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Evolving EV ecosystem in India

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Background

The switch from internal combustion engine ('**ICE**') vehicles to electric vehicles ('**EV**') in global market is primarily driven by the global climate agenda as detailed in the Paris Agreement under United Nations Framework Convention on Climate Change (UNFCCC)[1], to reduce carbon emissions for combating the alarming issue of global warming.

Right from the year 2012, the Indian Government has been taking continuous steps to develop and promote EV ecosystem in the country, witnesseth from National Electric Mobility Mission Plan ('**NEMP**') to introduction of Faster Adoption and Manufacturing of EVs scheme ('**FAME**') on the consumer side and Production-linked Incentive Scheme ('**PLI**') for Advanced Chemistry Cell ('**ACC**') as well as for Auto and Automotive Components manufacturers on the supplier side.

India being one of the world's largest automobile market, has always been a market of interest for multinational automobiles companies to launch their EVs, thereby benefitting out of the market opportunities presented by this segment. The Government is looking up to these companies to set up manufacturing/assembly units here, in order to promote Make in India initiative. However, regardless of the ambitious targets set by the government, the penetration of EVs in the Indian market continues to be at a nascent stage.

The Union Finance Minister while presenting the Finance Budget for the year 2022-2023 has made various announcements to edify the EV ecosystem in India and consequently some amendments have been introduced in notifications prescribing concessional rate of duty for import of EVs.

With this article, we have tried to highlight the changes in entries relating to EVs and their probable impact on the EV ecosystem in India.

Applicable rate of basic customs duty on EVs

Until the year of 2015, the Government of India levied uniform rate of basic customs duty on ICE vehicles and EVs imported into India. *Vide* Notification No. 10/2015-Cus dated 1 March 2015, an entry at S. No. 436B was introduced in the Notification No. 12/2012-Cus., dated 17 March 2012 to prescribe a concessional rate of basic customs duty ('**BCD**') for 'EVs for transport of ten or more persons'. Thereafter, *vide* Notification No. 3/2019-Cus., dated 29 January 2019 a separate entry for electric cars was introduced in Notification No. 50/2017-Cus., dated 30 June 2017 ('**Exemption Notification**'). This entry is substituted with a new entry *vide* Notification No. 2/2022-Cus., dated 2 February 2022. The changes carried out in the substituted entry in Exemption Notification dated 30 June 2017 *vis-à-vis* the earlier entry are discussed hereunder:

[1] Paris Agreement is a legally binding international treaty on climate change which was adopted by 196 parties (including India) at the 21st Conference of Parties in Paris, on December 12, 2015, and was enforced on November 4, 2016.

S. No.	HSN	Particulars	Rate
526A	8703	Electrically operated vehicles ~~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~~, if imported, - (1) incomplete or unfinished, as a Knocked Down kit containing all the necessary components, parts or sub-assemblies, for assembling a complete vehicle, including battery pack, motor, motor controller, charger, power control unit, energy monitor, contactor, brake system, electric compressor, whether or not individually pre-assembled, with, -	
		(a) ~~disassembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake system, Electric Compressor~~ none of the above components, parts or sub-assemblies inter-connected with each other and not mounted on chassis;	15%
		(b) ~~pre-assembled Battery Pack, Motor, Motor Controller, Charger, Power Control Unit, Energy Monitor Contractor, Brake System, Electric compressor~~ any of the above components, parts or sub-assemblies inter-connected with each other but not mounted on a chassis ~~or a body assembly.~~	30%
		(2) In ~~any other~~ a form other than (1) above, -	
		(a) with CIF value more than US$ 40,000	100%
		(b) other than (a) above ***Explanation***. – For the removal of doubts, the exemption contained in items (1)(a) and (1)(b) of this entry shall be available, even if one or more of the components, parts or sub-assemblies required for assembling a complete vehicle are not imported in the kit, provided that the kit as presented, is classifiable under the heading 8703 of the Customs Tariff Act, 1975 as per the general rules of interpretation.	60%

'Incomplete or unfinished':

The substituted entry uses the phrase *'incomplete and unfinished'* in clause (1) of the entry. Concerns have been raised as to whether this is an additional condition to be satisfied for import of goods at concessional rate of duty 15%/30%.

This phrase 'incomplete or unfinished' while read with the newly inserted explanation which prescribes that even if one or more of the components, parts or sub-assemblies required for assembling a complete vehicle are not imported in the kit, makes it clear that the benefit of concessional rate of duty would be available, provided the kit remains classifiable under CTH 87.03.

