

Renewable Corner

August 26, 2022

THE NEW RENEWABLE ENERGY CERTIFICATES MECHANISM IN INDIA: A HIT OR MISS?

INTRODUCTION

On 9 May 2022, the Central Electricity Regulatory Commission ("**CERC**") issued the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022. ("**REC Regulations 2022**"). A draft of these regulations was issued in February 2022 for public comments; and after the process of stakeholder consultation, the final REC Regulations have now been released. REC Regulation repeals and supersedes the extant CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2010 ("**REC Regulations 2010**") which earlier governed the pan-India market-based Renewable Energy Certificates ("**RECs**") mechanism in India.

The REC Regulations 2022 were to come into effect from the date of their notification in the Official Gazette.

However, before they could be notified, the regulations were challenged before the Delhi High Court¹ and in terms of the order dated 05 June 2022, the Delhi High Court directed that the regulations shall be notified only after the CERC have considered the issues raised by the petitioners.

The REC Regulations 2022 are yet to be notified and are therefore not yet in force. In this Article, we analyse and comment upon the REC Regulations 2022 as proposed since it is probable that the same may not undergo wholesale changes prior to their notification.

BACKGROUND: WHAT ARE RENEWABLE ENERGY CERTIFICATES?

RECs, more commonly known as Green Tags or Renewable Energy Credits in the US and also known as Renewable Energy Guarantees of Origin (REGOs) in the UK, are policy instruments intended to promote renewable energy ("**RE**") generation and consumption. RECs are market-based instrument carrying a denomination of one megawatt-hour (MWh) of electricity generated from RE sources which are tradeable as green energy commodities in open market (power exchanges).

RECs are traded in two ways, *firstly*, voluntarily or over the counter, whereby the consumers i.e., organizations, industries or individuals purchase RECs in an endeavor towards sustainable development. RECs are also used by the corporations to improve their Environmental, Social and Governance ("**ESG**") scores as a tool to reduce their carbon footprint. *Secondly*, RECs are also bought against regulatory and/or compliance requirements, i.e., to facilitate certain obligated entities (such as distribution licensees, open access consumers, etc.) to offset their Renewable Purchase Obligations ("**RPO**") under the applicable laws to procure green energy from RE sources. In the event any obligated entity is unable to fulfill its RPO or falls short by a certain percentage (due to a mismatch in generation and procurement owing to the variable/infirm nature of RE), then they fulfil their RPO by purchasing RECs in lieu of RE procurement. In India, RECs are of two categories, solar RECs (issued for electricity generation from solar energy sources) and non-solar RECs (issued for electricity generation from other RE sources)².

ELIGIBILITY: WHO CAN ISSUE RECS?

Since RECs derive their value from 'generation' from RE source, as a sequitur, only the entities undertaking RE generation are eligible to issue RECs. However, under the REC Regulations 2022, only the following entities are eligible to issue RECs.

a. RE generating plants:³

REC Regulations provide that all RE generating plants are eligible to issue RECs provided they meet the following conditions:

- Either their tariff, for part or full capacity, has not been determined under section 62 or adopted under section 63 of the Electricity Act; or they do not sell electricity directly or through a trader to power exchange, for RPO compliance; and
- they have not availed waiver of concessional transmission charges; or waiver of concessional wheeling charges.

Therefore, any RE generating station selling power to the obligated entities including Distribution Companies/ Licensees ("**Discoms**") directly or through traders would not be eligible under the REC mechanism if such sale is being accounted for RPO compliance of the Discoms/obligated entity. Further, as substantiated in the Explanatory Memorandum of the draft REC Regulations 2022 RECs can be issued for the capacity of a generating station, or in part or full, as long as such capacity is not tied up for sale to an obligated entity for RPO

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compliance.⁴ The rationale is that since the RECs issued by these plants are already being used for the RPO compliance or for its green attributes, therefore, allowing such generation under REC mechanism would tantamount to double accounting of the green attributes of such generation.

It is pertinent to note that that the above provisions under the REC Regulations 2022 propose to tighten the eligibility conditions for the REC issuing generators. Earlier, REC Regulations 2010 only excluded (a) RE generating plants with preferential tariff (under Section 62) and (b) RE generating plants which were set up for RPO compliance and supplied electricity at the pooled power purchase cost, from selling the green attributes in the form of RECs. However, inclusion of the terms “*for part or full capacity*” and inclusion of RE generating plants with tariff adopted under Section 63 and provisions pertaining to seeking concessional benefits is likely to disqualify many existing and upcoming RE generating plants from being eligible to issue RECs.

