

Date: 31st October 2022

To
The Superintendent of Central Tax,
Group-12, Circle-I,
Audit - II Commissionerate
1-98/B 20-21, Sanvi Yamuna Pride,
Krithika Layout, Madhapur
Hyderabad - 500 081



Dear Sir,

Sub: GST Audit on the accounts of M/s. NILGIRI ESTATES for the period from Jul'17 to Mar'20 - Certain Objections - Issue of Spot Memo - Submission of Reply - Reg.

Ref: a. Form GST ADT-01 (See Rule 101(s)) vide your DIN No. 20210956YS0099D87 dated 28th September 2021 towards Notice for conducting Audit for the period Jul'17 to Mar'20.
b. Out Letter dated 8th July 2022 towards reply given against the above Audit Notice.
c. Spot Memo vide DIN No. 20220956YS000041414A dated 21st September 2022

1. We would like to bring to your notice that we are inter alia engaged in sale of residential villas on own land under the name & style of 'NILGIRI ESTATES'. We are registered with department vide GST No. 36AAHFN0766F1ZA w.e.f. 01.07.2017.
2. During the audit conducted for the period July 2017 to March 2020, objections were noted by the audit party and issued the audit objections. We are herewith making the para-wise submissions for the objections as under:

Para - I: Short payment of GST due to adopting wrong method of valuation:

3. The audit party has observed that we have excess land deduction while discharging GST when compared with the 1/3rd deduction prescribed under para 2 of Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 and required us to pay an amount of Rs. 1,21,42,750/- (CGST - Rs.60,70,875/- & SGST - Rs.60,70,875/-) for the period from Jul'17 To Mar'20 towards the differential tax.
4. In this regard, we would like to bring to your notice that we are an owner of land situated at Ac. 10-06 gts., is Sy. No. 100/2, Rampally Village, Keesara Mandal, Medchal, Malkajgiri District and during the subject period, we are engaged in construction of villas in the project namely 'Nilgiri Estate' and have been selling the same to various customers.
5. The building permit for Construction of Villa No's. 1 to 79, on part of the land in March, 2015 along with a small residential complex of flats. Subsequently, building permit was revised in October, 2016 wherein the total of 188 villas were proposed to be constructed



along with other amenities and facilities. The small residential complex of flats which was proposed to be constructed was deleted and in its place 4 villas were constructed bearing no's. 80A to 80D. The construction of 1 to 79 villas, referred to as Phase I were completed by June, 2017 and the same were reflected in ST-3 returns under pre-GST period. Application for occupancy certificate was made on 02nd May, 2018. Further, the details of consideration received towards sale of Villa No's 80-185 in Phase-II are reflected in GST period.

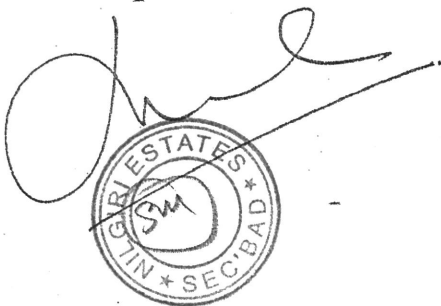
6. We would like to bring to your notice that whenever the customers come to purchase a villa's in Phase-II, we have been entering the following agreement
 - a. Agreement of Sale (AOS) for sale of Villas which clearly specifies the value agreed towards sale of land and value agreed towards construction services (Annexure-A to AOS can be referred).
 - b. Sale deed towards sale of land which was registered in Sub-registrar office
 - c. Agreement of Construction for provision of construction services which was also registered in sub-registrar office.
7. We would like to submit that the sale of land is neither a supply of good nor a supply of service in accordance with Paragraph 5 of Schedule-III, therefore, we have excluded the value towards sale of land while discharging GST and have paid GST on amount collected towards construction service as per the AOS. The valuation adopted by us is also supported by the Gujarat High Court decision in case of Munjaal Manishbhai Bhatt Vs UOI 2022-TIOL-663-HC-AHM-GST wherein the High Court has held that deeming fiction of 1/3rd land deduction is ultra-vires the statutory provisions wherever the actual land value is available. The relevant extract is as follows

"Thus, mandatory application of deeming fiction of 1/3 of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and scheme of the CGST Act and therefore ultra-vires the statutory provisions."