The phrase *'incomplete and unfinished'* is also used in the HSN Explanatory Notes in context of classification of vehicles under Chapter 87 even if the same is not fitted with certain parts. However, it is not clear if the concessional rate of duty can be availed even if the components, parts or sub-assemblies as presented for import are complete and finished in all respect.

'Knocked down kit':

Entry 526A as introduced in the year 2019 uses the phrase 'knocked down kit', while the Entry 526 for import of ICE vehicles uses the phrase 'completely knocked down (CKD) kit'. The Notification however does not define either of the terms.

In order to understand scope of 'CKD Kit' reference can be made to the explanation at S. No. 344 of Notification No. 21/2002-Cus., dated 1 March 2002 (superseded/rescinded by Notification No. 12/2012-Cus., dated 17 March 2012) which defined the term CKD unit[2] of a vehicle to mean a unit having all necessary components, parts or sub-assemblies for assembling a complete vehicle but excluded units containing pre-assembled or pre-installed engine, gear box or transmission mechanism. Therefore, it can be understood that a CKD kit must have all the necessary components, parts or sub-assemblies required for assembling a complete vehicle.

Whereas the newly inserted explanation in S. No. 526A of Exemption Notification allows an importer of EV in 'knocked down kit' to avail concessional rate of duty even if one or more of the components, parts or sub-assemblies required for assembling a complete vehicle are not imported in the knocked down kit, but such kit must be classifiable under CTH 8703 as per the General Rules of Interpretation. However, no such explanation has been in inserted at S. No. 526 for ICE vehicles imported in 'CKD kit'. Thus, a clarification on the scope and essentials of 'semi-knocked down kit' and 'completely knocked down kit' would bring certainty in the minds of importers.

'Individually pre-assembled':

The condition of different levels of 'pre-assembly' of specified components of kit as required under clause 1(a) and 1(b) of earlier entry, has now been relaxed and incorporated in Clause (1) of the substituted entry, providing that the components contained in an EV kit, may or may not be individually pre-assembled at the time of import of kit.

Whereas as per the earlier entry, if the said components were disassembled but not mounted on a chassis, the benefit of concessional rate of duty under clause 1(a) @ 15% was allowed and if the said same were pre-assembled then the Kit was subject to duty @ 30% under clause 1(b).

At this juncture, it is necessary to understand the meaning phrase 'individually pre-assembled' which presently has not been defined in the Exemption Notification. It can be said that unlike earlier entry, assembly of parts is not the criteria for deciding on the applicable rate of duty. However, the significance of term 'individually' being inserted before 'pre-assembled' could create confusion hence, a clarification in this regard would be of great help for the industry.

[2] "Explanation.- For the purposes of this exemption, " Completely Knocked Down" unit means a unit having all the necessary components, parts or sub-assemblies for assembling a complete vehicle but does not include,-

(a) a unit containing a pre-assembled engine or gearbox or transmission mechanism; or

(b) a body assembly of a vehicle on which any of the component or sub-assembly viz. engine or gearbox or transmission mechanism is installed"

'Inter-connected with each other'

The clause (1)(a) of substituted entry at 526A, requires that none of the components, parts or sub-assemblies contained in a kit shall be inter-connected with each other and mounted on chassis for qualifying under 15% rate of BCD. The phrase 'inter-connected with each other' used in aforesaid clause plays an important role in deciding the applicable rate of duty on import of EVs; however, its meaning has not been provided in the Exemption Notification.

The word interconnection has been commonly used in context of the components, parts as well as sub-assemblies. Thus, it is not clear if interconnection of various sub-assemblies for import of a part or interconnection of various parts for import of a component would be eligible for 15% rate of BCD. The industry is eagerly looking forward to getting more clarity regarding levels of integration allowed under clause 1(a) and 1(b).

Explanation

An explanation has been added to the substituted entry at S. No. 526A stating that the benefit of concessional rate shall be available even if one or more parts required for assembly of an EV are not imported in the Kit, however the kit as presented remains classifiable under CTH 87.03 as per GIR 2(a). In terms of TRU letter dated dated 01.02.2022, the said explanation has been added to provide that for an EV kit to be eligible for duty benefits: -

a) Each individual component in the kit need not be in a disassembled form.

b) Even if some components are missing in the EV kit, the benefit would still be available provided that the kit as presented has the essential character of an EV.

The insertion of said explanation raises a fresh need to define which parts, components or sub-assemblies contained in an EV kit provides 'essential characteristics' to it as the Exemption Notification is silent on it.