The above provisions appear to be excessively restrictive towards the RE generators, and dramatically reduces the sources of production of RECs. Especially in the context of excluding power producers whose tariff is determined pursuant to sections 63, this seems like a particularly regressive step. It precludes the possibility of a power generator taking a potential REC market into consideration when bidding and thereby letting the market determine the best price for production of power.

b. Captive generating plants (CGPs):⁵

Per the REC Regulations 2022, RE based CGPs are also required to meet the conditions specified above, i.e., only the RE plants whose tariff has not been determined under section 62 or 63 of the Electricity Act, which do not sell electricity directly or through a trader to power exchange, for RPO compliance and which do not avail concessional benefits such as exemption from transmission and/or wheeling charges can issue RECs.

CGPs use the green energy produced by them for either self-consumption and thereby also meet their own RPO or for sale to third party. Pertinently, RECs can be issued to CGPs for both power generated for self-consumption and power injected into the grid. However, the REC Regulations 2022 provide that RECs issued to CGPs to the extent of self-consumption would not be allowed for sale whereas RECs issued in excess of its self-consumption would be available for sale. This has again been done with the rationale to avoid additional benefits to the entities already availing benefits i.e., the self-consumption by any captive or non-captive consumers from a CGP replaces, for such consumers, the otherwise expensive grid power as the captive generators produce and consume power generated by themselves and hence are adequately compensated for such self-consumption.⁶

These additional conditions have been introduced in REC Regulations 2022, whereas the earlier regime (REC Regulations 2010) only required that the CGPs should have self-consumption, be commissioned between 2010 and 2016 and be registered with the central agency. Therefore, this is another attempt to constrict the eligibility conditions for RE CGPs.

c. Discoms and Open Access Consumers:⁷

REC Regulations 2022 provide that Discoms or open access consumers are also eligible to issue RECs, however, only to the extent of RE power purchased in excess of / beyond their RPO obligation. This is a welcome introduction which will drive the Discoms to procure more renewable energy so that the same can be in turn sold in the open market for increased cash flows.

FRAMEWORK FOR REC MECHANISM

REC Regulations 2022 provide for a mechanism for the RECs. REC Regulations 2022 continues to retain the National Load Despatch Centre as the central nodal agency (“**NLDC/Central Agency**”) to govern the REC mechanism, as was the case earlier, whilst also conferring powers on CERC to further appoint any other agency it deems fit for this purpose.⁸ As per the REC Regulations 2022, the following process shall be followed:

a. Grant of accreditation for RECs:⁹

A detailed procedure of accreditation shall be notified by the NLDC/Central Agency within a period of 3 (three) months of notification of the REC Regulations 2022. Accreditation to (a) entities connected to intra-state transmission system shall be granted by a State Agency appointed by the respective State Electricity Regulatory Commission (“**SERC**”); and (b) entities connected to inter-state transmission system shall be granted by Regional Load Despatch Center (“**RLDC**”) of the region where such entity is located. Whilst the REC Regulations 2022 provide for a procedure for registration for the RE generators, it provides deemed accreditation to Discoms or open access consumers who satisfy the criteria for issuing REC as discussed above. An accreditation granted under these regulations can be revoked, after an enquiry, written notice and recording reasons for such revocation, if any conditions of such accreditation is breached by the eligible entity.

b. Grant of registration for RECs:¹⁰

Similar as above, a detailed procedure for grant of registration shall also be issued by the NLDC/Central Agency whereby all the entities granted accreditation or deemed accreditation shall be granted registration under the REC Regulations 2022. In the interest of continuity, all the entities having registration under the REC Regulations 2010 shall be deemed to have been registered under the current regulations. The validity of such registration shall be 25 years from the date of registration or deemed registration.¹¹ This validity has been introduced to harmonise the provisions for issuance of RECs with the useful life of an RE project and/or the standard term of a power purchase agreement, i.e., 25 years thereby permitting the RE generators to be able to issue throughout the tenure of their generation. In this regard, a welcome change under these regulations is that the eligibility criteria has been simplified by linking the same with the date of commissioning of the plant and date of registration under the REC scheme has been dispensed with.

Further, REC Regulations 2022 provide that the Registration granted under these regulations is likely to be revoked, after an enquiry, written notice and recording reasons for such revocation, if any conditions of such registration is breached by the eligible entity.

c. Issuance of RECs:¹²

An eligible entity, having procured accreditation and registration under the REC Regulations 2022 may apply for issuance of RECs to the NLDC/Central Agency as per the detailed procedure to be notified by the NLDC/Central Agency. The REC Regulations 2022 provide that an application for issuance of RECs shall be made within a period of 6 (six) months from the date of corresponding generation against which such RECs are requested to be issued.

