due to this, it can be said that to avail benefit of the GST concessional rate under the GST Rate Notification, the requirement of obtaining an EC from DGH continues while in Customs law, it can be obtained on certificate issued by specified persons-Licensee/Lessee/Contractor.

At present, the availability of certification by the Licensee/Lessee/Contractor under Customs law and no such corresponding change under the GST law has generated an aperture between the two laws.

It's also noteworthy to mention that the list of goods eligible for BCD exemption and concessional IGST rate has been modified and made very specific under the Customs Notification (i.e. List 33), however, the list annexed to the GST Rate Notification stands unamended.

In such a case, what would be the implications where certain goods are eligible for the benefit under GST but the same are not eligible for benefit under Customs and *vice versa*?

Also, it was earlier clarified[5] *vide* that the original EC issued by DGH is sufficient and there is no need for taking a certificate every time on inter-state movement of goods within the same

[5] Circular No. 163/19/2021-GST ('**GST Circular**')

company/stock transfer so long as the goods are the same as those imported by the company at concessional rate. Accordingly, once a Licensee/Lessee/Contractor had imported the specified goods and availed the benefit under customs law, basis the EC issued by DGH, the second EC was not required under GST Law, subject to maintenance of proper records.

Now post the amendment, given that the requirement of obtaining EC issued by DGH has been removed at the time of import of goods, will the Circular still apply? The application of the above circular needs to be examined closely in order to avail benefit both under Customs and GST law.

The inconsistency between the two laws for availing the tax benefits in this regard, though seemingly unintended, spikes confusion and complexity in implementation of transactions for licensees, lessees, contractors and their sub-contractors. Absence of clarity amongst the industry is likely to stem unnecessary litigation for this crucial sector. The government should take necessary actions to bring the two laws in sync by bringing in suitable amendments in the GST law, keeping in mind the end-use benefit principle relevant for the sector.

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Goods and Services Tax (GST)

Notifications and Circulars

Certain changes by Finance Act, 2022 in the CGST Act, 2017 come into effect from 1 October 2022: Certain specified Sections of the Finance Act, 2022 amending the Central Goods and Services Tax Act, 2017 ('**CGST Act, 2017**') have been notified to come into force from 1 October 2022. Broadly, Sections 16 (Eligibility and conditions for taking input tax credit), 29 (Cancellation or suspension of registration), 34 (Credit and debit notes), 37 (Furnishing details of outward supplies), 38 (Communication of details of inward supplies and input tax credit), 39 (Furnishing of returns), 41 (Availment of input tax credit), 47 (Levy of late fee), 49 (Payment of tax, interest, penalty and other amounts), 52 (Collection of tax at source), 54 (Refund of tax), etc., have been amended or substituted with effect from 1 October 2022. Notification No. 18/2022-Central Tax dated 28 September 2022 has been issued for the purpose. The details of the changes are available here.

Further, the Central Goods and Services Tax Rules, 2017 has also been amended to carry out certain consequential and other changes, with effect from 1 October 2022. Broadly, Rules 21, 37, 85, 89 and certain consequential changes in Rules 36, 38, 42, 43, including omission of Rules

69, 70, 71, 72, 73, 74, 75, 76, 77 and 79, and Forms GSTR-1A, GSTR-2 and GSTR-3, has come into effect with effect from 1 October 2022. Notification No. 19/2022-Central Tax dated 28 September 2022 has been issued for the purpose. The details of the changes are available here.