Epilogue

The TRU letter in D.O. F. No. 334/01/2022-TRU dated 1 February 2022 has clarified that the changes in the Exemption Notification for goods under Chapter 87 have been made to remove the doubts that have arisen about the scope of the entries and that the changes are merely clarificatory in nature. Though, there is no change in the rate of duty, the changes carried out in the description in context of the form and manner in which the goods are to be imported is likely to cause muddle among the industry and the field formations. The industry is therefore expecting clarification on this front to arrest any possible litigation or dispute in the future.

The changes in the entry in the Exemption Notification relating to import of EVs are carried out to encourage companies to set-up their manufacturing plants in India. This intent, coupled with Government's commitment towards *Clean & Sustainable Mobility Programme* and introduction of *Battery Swapping Policy* in alternative for charging stations are clear indicators of our vision to evolve an efficient EV Ecosystem. Thus, it would be interesting to witness how the EV Ecosystem unfolds and how efficient the fuelling by Union Budget, 2022 proves to be.

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Goods and Services Tax (GST)

Ratio decidendi

No presumption of tax evasion on expiry of e-way bill due to reasons beyond control: In a case involving expiry of e-way bill a day earlier and where the goods could not be taken to the destination within time due to reasons beyond the control of the assessee, the Supreme Court has upheld the decision of the High Court which had stated that no presumption could be drawn of an intention to evade tax. Noticing that there was traffic blockage due to an agitation, the Apex Court held that the State alone remains responsible for not providing smooth passage of traffic. The Apex Court also enhanced the costs imposed by the High Court on Deputy State Tax Officer who after detaining the goods kept them at his relative's house for 16 days. [*Assistant Commissioner* v. *Satyam Shivam Papers Pvt. Limited* – 2022 VIL 06 SC]

No penalty under Section 73 when excess credit transitioned but reversed after SCN before utilisation: The Madras High Court has held that though under Sections 73(1) and 74(1) of the Central Goods and Services Tax Act, 2017, proceedings can be initiated for mere wrong availing of Input Tax Credit followed by imposition of interest and penalty either under Section 73 or under Section 74, they stand attracted only where such credit was not only availed but also utilised for discharging the tax liability. The petitioner had mistakenly taken excess transition credit in TRAN-1 but, had reversed it after receipt of show cause notice. The High Court in this regard distinguished the Supreme Court decision in the case of *Ind-Swift Laboratories Ltd.* The Court also noted that the show cause notice did not invoke the ingredients to justify the invocation of Section 74. According to the Court, the proper method would have been to levy penalty under Section 122 of TNGST Act, 2017. [*Aathi Hotel* v. *Assistant Commissioner* – 2022 VIL 72 MAD]

Blocking of electronic credit ledger does not amount to provisional attachment of property – Post decisional hearing to be granted and reasons to be mandatorily recorded in writing: The Bombay High Court has held that blocking of Electronic Credit Ledger (ECL) under Rule 86-A of the Central Goods and Services Tax Rules, 2017 is not provisional attachment of property under Section 83 of the Central Goods and Services Act, 2017. The Court was of the view that the embargo under Rule 86-A, placed upon utilisation of the amount of credit or refund of the unutilised amount of credit, is not akin to seizure of the credit amount for consequent appropriation for realisation of tax dues as would happen in the case of attachment of property. Further listing our various other differences, the Court observed that power under Rule 86-A is quite distinct from the power under Section 83. Also, noting that all the requirements of Rule 86-A would have to be fully complied with before the power thereunder is exercised, the Court noted that the power must be exercised fairly and reasonably by following the principles of natural justice. It stated that while a post decisional or remedial hearing must be granted to the person affected by blocking of his ECL, the word, 'may' used before the words, 'for the reasons recorded in writing' signifies a mandatory duty of the competent authority to record reasons in writing. [*Dee Vee Projects Ltd.* v. *Government of Maharashtra* – 2022 TIOL 238 HC MUM GST]

Electronic credit ledger cannot be blocked when credit balance is nil – Insertion of negative balance by proper office also not correct: The Gujarat High Court has held that blocking of electronic credit ledger under Rule 86-A of the CGST Rules, when no input tax credit was available in the ledger, and insertion of negative balance in the ledger by the Revenue authorities is without jurisdiction and illegal. The Court was of the view that in case where credit of input tax is not available in the electronic credit ledger or such credit has already been utilised, the powers conferred under Rule 86-A cannot be invoked. Holding that the proper officer is not entitled to make debit entries in the electronic credit ledger of the registered person, the Court observed that otherwise it would tantamount to permanent recovery of the input tax credit which is beyond the plain language and underlined intent of Rule 86-A. [*Samay Alloys India Pvt. Ltd.* v. *State of Gujarat* – 2022 VIL 125 GUJ]