8. We would like to submit that from the above referred decision, it is clear that the wherever the actual land value is available, the same can be taken as deduction for the purpose of payment of GST and the deeming fiction of 1/3rd land value as deduction is ultra-vires the statutory provisions. Hence, we would like to submit that the compliance made by us is in accordance with the law and there is no short payment of GST.

Para – II: Short payment of GST on amount forfeited from the customers.

9. The audit party has observed that we have forfeited certain amounts from the customers for not following the conditions laid down in the agreements entered with the customers during the period from Jul'17 to Mar'20 and required us to pay GST of Rs.14,400/- on the same.

A handwritten signature in black ink is written over a circular stamp. The stamp contains the text "NILGIRI ESTATES" at the top and "SEC'BAD" at the bottom, with a star on either side. In the center of the stamp, there is a handwritten "SM" and a diagonal line.

d. In this regard, we would like to bring to your notice that we have already discharged the applicable taxes on the amounts forfeited from the customers as follows

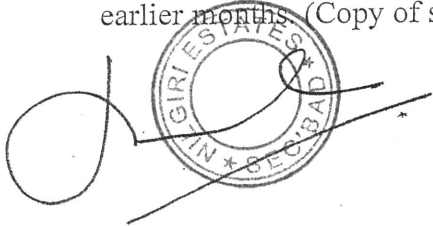
Period	Amount forfeited in Rs.	CGST	SGST	Total	Remarks
2017-18	25,000	2,250	2,250	4,500	This amount was received prior to implementation of GST, therefore, we have declared the same in ST-3 Returns for the month of Jun'17 and discharged service tax on the same (Copy of ST-3 return along with ledger account is enclosed Annexure – II)
2018-19	21,186	1,907	1,907	3,813	During the period 2018-19, we have forfeited an amount of Rs.21,186/- and have discharged applicable GST in the Month of May 2018 and declared the same in GSTR-3B for respective month (Copy enclosed as Annexure III) Further, the audit party has stated that we have received an amount of Rs.55,000/- during the period 2018-19 but the same is not factually correct. To evidence the same, we are enclosing the copy of ledger as Annexure III.

10. From the above referred explanation, it is clear that the observation of the audit party is not correct. Hence, we request you to drop further proceedings in this regard.

Para-III: Short Payment of tax due to difference in tax rate:

11. The audit party has observed that we have paid the tax at the rate of 12% instead of 18% during the period Jul 17 to March 18 as Specified Notification No. 11/2017 CT (Rate) dated 28th June 2017 and required us to pay the short-paid GST of Rs.19,82,815/-

12. In this regard, we would like to bring to your notice that the actual differential taxes are of CGST Rs. 4,99,426/- & SGST 4,99,426/- (Total = 9,98,852) but not Rs. 19,82,815/-. Out of Rs. 9,98,852, we have issued debit notes for Rs.9,25,202 in December 2018 i.e; CGST of Rs. 4,62,601 & SGST of Rs. 4,62,601/- and disclosed in books. The Amount of Rs. 9,25,202 has been adjusted with excess output tax paid in earlier months (Copy of statement enclosed as Annexure IV)



13. At the end of 2018-19, the total Output tax as per GSTR-3B is of Rs. 1,89,46,706/- and total output tax as per GSTR-1 and as per Books is of Rs. 1,94,62,187/- (Copy of statement enclosed as Annexure IV). So, the difference between these amounts is of Rs. 5,15,481/- which has been paid through DRC-03 dated 09/08/2019 acknowledged vide ARN No. AD3608190006125 (Copy of DRC 03 enclosed as Annexure VI) and the difference between Rs. 9,98,852/- & Rs. 9,25,202/- i.e; Rs. 73,650/- has been paid through DRC-03 dated 15/06/2020 acknowledged vide ARN No. AD360620001467E (Copy of DRC-03 enclosed as Annexure V).