The said procedure is, however, different for the Discoms or open access consumers, which shall make their application for issuance of RECs within a period of 3 (three) months from the end of financial year along with a certificate from the respective SERC certifying procurement of RE in excess of the RPO. This is so because RPO is accounted for annually and therefore, REC applications can only take place after such RPO accounting is completed.

Within a period of 15 (fifteen) days from the date of making such application, the said application shall be allowed or rejected by NLDC/Central Agency whilst recording the reasons for rejection.¹³ The validity period for the eligible entities for issuance of RECs shall be the validity of registration borne by such entities.¹⁴

d. Exchange and redemption of RECs:¹⁵

A record of all the RECs shall be maintained by the NLDC/Central Agency in the Registry of RECs, as existing and all the RECs shall be traded on the power exchanges notified by the CERC or through the power traders as stipulated by the NLDC/Central Agency in the detailed procedure to be issued by such agency. Currently, RECs are traded on two power exchange platforms viz. Indian Energy Exchange (IEX) and Power Exchange of India (PXIL).

The REC Regulations 2022 provide the RECs issued will remain valid until their redemption. It further provides that once traded on power exchange or through trader and used for RPO compliance, the RECs shall stand redeemed.¹⁶ Similarly, the RECs issued to captive generating plants for self-consumption are once used towards its RPO compliance, then the said RECs shall stand redeemed.¹⁷ The NLDC/Central Agency shall extinguish such RECs upon their redemption and update the records in the REC registry.

This is a welcome amendment as it simplifies the process and retains the validity of the RECs until sold, as against the prevailing requirement where the CERC had to extend the validity of RECs by issuing multiple orders and subsequent amendments to the REC Regulations 2010. Until recently, the validity of RECs was determined as 1095 (one thousand and ninety-five) days¹⁸ after the date of issuance, i.e., RECs shall automatically be redeemed whether sold or not after the abovementioned period.

DENOMINATION AND PRICING OF RECS

As mentioned above, one REC denotes 1 (one) MWh of power produced by RE sources and injected into the grid (including deemed injection in case of self-consumption by RE captive plants). The REC Regulations 2022 provide that the price of REC shall be discovered by the market forces on the power exchanges or mutually decided between the trader and generator, thereby doing away with the concept of a '*floor price*' and a '*forbearance price*' under the existing framework.

Traditionally, the price of RECs was determined by market demand and contained between the floor price (minimum price) and forbearance price (maximum or ceiling price) specified by the CERC. For example: the floor price, or the lowest selling price for which a REC can be sold in an open market would be INR 1,000 and the forbearance price or the highest price would be INR 1,500. The price of a REC would fluctuate between the two depending upon the market conditions and would not go below or above the stipulated price as fixed by the CERC. This framework was adopted keeping in view the need to guarantee a minimum return for RE generators against their investments as an alternative source of income and to provide a threshold level of revenue certainty to make their RE projects viable. Unfortunately, due to excess of RECs in the market and abysmally low RPO compliance by the obligated entities, the RECs have been trading at the floor price off late.

Since REC Regulations 2022 has dispensed with the concept of floor price and forbearance price altogether and has left the determination of price of RECs purely on market forces, hopefully this will lead to transparent price discovery and a more active and robust REC market. However, it will all depend on the implementation of the obligated entities fulfilling their RPOs. Pertinently, CERC has retained some powers to intervene in determination and pricing of RECs.

However the new Regulations have sparked dissent amongst RE generators. In this regard, Indian Wind Power Association ("*IWPA*") has filed a Writ Petition bearing No. 9152 of 2022 before the Delhi High Court ("*Writ Petition*") challenging the removal of floor and forbearance price.¹⁹

CERTIFICATE MULTIPLIER

With an intent to promote new technologies and to incentivise capital intensive RE projects, the REC Regulations 2022 introduce the concept of a '*Certificate Multiplier*' for new projects based on the tariff range of various RE technologies adopted by such projects. Certificate multiplier basically provides that in lieu of every one (1) MWh of electricity generated, RECs shall be issued in multiple of the assigned multiplier. For example, assuming that 100 MWh of energy is produced by a hydro generator and a multiplier of 1.5 is assigned to energy produced from hydro sources, then in lieu of such 100 MWh of energy, 150 RECs (100*1.5) shall be issued to such entity.