Proceedings initiated by Revenue department under GST also attract embargo contained in Section 14 of IBC: Petition was sought to quash the notice issued under Section 65 of the KGST and CGST Act read with Rule 101(4) of CGST Rules during the moratorium declared under Section 14 of Insolvency and Bankruptcy Code, 2016. The Karnataka High Court after relying on the various decisions pronounced by Apex court, Delhi High Court and Madras High Court under Income Tax Act and Negotiable Instruments Act stated that plain reading of Section 14 of the IBC clearly indicates that there is a total embargo to initiate and continue proceedings against the petitioner before any authority until the lifting of moratorium and completion of the corporate insolvency resolution process. Hence, it was held that the instant proceedings initiated pursuant to the impugned notices should be kept in abeyance till conclusion of the proceedings before NCLT and appeal(s) to be filed. [*Associate Décor Limited* v. *Deputy Commissioner of Commercial Taxes* – 2022 VIL 66 KAR]

Confiscation – A person cannot be held liable for contravention of provision of law by another person in supply chain: The Punjab and Haryana High Court has held that a person can be attributed intent to evade payment of tax only if the contravention of the provisions of the Act or rules thereunder has some direct nexus with his action. The Court was of the view that any person cannot be held liable under Section 130 of the CGST Act, 2017, providing for confiscation, for contravention of provision of law by other person in the supply chain. It also observed that wrongful claim of input tax credit does not necessarily involve intent to evade payment of tax and is not one of the conditions enumerated under Section 130(1) that could entail confiscation of goods. The issue in the dispute was the validity of confiscation proceedings initiated under Section 130 when one of the predecessors in the supply chain had contravened the provisions of Section 132(1)(b) of CGST Act by not paying tax on its outward supplies resulting in successive dealers guilty of availing input tax credit wrongfully. [*Shiv Enterprises* v. *State of Punjab* – 2022 TIOL 169 HC P&H GST]

Power to issue summons – Section 70 of CGST Act constitutionally valid: In this case the summon was issued without indicating the nature of enquiry being conducted against the petitioner and giving unreasonably short time of merely 12 hrs to appear in city different from where the petitioner resides. The Petitioner challenged the vires of Section 70 of CGST Act under which summons were issued and contended that it violates separation of powers as the officer issuing summons himself is interested in the case. The Court observed that the provision while empowering the proper officer to summon a person to give evidence or to produce

documents, controls such exercise of powers by providing that the summons may be issued where a proper officer considers necessary that such person should give evidence or produce documents. It stated that the power of the proper officer under Section 70 of CGST Act is not unguided and must be exercised as per the procedure prescribed under the Civil Procedure Code. The Court declined to quash the summons stating that the powers under Section 70 are not beyond legislative competence or opposed to fundamental rights or any provisions of the Constitution of India. On the issue of unreasonably short time given, the Court stated that if it is impossible for the noticee to comply with, it is always open for the aggrieved person to seek extension from the authority or to take shelter of the court proceedings. [*S.K. Metal* v. *Asst. Commissioner* – 2022 VIL 98 RAJ]

Renting of residential premises as hostel for students and working professionals – Exemption available: The Karnataka High Court has held that a residential dwelling being rented as the hostel to the students and working women for residence would fall within the purview of residential dwelling and hence the assessee would be eligible to claim the benefit of exemption under Entry 13 of Notification No. 9/2017-IGST (Rate). The assessee-petitioner had leased out a residential property to lessee and the lessee had further leased it out as hostel for providing long-term accommodation to students and working professionals. The Authority for Advance Ruling and the Appellate Authority had given negative rulings. The High Court stated that to ascertain whether the service would get covered under the exemption notification it has to be seen firstly what was being rented and secondly the purpose for which the residence was used for. It also noted that hostel of students and working women was classified in residential category in the Revised Master Plan 2015 of Bangalore city. The Court also relied on the Supreme Court case of *Kishore Chandra Singh* v. *Babu Ganesh Prasad Bhagat* [AIR 1954 SC 316] wherein it was held that expression 'residence' only connotes that a person eats, drinks and sleeps at that place and it is not necessary that he should own it. CBIC Educational Guide and many dictionaries were also relied upon for the meaning of 'residential dwelling'. [*Taghar Vasudeva Ambrish* v. *Appellate Authority for Advance Ruling* – 2022 VIL 110 KAR]