14. And also we didn't receive any workings relating to the basis for calculation of short paid GST of Rs. 19,82,815/- as mentioned by department in spot memo. Please provide the calculations regarding the short paid GST of Rs.19,82,815/-

Para - IV: Non-Short payment of GST on comparison of Tax Liability declared in GSTR-1 and GSTR-3B

15. The audit party has observed that there is a difference between the tax liability declared in GSTR-01 and GSTR-3B for the month of June 2018 and March 2019 and required us to pay an amount of Rs.27,16,554/-.

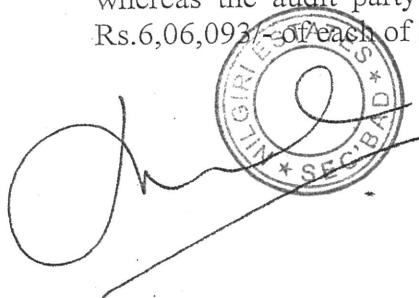
16. In this regard, we would like to bring to your notice that the spot memo has considered only the differences in the months in which there is an excess taxes declared in GSTR-01 and ignored the differences in the months in which excess taxes-declared in GSTR-3B. The total GST liability declared in GSTR-01 for the period July 2017 to March 2020 is Rs. 2,68,55,480/- and the total liability declared in GSTR-3B for such period is Rs. 2,63,40,002/- leaving a difference of only Rs.5,15,480/-. Once the differences in other months during the period July 2017 to March 2019 are considered the difference is only Rs.5,15,480/- and not Rs.27,16,554/- as stated by the audit party.

17. Such difference of Rs. 5,15,480/- has been already paid through DRC-03 on 9th August 2019 acknowledged vide ARN No. AD3608190006125 (Copy of DRC-03 and Statement showing the difference between GSTR-01 and GSTR-3B is enclosed as annexure - VI). Hence, we request you to drop this paragraph.

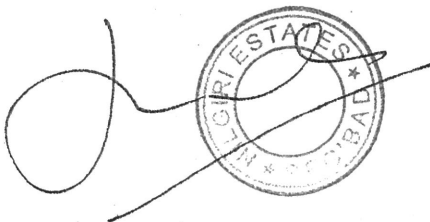
Para - V: Excess availment of ITC in GSTR-3B on comparison with GSTR-2A:

18. The audit party has observed that there is a difference between the ITC availed in GSTR-3B and ITC that was reflected in GSTR-2A during the period July 2017 to March 2020 to the tune of Rs.38,58,144/- (IGST- 3,77,768/- CGST - Rs.17,40,188/- & SGST - Rs.17,40,188/-).

19. In this regard, we would like to bring to your notice that the audit party has considered only the months in which there is a less reflection of ITC in GSTR-2A and have ignored the months in which there is an excess reflection of ITC in GSTR-2A. Once the ITC is compared on consolidated basis for a particular year, the difference is very less and in fact there is excess reflection of GSTR-2A during the period July 2017 to March 2018 whereas the audit party has stated that there is a difference of Rs.44,274/- of IGST, Rs.6,06,093/- of each of SGST and CGST.