Ratio decidendi

Limitation for refund under CGST Section 54 – Date of online filing and not physical submission of documents, relevant: The Gujarat High Court has held that the period of two years for filing refund claim under Section 54 of the CGST Act would be applicable up to the date of filing application on the common portal and not the date of submitting printout of application for the refund uploaded on the common portal. The Revenue department had contended that since the circular dated 15 November 2017 prescribed the procedure to file application physically, the actual date of filing of the refund claim would be counted from the said date when physical tendering of the application/ documents happened. Allowing assessee's petition, the Court observed that the Circular providing for procedure of filing application and filing of physical application with documents cannot have an overriding operation to the detriment of the assessee, who had filed the refund application in the common portal of the respondents, which was acknowledged and ARN was also generated. [*Chromotolab and Biotech Solutions* v. *Union of India* – 2022 VIL 714 GUJ]

Credit available in Electronic Credit Ledger can be utilised for payment of 10% pre-deposit amount under CGST Section 107: Observing that clause 107(6)(b) of the Central Goods and Services Tax Act, 2017 ('**CGST Act**') provided a precondition that 'unless the appellant has paid' (not deposited) a sum equal to 10% of remaining amount of tax in dispute, the Bombay High Court has held that Petitioner having to pay 10% of the Tax in dispute under said provision, can certainly utilise the amount of Input Tax Credit available in the Electronic Credit Ledger. The Court observed that the 10% of tax was to be paid as a pre-condition and that tax can be Integrated Tax or Central Tax or the State Tax or Union Territory Tax, as the case may be. It also noted that the amount of ITC available in the Electronic Credit Ledger can be utilised towards payment of these taxes. The High Court hence held that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the CGST Act can be made by utilisation of the amount available in the Electronic Credit Ledger. CBIC Circular F. No. CBIC-20001/2/2022-GST, dated 6 July 2022, was relied upon by the Court for the purpose. [*Oasis Realty* v. *Union of India* – 2022 TIOL 1287 HC MUM GST]

Orders – Provision of digital signature by issuing authority is mandatory: Observing that unless digital signature is put by the issuing authority that order will have no effect in the eyes of law, the Bombay High Court has held that that only on the date on which the signature of the issuing authority is put on the order for the purpose of attestation, time to file appeal would commence. Rejecting the Revenue department's plea that the petitioner could not take stand of not receiving the signed copy because the unsigned order was admittedly received by the petitioner electronically, the Court stated that if this stand is accepted, then the Rules which prescribe specifically that digital signature must be put will be rendered redundant. [*Ramani Suchit Malushte* v. *Union of India* – 2022 VIL 658 BOM]

Provisional attachment – Section 83 provides more stringent requirement than mere expediency: The Allahabad High Court has set aside the order of provisional attachment under

Section 83 of the Central Goods and Services Tax Act, 2017. The Court in this regard observed that a more stringent requirement than a mere expediency, has been provided in Section 83 and that the exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. The Court in this regard observed that no proceedings under Section 74 of the CGST Act had been initiated and the Commissioner while passing the order for provisional attachment had neither recorded his opinion nor referred to any tangible material which necessitated him to pass such order so as to protect the interest of the Government revenue. Supreme Court decision in the case of *Radha Krishan Industries* was relied upon. It may be noted that the High Court also imposed a cost of INR 50,000 on the Department. [*Varun Gupta* v. *Union of India* – 2022 VIL 659 ALH]

Renting of residential dwelling – Government clarifies before Court: The Central Government has clarified before the Delhi High Court that renting of a residential dwelling to a proprietor of a registered proprietorship firm who rents it in his personal capacity for use as his own residence and not for use in the course or furtherance of business of his proprietorship firm and such renting is not that of the proprietorship firm, shall be exempt from tax under Notification No.04/2022-Central Tax (Rate). The Petitioner had challenged Clause (A)(b) of the Notification No.04/2022-Central Tax (Rate) dated 13 July 2022, according to which exemption granted earlier for renting of residential accommodation is no longer available to tenants who are registered under GST. [*Seema Gupta* v. *Union of India* – 2022 VIL 671 DEL]