Membership fees, annual subscription and annual games fee collected by club from members is liable to GST: The Maharashtra AAR has held that membership fees, annual subscription and annual games fee collected by a club from members is liable to GST. The authority observed that *vide* Finance Act, 2021 a new clause (aa) was introduced under Section 7(1) of the CGST Act, 2017 w.e.f. 1 July 2017 according to which any activities or transactions by a person other than individuals, to their members will be treated as 'supply'. Relying on the aforesaid amendment, it was held that the applicant club and its members are distinct persons and the fees/ contributions received by the applicant, from its members are nothing but consideration received for supply of goods/services as a separate entity. Supreme Court decision in *Calcutta Club* [2019 19 SCC 107], propounding principle of mutuality, was distinguished considering the amendment. [In RE: *Poona Club Ltd*. – 2022 VIL 24 AAR]

Sale of developed plots along with common facilities is liable to GST: The Gujarat Appellate AAR has held that sale of developed plots by applicant along with the common facilities being developed/being got developed by the applicant before sale of plot, as per the requirement of approval by the respective authority (Zilla Panchayat), will be covered under the scope of 'construction of civil structure or a part thereof,

intended for sale to a buyer' under clause (b) of paragraph 5 of Schedule-II read with Section 7(1A) of the CGST Act, 2017. The sale of developed land will not fall under Entry No.5 of Schedule-III read with Section 7(2)(a) of the CGST Act, 2017. The Authority noted that no evidence was submitted by the applicant to prove that the price charged for plots sold to the individual buyers does not include the price of the common facilities which the individual buyers are entitled to enjoy or use. By referring to the definition of 'consideration' and Section 15(2)(b) of the CGST Act, it also noted that the amount charged from the individual buyers includes the amount spent towards the construction of common facilities as the same were liable to be borne by applicant as mandatory condition under approved plan. [In RE: *Shree Dipesh Anil Kumar Naik* – 2022 VIL 08 AAAR]

Blocked credit – ITC when not available on agreeing to give away leasehold rights: The Tamil Nadu Appellate AAR has denied the appellant-assessee credit of GST charged by the lessor for 'agreeing to give away the leasehold rights held by it' in the favour of the applicant. It observed that credit in respect of service supplied by the lessor, the cost of which was capitalized by the applicant, was restricted under Section 17(5)(d) of the CGST Act, 2017 as the same was received for construction of manufacturing plant which was an immovable property. The Authority observed that the air separation plant was not merely 'plant' or 'machinery'. Supreme Court decision in *Duncan Industries* v. *State of UP* [1999-VIL-30-SC] was relied upon to hold that air separation unit was an immovable property. The AAAR was of the view that even if the air separation unit is considered as 'plant and machinery', the credit on the services received towards the leasehold of the 'land' was restricted by Section 17(5)(d) read with the Explanation for 'construction' and 'plant and machinery'. [In RE: *Inox Air Products Pvt. Ltd*. – 2022 VIL 07 AAAR]

Inspection services for foreign clients in respect of equipment in India is not export of service: The Telangana AAR has held that 'inspection and expediting services' to foreign clients during the manufacturing and packing of equipment/materials in India, which are intended to be exported, against consideration receivable in foreign currency, is liable to GST. The service was held not a export of services. Reliance in this regard was placed on Section 13(3)(a) of the IGST Act, 2017, which provides that place of supply in respect of goods which are required to be made physically available by the recipient of services to the supplier of services in order to provide the services shall be the location where the services are actually performed. [In RE: *International Inspection Services Private Limited* – 2022 VIL 09 AAR]

(i) No GST payable on recoveries from employees for provision of canteen and bus transportation facilities (ii) No GST payable on notice pay recoveries from employees not serving full notice period: The Maharashtra AAR has held that GST would not be payable on recoveries made from the employees towards providing canteen facility and bus transportation facility. The AAR also held that GST would not be payable on the notice pay recoveries made from the employees on account of not serving the full notice period.

In respect of canteen and transportation facility, the AAR was of the view that the transaction was not in the course or furtherance of business. It was hence held that canteen and transportation services provided by the applicant to its employees cannot be considered as a 'supply' and therefore the applicant was not liable to pay GST on the recoveries made from the employees towards providing such facilities. In respect of

notice period recovery, referring to Entry 1 of Schedule III read with Section 7(2)(a) of the CGST Act, the Authority observed that services by an employee to the employer in the course of or in relation to his employment was out of the purview of GST. The AAR held that compensation which accrued to the employer was in relation to the services provided by the employee and therefore the same was out of purview of GST. This view was supported by decision of Madras High Court in the case of *GE T&D India Ltd v. Deputy Comm. of Central Excise, LTU, Chennai* [2020-VIL-39-MAD-ST] and in case of *Bharat Oman Refineries Limited* [2021-VIL-73-AAAR]. [In RE: *Emcure Pharmaceuticals Limited* – 2022 TIOL 10 AAR GST]