20. We would like to submit that once the differences are considered on consolidated basis, the actual difference is only to the tune of Rs.17,78,059/- (IGST - (48,829.95) CGST - 9,13,444 & SGST - 9,13,144) as against the amounts disputed by the audit party. Statement showing the details of ITC availed in GSTR-3B, ITC reflected in GSTR-2A and the differences are enclosed as Annexure VII.
21. Without prejudice to above, we would like to submit that ITC cannot be denied for mere non-reflection in GSTR-2A for the following reasons
- ITC cannot be denied merely due to non-reflection of invoices in GSTR-2A as all the conditions specified under Section 16 of CGST Act, 2017 has been satisfied.
 - GSTR-2A cannot be taken as a basis to deny the ITC in accordance with Section 41, Section 42, Rule 69 of CGST Rules, 2017.
 - The fact of payment or otherwise of the tax by the supplier is neither known to Noticee nor is verifiable by Noticee. Thereby, it can be said that such condition is impossible to perform and it is a known principle that the law does not compel a person to do something which he cannot possibly perform as the legal maxim goes: *lex non-cogit ad impossibilia*, as was held in the case of:
 - Indian Seamless Steel & Alloys Ltd Vs UOI, 2003 (156) ELT 945 (Bom.)*
 - Hico Enterprises Vs CC, 2005 (189) ELT 135 (T-LB). Affirmed by SC in 2008 (228) ELT 161 (SC)*Thereby it can be said that the condition which is not possible to satisfy, need not be satisfied and shall be considered as deemed satisfied.
 - In the same context, Noticee also wish to place reliance on the decision in case of *Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11-SC-VAT* and *M/s Tarapore and Company Jamshedpur v. State of Jharkhand - 2020-TIOL-93-HC-JHARKHAND-VAT*.
 - Section 41 allows the provisional availment and utilization of ITC, there is no violation of section 16(2)(c) of CGST Act 2017
 - The above view is also fortified from press release dated 18.10.2018
 - Even if there is differential ITC availed, if the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules and the payment was also made to the suppliers, the Noticee is rightly eligible for ITC.
 - Noticee submit that under the earlier VAT laws there were provisions similar to Section 16(2) ibid which have been held by the Courts as unconstitutional.



- i. Noticee further submit that the fact that there is no requirement to reconcile the invoices reflected in GSTR-2A vs GSTR-3B is also evident from the amendment in Section 16 of CGST Act, 2017 vide Section 100 of Finance Act, 2021. Hence, there is no requirement to reverse any credit in the absence of the legal requirement during the subject period.
 - j. Similarly, it is only Rule 36(4) of CGST Rules, 2017 as inserted w.e.f. 09.10.2019 has mandated the condition of reflection of vendor invoices in GSTR-2A with adhoc addition of the 20% (which was later changed to 10% & further to 5%). At that time, the CBIC vide Circular 123/42/2019 dated 11.11.2019 categorically clarified that the matching u/r. 36(4) is required only for the ITC availed after 09.10.2019 and not prior to that. Hence, the denial of the ITC for non-reflection in GSTR-2A is incorrect during the subject period.
 - k. Noticee submits that Rule 36(4), ibid restricts the ITC on the invoices not uploaded by the suppliers. However, such restrictions were beyond the provisions of CGST Act, 2017 as amended more so when Section 42 & 43 of CGST Act, 2017 which requires the invoice matching is kept in abeyance and filing of Form GSTR-2 & Form GSTR-3 which implements the invoice matching in order to claim ITC was also deferred. Thus, the restriction under Rule 36(4), ibid is beyond the parent statute (CGST Act, 2017) and it is ultra vires. In this regard, reliance is placed on the Apex Court decision in the case of Union of India Vs S. Srinivasan 2012 (281) ELT 3 (SC) wherein it was held that *"If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it."* (Para 16)
- Once any rule is ultra vires, the same need not be followed. Hence, the proposition to deny the ITC stating that invoices not reflected in GSTR-2A require to be dropped.
- l. Noticee submits that Section 76 of CGST Act, 2017 provides the recovery mechanism to recovery the tax collected by the supplier but not paid to the government. Further, Section 73 and 74 also provides the recovery mechanism to recover the GST collected by way of issue of notice. In this regard, Noticee submits that the revenue department cannot straight away issue notice to the recipient of goods or services without exercising the above-referred powers.
 - m. Noticee submits that without impleading the supplier the department cannot deny ITC to the recipient. Further, Section 16(2) of CGST Act, 2017 states that if the tax is not remitted by the supplier the credit can be denied and to ascertain the same, the department should implead the supplier first. In the instant case, no such act is initiated by the department against the supplier instead proposed to deny the ITC to the recipient which is not correct.
 - n. Noticee submits that if the department directly takes action against the recipient in all cases then the provisions of Section 73, 74 and 76 would be rendered *otiose*, which is not the legislative intent. Further, Noticee submits that the department cannot be a mute spectator or maintain sphinx like silence or dormant position