Further, the above concept of certificate multiplier has also been qualified by the tariff range for such renewable technologies, i.e., the technologies with higher tariff have as higher multiplier assigned to them such as energy generated from municipal solid waste within a tariff range of INR 6-8 have been assigned a multiplier of 2 and energy produced biomass and biofuel which fall within a tariff range of INR 8-10 have been assigned a multiplier of 2.5. This has been done with a rationale of promoting newer and costlier technologies and to provide an incentive to the power producers for production of expensive source of energy. While the legislative intent behind this introduction is to dispense with separate RECs for solar and non-solar and to provide a common but differentiated by number of

RECs, by way of certificate multiplier based on maturity and cost of a particular technology.²⁰

The REC Regulations 2022 further provide that a multiplier shall be assigned for a period of 3 years and be revised from time to time, however, it also mentions that the multiplier once assigned to a RE generating station shall remain valid for a period of 15 (fifteen) years from the date of commissioning of such plant.

While the said introduction is an optimistic attempt for promotion of newer technologies, it is unfortunately not well thought out. By virtue of the uniform certificate multiplier all the RE plants, new and old are brought at the same level disregarding the fact that older plants (both solar and wind) were more capital intensive and that consequently the tariff for such plants is higher than the tariff in comparison to the newer plants being setup. This will cause disadvantage to the plants which were setup during the initial phases of advent of RE in Indian energy sector.

TAX TREATMENT OF RECS

While the REC Regulations 2022 are silent on the taxability of RECs, we have analysed the tax implications on sale and purchase of RECs under the Indian tax regime. In India, any income generated from the sale of RECs (or on account of carbon credit or protecting the environment) is not considered to be generated through the sale and purchase of electricity by the RE generating companies rather such income is considered to have been generated as a corollary of the environmental concerns. Therefore, such income is considered as a capital receipt instead of a business receipt.²¹ Andhra Pradesh High Court has set a precedent in the matter of *Commissioner of Income Tax vs. My Home Power Ltd.*²² as follows:

"ITAT have considered the aforesaid submission and ITAT are unable to accept the same, as the learned Tribunal has factually found that 'Carbon Credit is not an offshoot of business but an offshoot of environmental concerns. No asset is generated in the course of business but it is generated due to environmental concerns' ITAT agree with this factual analysis as the Assessee is carrying on the business of power generation. The Carbon Credit is not even directly linked with power generation. On the sale of excess Carbon Credits the income was received and hence as correctly held by the Tribunal it is capital receipt and it cannot be business receipt or income. In the circumstances, we do not find any element of law in this appeal."

However, the above stance i.e., treatment of income from sale of RECs as capital receipts was restricted up to FY 2017-18. Finance Act, 2017 inserted Section 115BBG²³ for special treatment of income from carbon credits. Relying on this regard, the Income Tax Appellate Tribunal in the matter of *Essel Mining & Industries Limited vs. Deputy Commissioner of Income Tax*,²⁴ whilst relying on the findings of the Andhra Pradesh High Court, have extended the application of Section 115BBG to RECs and opined that:

"10. Issue is whether receipts received by the assessee on sale of alleged carbon credit is revenue in nature or capital in nature."

11. Thus, taking into consideration resolution of litigation on this issue by the Legislature itself, which had made provision for taxation of such receipts at the rate of 10 per cent from the assessment year 2018-19. Thus, any sum received on account of carbon credit or protecting the environment is not included in the business income however, subsequently there is an amendment by Finance Act, 2017 whereby Section 115BBG has been inserted in the statute w.e.f. 01.04.2018 which reads as under: —

"Following section 115BBG shall be inserted after section 115BBF by the Finance Act, 2017, w.e.f. 1-4-2018: Tax on income from transfer of carbon credits. 115BBG. (1) Where the total income of an assessee includes any income by way of transfer of carbon credits, the income tax payable shall be the aggregate of—

(a) the amount of income-tax calculated on the income by way of transfer of carbon credits, at the rate of ten per cent; and

(b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (a).

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of subsection (1).

Explanation—For the purposes of this section "carbon credit" in respect of one unit shall mean reduction of one tonne of carbon dioxide emissions or emissions of its equivalent gases which is validated by the United Nations Framework on Climate Change and which can be traded in market at its prevailing market price."

Thus, the income by way of transfer of carbon credit has been given a special treatment as chargeable to tax @ 10% and not as part of the normal business income of the assessee. The said amendment is prospective in nature and therefore, cannot be applied to the assessment years under consideration."