GST/VAT developments outside India

Turkey – 1% VAT applicable on foodstuff in general with effect from 14 February 2022: Turkey has expanded the 1% VAT rate for all food supplies in general thus removing the wholesale-retail distinction. It may be noted that prior to 14 February 2022, the 1% rate was limited only to wholesale supplies. As per reports, the 1% reduced rate does not apply, however, for food products subject to special consumption tax such as soda, fruit juice, and others. Further, the 1% reduced rate does not apply to restaurant services, bakery services, etc.

EU VAT – Opening of individual files setting out clinical history, exempt as medical care: The Court of Justice of the European Union has held that the payments made in return for the services of opening, for each user, an individual file setting out the clinical history entitling the user to purchase traditional thermal cure treatments, be included within the concept of closely related activities in Article 132(1)(b) [hospital or medical treatment services] of the EU VAT Directive. The Court in *Autoridade Tributaria e Aduaneira* v. *Termas Sulfurosas de Alcafache SA* [Judgement dated 13 January 2022] was hence of the view that activity is liable to come within exemption from VAT as an 'activity closely related' to medical care. It held that it was for the referring court to consider that the activity is indeed an essential step in the process of supplying medical care in order to achieve the therapeutic objectives.

Customs

Notifications and Circulars

Scrip based FTP Schemes – Last date for submitting applications extended to 28 February 2022: The last date of submitting applications under MEIS, SEIS, ROSCTL, ROSL and 2% additional *ad hoc* incentive (under Para 3.25 of the FTP) which was earlier notified to be 31 January 2022 has been extended till 28 February 2022. DGFT Notification No. 53/2015-20 dated 1 February 2022 amends Para 3.13A of the FTP 2015-20 for this purpose.

New ITC(HS) 2022 for Import Policy notified – Import of drones in CBU/CKD/SKD form prohibited with certain exceptions: ITC(HS), 2022- Schedule-1(Import Policy) has been notified by DGFT Notification No. 54/2015-20, dated 9 February 2022. This new edition is in sync with the changes made by the Finance Act, 2021 in the Customs Tariff Act, 1975 with effect from 1 January 2022. Further, Import Policy of drones imported in CBU/CKD/SKD form under HS Code 8806 is now prohibited with exceptions provided for R&D, defence and security purposes. It may be noted that import of drone components is however 'free'.

Human hair – Exports restricted with effect from 25 January 2022: The Export Policy of human hair, unworked, whether or not washed or scoured, waste of human hair or any other form of raw human hair falling under ITC (HS) Code 0501, has been put under restricted category with effect from 25 January 2022. DGFT Notification No. 51/2015-20, dated 25 January 2022 has amended Chapter 05 of Schedule 2 of the ITC (HS).

Syringes – Export restrictions removed with effect from 31 January 2022: The export policy of all kinds of syringes falling under ITC(HS) Code 9018 31 00 or any other HS code has been made 'free' with immediate effect. DGFT Notification No. 52/2015-20 dated 31 January 2022 in this regard amends Notification No. 38/2015-2020 dated 14 October 2021 pertaining to Chapter 90 of Schedule 2 of ITC (HS) Export Policy, 2018.

Calcined Pet Coke for aluminium industry and Raw Pet Coke for CPC manufacturing industry – Procedure for allocation of quota notified: The Supreme Court put a cap on import of Calcined Pet Coke for aluminium industry and Raw Pet Coke for CPC manufacturing at 0.5 million MT per annum and 1.4 million MT per annum respectively. The procedure for import of these products is now notified. Complete online application with requisite documents must be filed by 28 February 2022. Application for import license is to be made in accordance with procedure laid under Trade Notice No. 49 dated 15 March 2019. Such imports will be subject to guidelines issued by Ministry of Environment, Forest and Climate Change, OM No Q-18011/54/2018-CPA. DGFT Public Notice No. 48/2015-20 dated 10 February 2022 has been issued for the purpose.