Consideration for supply – Money granted by Government for activities beneficial to public is 'subsidy': The Maharashtra Appellate AAR has held that the reimbursement amount received by the assessee from the Women and Child Development Department of the Government of Maharashtra can be construed as a subsidy. The assessee was involved in the activities of rendering services (taking care) to destitute women who are litigating divorce, or homeless, or victims of domestic violence, under the 'One Stop Crises Centre Scheme', and was being reimbursed for its expenses by the Government. The Appellate AAR in this regard noted that as per dictionary meaning of 'subsidy', any money/amount granted by the government to any private person or company for undertaking any charitable activities which are beneficial to the public will be construed as subsidy. The reimbursed amount was hence not a 'consideration' and hence out of the purview of 'supply'. [In RE: *Jayshankar Gramin and Adivasi Vikas Sanstha* – 2022 VIL 75 AAAR]

Frozen Paratha is not classifiable as roti/chapatti – Covered under Heading 2106: The Gujarat Appellate AAR has held that frozen parathas i.e. malabar paratha, mixed veg paratha, onion paratha, methi paratha, alu paratha, laccha paratha, mooli paratha and plain paratha having common ingredient as wheat flour varying in composition from 36% to 62% and having other ingredients *viz.* water, edible vegetable oil, salt, anti-oxidant etc., are classifiable under Heading 2106 of the Customs Tariff Act, 1975 as applicable to GST. Rejecting the plea of classification under Heading 1905, which covered bread, pastry, cakes, biscuits and other bakers' wares, the AAAR noted that the parathas were sold in packed and frozen condition and were required to be cooked on pan or griddle for-3-4 minutes till the Paratha was golden brown on both sides. Upholding the AAR's decision, the Appellate AAR also distinguished the paratha from 'roti' or 'chapatti', observing that the composition of both were different and that the paratha required further

processing/cooking before consumption. [In RE: *Vadilal Industries Ltd.* – 2022 VIL 77 AAAR]

No GST on employees' portion of canteen and transportation charges collected and paid to service provider: The Gujarat AAR has held that GST is not leviable on the amount representing the employees' portion of canteen and transportation charges which is collected by the assessee and paid to the canteen and bus transport service provider. It noted that the facilities were provided to permanent employees as per contractual agreement under employer-employee relationship. The AAR for this purpose relied upon CBIC Circular No. 172/04/2022-GST, dated 6 July 2022 which had clarified that perquisites provided by the employer to the employee in terms of contractual agreement between employer and employee will not be subject to GST. [In RE: *SRF Ltd.* – 2022 VIL 262 AAR]

Customs

Notifications and Circulars

Solar power plants or solar power projects – Project Imports Regulations amended: The Ministry of Finance has amended the Project Imports Regulations, 1986 to provide for exclusion of solar power plants or solar power projects from the scope of power plants and transmission projects. Amendment in this regard has been made in Sl. Nos. 2 and 3 of the Table available in the Regulations. Notification No. 54/2022-Cus., dated 19 October 2022 and effective from 20 October 2022 also adds Bhopal Metro Rail Project and Indore Metro Rail Project to the existing list of projects.

Platinum, Palladium, Rhodium, etc. – Import duty increased: The Ministry of Finance has withdrawn the lower rate of basic customs duty available on imports of Platinum, Palladium, Rhodium, Iridium, Osmium and Ruthenium. The imports of said goods, covered under Heading 7110 of the Customs Tariff Act, 1975 will now be covered under the Tariff rate of 12.5% instead of 10%. Further, Agriculture Infrastructure and Development Cess @ 1.5% has been imposed on imports of goods of this Heading, other than those specified. It may be noted that exclusion has been provided to Platinum and Palladium for use in the manufacture of (i) all goods, including Noble Metal Compounds and Noble Metal Solutions, falling under heading 2843, (ii) all goods falling under sub-heading 3815 12, and (iii) catalytic convertors falling under tariff item 8421 32 00, subject to conditions. Notifications Nos. 52 and 53/2022-Cus., both dated 3 October have been issued for the purpose.

SCOMET items – Procedure for general authorisation for export after repair in India notified: The Directorate General of Foreign Trade (DGFT) has notified the procedure for

General Authorisation for Export after Repair (GAER) in India, of same imported SCOMET items. As per new Para 2.79C(D) of the Handbook of Procedures, export of imported SCOMET items to the same entity abroad after repair in India will be allowed on the basis of a onetime GAER in India, subject to conditions. This GAER will be valid for a period of 1 year and cannot be re-validated in terms of Para 2.80 of HoP.