Therefore, the income from the sale of RECs is governed under Section 115BG of the Income Tax Act, 1961, and any transaction in relation to RECs is subject to GST at the rate of 18%.²⁵

CONCLUSION

REC Regulations 2022 aim to transform the REC mechanism to the core and have therefore brought an upheaval in the RE sector. Many stakeholders, especially the RE generators are not happy with the new framework. As mentioned above, a Writ Petition was filed before the Delhi High Court, where the RE generators/IWPA had challenged *inter alia* the stringent eligibility restrictions on the RE generators, the arbitrary removal of the provision for floor price of the RECs while highlighting the plight of the RE generators, who had set up their wind power plants under the prior REC framework, etc. The Delhi High Court, vide its order dated 05 June 2022 disposed the above petition whilst (a) giving directions to CERC to consider the writ petition filed by IWPA as a representation and to provide a response to IWPA on the issues raised by them within a period of six weeks; and (b) to not notify the REC Regulations 2022 and thereby giving interim relief that trading of RECs, under the new regime shall not take place until the above has been settled.

While it is true that there has been relative improvement in technology and higher generation from RE power is taking place, it is equally pertinent to note that the Discoms in the power sector have been bleeding red in the mounting debts and have been consistently failing to honour their terms under the concluded power purchase agreements. If the REC framework is overhauled, as proposed under the REC Regulations 2022, while it might lead to some positive changes such as increase in RPO compliance due to lower price of RECs, perpetuity of RECs, bilateral transactions between RE generators and traders for trading in RECs, etc., but it will also prejudice the interests of RE generators by firstly, not letting a larger number of them issue RECs by tightening the eligibility criteria and secondly, by removing the floor price which will result in low exchange rates of RECs and consequently revenue losses for the RE generators who might have not factored such lower rate of RECs into their project cost while making such investments. Not only this, as the sector has witnessed in the case of Andhra Pradesh where instead of procuring power from the RE generators, the Discoms were scheduling power from open market through short-term open access, the Discoms could also opt to buy RECs from the open market (which would be cheaper without any floor price) to fulfill their RPO and not schedule RE power given the high cost of procurement.

Since the Delhi High Court has already mandated CERC to consider the writ petition as representation made by the RE generators, it is now upon the regulator/CERC to find a way to harmonise the interests of all the stakeholders, bearing in mind the policies for promotion of the RE sector.

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You can direct your queries or comments to the authors

¹ Writ Petition No. 9152 of 2022

² <https://www.recregistryindia.nic.in/index.php/publics/faqs#:~:text=Solar%20RECs%20are%20issued%20to,energy%20sources%20other%20than%20solar>

³ Regulation 4(2) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

⁴ Explanatory Memorandum to Draft CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

⁵ Regulation 4(3) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

⁶ Explanatory Memorandum to Draft CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

⁷ Regulation 4(4) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

⁸ Regulation 3(1) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

⁹ Regulation 6 of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹⁰ Regulation 8 of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹¹ Regulation 8(2) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹² Regulation 10 of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹³ Regulation 10(4) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹⁴ Regulation 10(6) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹⁵ Regulation 11 of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹⁶ Regulation 11(5) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹⁷ Regulation 11(7) of the CERC (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022

¹⁸ ^{3rd} Amendment to REC Regulations 2010 dated 30 December 2014.

¹⁹ The Indian Wind Power Association, the Petitioner in the Writ Petition No. 9152 of 2022 has pleaded a writ direction of Certiorari to set aside certain provisions of the Central Electricity Regulatory Commission (Terms and Conditions for Renewable Energy Certificates for Renewable Energy Generation) Regulations, 2022 on *inter alia* the following grounds that the removal of floor and forbearance price is arbitrary, illegal and ultra vires as (a) the RE generators would lose the assured certainty of recovery of a minimum price and be more vulnerable to market risks, (b) the new REC framework is arbitrarily skewed in the favour of the defaulting obligated entities who have failed to meet their Renewable Power Obligations; (c) the CERC has acted on behest of Ministry of Power by accepting the proposals of the Discussion Paper dated 04 June 2021 issued vide Press Release dated 29 November 2021, (d) arbitrary removal of floor price without any justification, and (e) against the order in Appeal No. 113 of 2020 of Ld. Appellate Tribunal for Electricity dated 09 November 2021.

²⁰ Para 10, pg. no. 13-14, Explanatory Memorandum to Draft CERC (REC) Regulations, 2022

²¹ Deputy Commissioner of Income Tax vs. M/s Dawarkesh Sugar Industry Ltd. In ITA No. 312/Mum/2019 (A.Y. 2014-15)

²² [2014] 365 ITR 082 (AP)

²³ W.e.f from 01 April 2018

²⁴ ITA No. 602/Mum/2021 (A.Y. 2015-16)

²⁵ <https://www.powerexindia.in/media/downloads/Circular%20No%20353%20GST%20Rate%20Applicability%20on%20Renewable%20Energy%20Certificate.pdf>

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