Ratio decidendi

Refund – Expression of protest itself is payment under protest: The CESTAT Ahmedabad has held that the expression of protest itself is payment under protest, even if letter of protest was not filed. The Tribunal observed that the main reason for holding the refund as time bar was that the appellant had not filed a specific letter of protest for payment of duty. Accordingly, the appeal was allowed by way of remand to ascertain whether the appellant had protested the payment of duty on demand of duty by the department at any point of time and on that basis the issue is to be decided a fresh. The appellant had submitted that even though the letter of protest was not given but since the duty was paid during investigation and no show cause notice was issued in respect of such duty payment, the duty so paid should be deemed to be under protest. [*Nayara Energy Ltd.* v. *Commissioner* – 2022 TIOL 12 CESTAT AHM]

Loading of goods on board without LEO – Failure not attributable to exporter: Section 40 of Customs Act, 1962 provides that it is the responsibility of the person-in-charge of conveyance to not permit loading of goods without 'let export order'. Taking note of the aforementioned provision, the CESTAT Mumbai has held that failure to comply with the aforementioned provision is attributable to

person-in-charge of conveyance and not the exporter. It also noted that the LEO was granted later and with that, the process of export which was the responsibility of the exporter stood completed even if belatedly. The goods were held liable to confiscation. Redemption fine was however held to be without authority of law as goods were not available for confiscation. [*UM Cables Ltd*. v. *Commissioner* – 2022 (2) TMI 553-CESTAT Mumbai]

SFIS – DGFT Policy Circular No. 27 of 2007 is clarificatory but not retrospective in nature: The Bombay High Court has held that DGFT Policy Circular No. 25 of 2007 dated 1 January 2008 though is clarificatory in nature, it does not have retrospective operation. According to the Court, the Circular does not withdraw a benefit that was granted to the assessee earlier on its understanding and working of the terms of the Served From Indian Scheme (SFIS). Noting the phrase 'the following principles be applied while finalizing the claims', in the Circular, the Court held that though the DGFT by issuing said Circular sought to clarify the terms of the SFIS but, such Circular was intended to be implemented to decide claims for grant of benefits under the SFIS which were not finalized as on date the said Circular. The Court observed that it was never the intention of the DGFT to permit an exercise of reopening settled and/or closed cases. [*Essar Shipping Ltd*. v. *Union of India* – 2022 TIOL 225 HC MUM CUS]

Videography of interrogation permissible at the cost of summoned person: Taking note of the Supreme Court decision in *Om Prakash* v. *UOI* [2011 (9) TMI 65-SC] and the view taken by the Bombay High Court in *Rajuram Purohit* v. *UOI* [2018 (1) TMI 1528 Bom HC], the Bombay High Court has held that the statement can be recorded in the terms of Section 108 of Customs Act, 1962 in the presence of the advocates at visible but not audible distance. Additionally, the Court also permitted videography, to record such interrogation, at the cost of the summoned person. The High Court also directed that the interrogation and the recording of statement of the petitioners to be done during the office hours. [*Ronak Kumar, Jasraj Jain & Chetan Kr* v. *Manish Roy Senior Intelligence Officer, DRI* – 2022 (2) TMI 470- Bom HC]

Valuation – Commercially interchangeable goods must be of the same commercial level and substantially same quantity: Rule 5 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 requires that the comparable imports must be at the same commercial level and in substantially the same quantity as the goods being valued to determine value of imported goods. However, none of the two conditions were satisfied in the case under consideration. Thus, the Tribunal held that the declared value of the imported goods cannot be rejected under Rule 12 of said Rules. [*National Steel & Agro Pvt. Ltd.* v. *Commissioner* – 2022 VIL 121 CESTAT MUM CU]

Illegal bringing of vessel in India by the crew, without knowledge of owner, is not import: The Kerala High Court has held that abduction and bringing into India of a foreign vessel by its crew illegally, without the knowledge of its owner, cannot amount to import or be liable to customs duty, unless the same is used for consumption in India. The High Court was of the view that terming the crossing of the territorial waters of India at the behest of the Coast Guard, who acted pursuant to a distress call, as an import into India, will indubitably lead to an absurdity. It was hence held that the act of bringing into the territorial waters of the country, not being a voluntary action on the part of the owner of the vessel, confiscating the vessel was highly arbitrary and contrary to law. [*Eisa Nooh Zetnan Zetan* v. *Assistant Commissioner* – 2022 TIOL 120 HC KERALA CUS]

Central Excise, Service Tax and VAT

Ratio decidendi

No service tax on notice pay received/recovered from employees for premature resignation: The CESTAT New Delhi has rejected the contention of the Revenue department that the amounts received or recovered by the employer from its employees for resigning from the service without giving the requisite notice is liable to service tax as a Declared Service under Section 66E(e) of the Finance Act, 1994. Section 66E(e) covered 'agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act'. Observing that 'consideration' is the result of successful performance of the contract while 'compensation' is paid by the party frustrating the contract to the other, the Tribunal held that the amount paid was a compensation and not consideration. Department's argument that liquidated damages were built in the contract and hence there was an agreement to tolerate a situation, was also rejected by the Tribunal. The Tribunal observed that each party to a contract desires the other to perform his part of the deal and not that the other party does not perform so that it can get a compensation. Madras High Court decision in the case of *GE T&D India Ltd*. was relied upon. [*Rajasthan Rajya Vidhyut Prasaran Nigam Ltd.* v. *Commissioner* – 2022 TIOL 134 CESTAT DEL]