Wheat Flour (Atta) exports allowed under Advance Authorisation and by EOU/SEZ, subject to conditions: The Ministry of Commerce and Industry has allowed export of wheat flour (atta) against Advance Authorisations and by Export Oriented Units (EOUs) and units in Special Economic Zones (SEZs). In respect of EOU and SEZs, there is a condition of pre-import of wheat by actual user. The importer would not be permitted to transfer imported goods for any purpose including job work. Further, procurement of domestic wheat for the purpose of export of wheat flour will not be allowed. Also, entire production must be exported except the wastage as permitted by the Norms Committee. Notification No. 39/2015-20 dated 14 October 2022 has amended Notification No. 30/2015-20 for this purpose.

Rice – Export quota for broken rice notified: The Ministry of Commerce has notified export quota for the year 2022-23 for export of broken rice which is otherwise prohibited for exports. As per Notification No. 38/2015-20, dated 12 October 2022, quota of 3,97,267 MT would be available in case Letters of Credit have been opened and the message between the foreign bank and the Indian bank, both are before 8th of September 2022. It may be noted that Notification No. 31/2015-20, dated 8 September 2022 prohibited export of broken rice with effect from 9 September 2022.

Ratio decidendi

Interest and penalty cannot be levied with demand of Customs Additional duty, SAD and surcharge: The Bombay High Court has held that interest and penalty cannot be recovered by taking recourse to machinery relating to recovery of duty. Setting aside the imposition of interest and penalty for non-payment of Customs Additional Duty, Special Additional Duty and Surcharge as without jurisdiction, the Court observed that there is no provision under Section 3 (for additional duty) or Section 3A (for Special Additional Duty) under the Customs Tariff Act, 1975, or Section 90 of the Finance Act, 2000, that creates a charge in the nature of penalty or interest.

Citing the judgment of the Supreme Court in the cases of *India Carbon Ltd.* v. *State of Assam* and *J.K. Synthetics Ltd.* v. *Commercial Taxes Officer,* the Court said that the liability to interest and penalty is substantive and that provisions imposing interest and penalty are substantive (and not machinery). The High Court observed that mere fact that there is machinery for assessment, collection and enforcement of tax and penalty under the Customs Act, 1962, it does not mean that the provision for penalty and interest in the Customs Act, 1962 is treated as applicable for penalty and interest under the Customs Tariff Act, 1975. According to the Court, the meaning of penalty or interest under the Customs Tariff Act, 1975 cannot be enlarged by the provisions of machinery of the Customs Act, 1962 incorporated for working out the Customs Tariff Act, 1975. The High Court also took noted of the difference between provisions relating to anti-dumping duty which specifically provided for interest and penalty. [*Mahindra and Mahindra Limited* v. *Union of India* – Judgement dated 15 September 2022 in Writ Petition No.1848 of 2009, Bombay High Court]

Amendment under Section 149 – Documentary evidence as available at time of import only to be considered: The Bombay High Court has held that while considering application under Section 149 of the Customs Act, 1962, if the goods have been cleared for home consumption, the proper officer has to only consider the documentary evidence which was in existence at the time the goods were cleared and nothing more. Allowing the writ petition, the Court observed that there was nothing to indicate in the impugned order that petitioner had not submitted the documentary evidence which was in existence at the time the goods were cleared. The petitioner's application of amendment of GSTIN in the Bills of Entry was rejected by the Department holding that GST laws do not permit such amendment post clearance from Customs. [*Hindustan Lever Ltd*. v. *Union of India* – 2022 VIL 695 Bom CU]