Expenses incurred by head office for overseas branch offices is not for any service received from branch offices: The Bengaluru branch of the CESTAT has reiterated that the amounts incurred by the head office towards the salaries etc. of the employees working in their branches can by no stretch of imagination be equated to any service rendered to them by the respective branches situated abroad. The Tribunal in this regard observed that the payments made by the assessee were none other than the recurring expenses like salary, travelling allowance, rent, telephone charge etc. Relying on precedents, it observed that the demand on account of reimbursement of expenses to their employees working in the overseas branches does not constitute any remuneration in lieu of a service received by the assessee. [*Cades Digitech Pvt. Ltd.* v. *Commissioner* – 2022 VIL 54 CESTAT BLR ST]

Cenvat credit on medical insurance policy for employees opting for VRS – Issue of interpretation of Cenvat Rule 2(l) referred to Larger Bench: In a case involving eligibility to cenvat credit of the service tax paid by assessee on the insurance premium paid by them on the medical insurance policy in respect of the employees who opted for Voluntary Retirement Scheme announced by them, the CESTAT Mumbai has referred to the Larger Bench the issue of interpretation of Rule 2(l) of the Cenvat Credit Rules, 2004 for the period prior to amendments in 2011. The Tribunal also referred the question on applicability of CAS-4 for determination of eligibility to cenvat credit in cases other than where the goods are captively consumed and valued in terms of Rule 4 of Central Excise Rules, 2000. [*Reliance Industries Ltd.* v. *Commissioner* – 2022 VIL 55 CESTAT MUM CE]

Refund of duty at time of debonding, when goods finally exported by DTA unit: In a case where the 100% EOU on conversion to a DTA unit had paid central excise duty at the time of debonding, the Rajasthan High Court has allowed the refund of said duty when the goods were finally exported though by the DTA unit. Observing that the petitioner as a DTA unit

exported the goods and claimed refund of excise duty previously paid in its capacity as an EOU, the Court noted that there was no procedure in law to deprive the petitioner from such benefit. [*Ercon Composites* v. *Union of India* – 2022 VIL 68 RAJ CE]

Interest on loans, collected and accounted in any manner, is not liable to service tax: The CESTAT Bengaluru has opined that only because there is change in the nomenclature or in the treatment of the account, certain receipts would not cease to be interest. Setting aside the service tax liability on incidental expenses collected by the assessee from clients who took gold loans, the Tribunal held that it would not be legally tenable for the Revenue to say that portion of the interest shown and collected as incidental charges would cease to be interest. Reliance in this regard was also placed on Section 65B(30) of the Finance Act, 1994 defining 'interest'. Observing that fixation of rate of interest was not the work of service tax officers, the Tribunal rejected the argument that interest charged over and above 18% was a consideration towards the service and therefore, exigible to service tax. [*Kosamattam Finance (P) Limited* v. *Commissioner* – 2022 VIL 97 CESTAT BLR ST]

'Premium' or 'salami' whether can be subjected to service tax under 'renting of immovable property service' – Issue referred to Larger Bench of CESTAT: The CESTAT New Delhi has referred to the Larger Bench the question as to whether 'premium' or 'salami' can be subjected to levy of service tax under 'renting of immovable property' defined under Section 65(90a) of the Finance Act. The Tribunal noted that conflicting views were expressed by the Division Benches of the Tribunal in the cases of *Greater Noida Industrial Development Authority* [2015 (38) S.T.R. 1062 (Tri. – Del)] and *Kagal Nagar Parishad* [2018 (5) TMI 1363 – Cestat Mumbai] on the one hand and *RIICO Ltd.* [2018 (10) G.S.T.L. 92 (Tri. – Del.)], *City and Industrial Development Corporation of Maharashtra Ltd.* [2019 (8) TMI 386 – CESTAT Mumbai] and *Starcity Entertainment* [2019 (12) TMI 645 – CESTAT Mumbai] on the other hand. [*Rajasthan State Industrial Development & Investment Corporation Ltd.* v. *Commissioner* – Interim Order No. 02/2022, dated 4 February 2022, CESTAT New Delhi]

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