Pre-show cause notice consultation is mandatory: The Delhi High Court has reiterated that the pre-show cause notice consultation, as provided, both in the Customs Act, 1962 as well as the Pre-Notice Consultation Regulations, 2018, is necessary. The Court in this regard noted that objective of such consultation as to stem the tide of litigation between the revenue and assessee. According to the High Court, with the docket explosion that Courts are experiencing, this is a wholesome provision, which the revenue needs to scrupulously adhere to. Setting aside the Order in Original, the Court noted that there has been a violation of not only the safeguard provided in Section 28(1)(a) of the Customs Act requiring holding pre-notice consultation but also infraction of the right of such person, to be accorded, at least 15 days under Regulation 3(2) of the 2018 Regulations to respond to any such initiative of holding such consultation. [*Victory Electric Vehicles International Pvt. Ltd.* v. *Union of India* – 2022 TIOL 1312 HC DEL CUS]

Provisional release of seized goods to only be in favour of owner – Issue of SCN under Section 124 to importer is immaterial: The Bombay High Court has held that issuance of a show cause notice in terms of Section 124 of the Customs Act, 1962 does not necessarily establish that the person in whose name it is issued, is necessarily the owner of seized mis-declared goods which are sought to be confiscated. Observing that as per Section 110A the goods seized may be released to the owner, the Court noted that the said section does not include or envisage release of goods provisionally in favour of an importer of goods or in favour of 'any person', in addition to the owner, as mentioned in Section 124. Allowing the appeal filed against the decision of the Tribunal, granting provisional release in favour of importer, the High Court noted that nothing prevented the legislature from specifically incorporating a provision in Section 110A, which would also entitle, besides an owner, an importer, a beneficial owner or any person holding himself to be an importer to claim a right to seek provisional release of goods in terms of Section 110A. [*Commissioner* v. *Dinesh Bhabootmal Salecha* – 2022 SCC OnLine Bom 1808]

Alloy steel forging rings requiring further operation to be used as rings for bearing are classifiable under Heading 7326: The CESTAT Ahmedabad has held that alloy steel forging (machined) that is required to undergo further operation to be ready to use as rings for bearings, etc., is classifiable under Heading 7326 of the Customs Tariff Act, 1975 as 'other articles of iron or steel'. The Tribunal observed that the articles of iron and steel which are subjected to various processes and incomplete shape would be covered under Chapter 73. The Court noted that alloy steel forged machined rings were to be

further subjected to heat treatment, grinding, and super finishing (like honing and lapping) processes at the buyer's end to convert into bearing race. [*Ravi Technoforge Pvt. Ltd.* v. *Commissioner* – 2022 VIL 770 CESTAT AMH CU]

Valuation – Plea of lower end version when not available: The CESTAT New Delhi has set aside the Order of the Commissioner (Appeals) which had set aside the rejection of the transaction value and its re-determination under Rules 4 and 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, by the Original Authority. The Tribunal in this regard noted that the Commissioner (A)'s erred in relying on an email obtained by the importer after the case was booked when all other evidence was to the contrary. It noted that there was nothing in the import documents to substantiate that the imported goods were of a lower version with lower features. The Tribunal also noted that no lower end versions were found during the market survey nor were any such version put up on the website of the company maintained by the importer itself. [*Principal Commissioner* v. *Global Technologies & Research* – 2022 VIL 729 CESTAT DEL CU]

Central Excise, Service Tax and VAT

Notifications and Circulars

Sabka Vishwas (LDR) Scheme available for waiver of interest: The CBIC has reiterated that in cases where the assessee has filed ST-3 return on or before 30 June 2019 and has paid the tax dues in full before filing the application under Sabka Vishwas (Legacy Dispute Resolution) Scheme, the declarant is eligible to avail the benefit of the scheme for waiver of interest. As per Instruction CBIC-110267/75/2022-CX-VIII SECTION-CBEC, dated 6 October 2022, this shall also include the cases where the interest has been demanded by a show cause notice or order-in-original.

Ratio decidendi

No bar of Cenvat credit on supplementary invoices in case of transfer from conversion agent: The CESTAT Kolkata has held that the bar from availing Cenvat credit on the supplementary invoice is only when the goods are sold to the recipient who has claimed the credit on the basis of such supplementary invoices, and that there was no criterion laid down in the Cenvat Credit Rules, 2004 that the transferring unit should be a sister unit or a related party in order to become eligible for availing credit. The Revenue department's case was that the assessee and the scrap conversion

agents were neither related nor sister unit and there was no stock transfer amongst the aforesaid parties, and hence the case law which pertained to stock transfer and had allowed credit, were not applicable. The Tribunal noted that Revenue had not disputed that the converted aluminium ingot was not sold by the conversion agent to the assessee appellant and therefore the credit was not barred under Rule 9(1)(b) of the Cenvat Credit Rules, 2004. [*Hindalco Industries Ltd.* v. *Commissioner* – 2022 TIOL 911 CESTAT KOL]

Cenvat credit of hotel accommodation services when available: The CESTAT Delhi has held that input service of 'hotel accommodation' used by the employees of the assessee while on outstation duties for providing output service of 'Erection, Commissioning and Installation' service at customer's site, was eligible for Cenvat credit. Observing that for rendering such service at the site, the staff of the appellant was required to be necessarily accommodated at hotels situated nearby and thus without such accommodation the taxable output service cannot be rendered, the Tribunal held that the hotel accommodation service received by the assessee was an eligible input service under Rule 2(l) of the Cenvat Credit Rules, 2004. [*Bharat Heavy Electricals Ltd.* v. *Commissioner* – 2022 VIL 754 CESTAT DEL ST]

No service tax on foreclosure charges for insurance contracts – Tribunal holds such charges as not different from surrender charges: The CESTAT Bench at Mumbai has upheld the view that 'foreclosure charge' is not different from 'surrender charge' except that the former is the consequence of a positive decision to discontinue the insurance policy while the latter stems from non-payment of 'premium' that has the effect of terminating the policy issued by the assessee. Holding retention of foreclosure charges also as not liable to service tax, the Tribunal noted that the termination of contract of insurance, whether within the agreed upon terms and conditions or from a breach of conditions, closes the relationship between the provider and the recipient and such closure erases the provider-recipient framework which is essential for the levy of service tax under the Finance Act, 1994. The Tribunal however upheld the demand in respect of 'reinstatement charges'. It observed that the termination leading to 'foreclosure charge' is pre-empted by such payment upon issue of the mandatory notice prior to the erasure of the relationship, and restores the relationship to that of provider and recipient. [*ICICI Prudential Life Insurance Co. Ltd.* v. *Commissioner* – 2022 VIL 712 CESTAT MUM ST]

Premium charged on interest restructuring of loan is not liable to service tax: The CESTAT, New Delhi has held that premium charged on interest restructuring of loan is not leviable to service tax. It thus rejected the contention of the Revenue department that restructuring premium charged by the assessee-Bank would fall under 'lending' and would be subjected to levy of service tax under 'banking and other financial services'. The Tribunal was hence of the view that premium so charged by the Bank from its customers due to interest restructuring is nothing but net present value of loss of interest that will be caused to the assessee-Bank and thus would be covered as 'interest' which is outside the purview of said services. [*Commissioner* v. *Power Finance Corporation* – 2022 VIL 711 CESTAT DEL ST]

Incidental output from a machine cannot justify a different classification: The Supreme Court has affirmed the decision of CESTAT holding that the Modified Vapour Absorption Chillers (MVAC) is not a heat pump but would be covered under sub-heading 8418.10 of the Central Excise Tariff Act, 1985 as refrigerating equipment. It noted that the end use of MVAC

was to produce chilled water and that the use of heat as one of the sources in the air conditioning system would not take away its primary function, which was to cool and not heat water. The Court observed that the additional heating capability of the machine raised a peculiar dilemma but, one can be guided by the market parlance test which showed that the machine was perceived and purchased only as a cooling device. [*Thermax Ltd.* v. *Commissioner* – Judgement dated 13 October 2022 in Civil Appeal Nos. 6048-6050 of 2009, Supreme Court]

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