o. Noticee wish to rely on recent decisions in case of

- M/s. D.Y. Beathel Enterprises Vs State Tax officer (Data Cell), (Investigation Wing), Tirunelveli 2021(3) TMI 1020-Madras High Court
- Jurisdictional High Court decision in case of Bhagyanagar Copper Pvt Ltd Vs CBIC and Others 2021-TIOL-2143-HC-Telangana-GST
- M/s. LGW Industries limited Vs UOI 2021 (12) TMI 834 -Calcutta High Court
- M/s. Bharat Aluminium Company Limited Vs UOI & Others 2021 (6) TMI 1052 – Chattishgarh High Court

22. As held by Hon'ble Supreme Court in Tata Chemicals Limited v Commissioner, 2015 (320) ELT 45 (SC) when the law requires a particular thing to be done in a particular manner, it must be done in that manner only or not done at all. Therefore, ideally, the recipient cannot be asked to comply with this condition and reverse ITC when he has no mechanism to ensure whether the supplier has paid tax to the government or not.

Para – VI: Non-reversal of ITC on receipt of Credit Note:

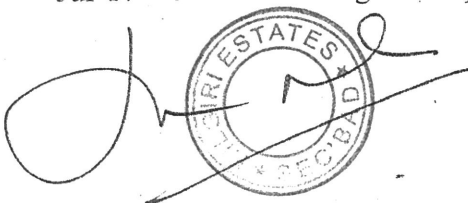
23. The audit party has observed that we have not reversed the ITC to the extent of credit notes reflected in GSTR-2A amounting to Rs. 1,69,159/-for the period July 2017 to March 2020 and required us to reverse the same.
24. In this regard, we would like to submit that we have agreed for this Para and would be making the payment through DRC-03 and submitting a copy of the same.

Para – VII: Short payment of Interest towards late payment of tax

25. The audit party has observed that there is a delay in payment of tax for the period July 2017 to March 2018 and required us to pay an amount of Rs.1,420/-.
26. In this regard, we would like to bring to your notice that Section 50 of CGST Act, 2017 provides for interest on delay in payment of taxes wherein the first proviso provides that interest is applicable only on such liability which was discharged using electronic cash ledger. The first proviso has been inserted retrospectively with effect from 01.07.2017.
27. During the period July 2017 to March 2018, we have already discharged interest on liability discharged through electronic cash ledger while filing the GSTR-3B for the month of September 2017. In subsequent months, we have discharged our liability through electronic credit ledger only. Once the interest is calculated only on tax paid using cash ledger, then there is no short payment of interest as pointed out in audit note. Hence, we request you to drop further proceedings in this regard.

Para – VIII: Non-payment of GST under RCM as per section 9(4) of CGST Act, 2017 on Rent paid and hamali charges to Un-registered person:

28. The audit party has observed that we have not paid GST under RCM on Rent paid during Jul'17 - Oct'17 to unregistered persons and required us to pay an amount of Rs.14,960/-.



29. In this regard, we submit that the Section 9(4), ibid specifies all procurements from unregistered persons (hereinafter referred to as URP) liable in the hands of the recipient. However, an exemption was granted to URP vide notification No. 8/2017 - Central Tax (Rate) dated 28.06.2017, effective from 1st July 2017 with the exception carved out by way of a proviso to such notification, whereby if the URP in a day exceeds Rs. 5,000/- no exemption would be applicable.
30. Subsequently, this proviso was omitted vide Notification No. 38/2017 - Central Tax (Rate) dated 13.10.2017 whereby all URP were exempt. However, the said notification did not specify the effective date and also did not have any saving clause.
31. We submit that the omission of the proviso vide notification No. 38/2017-CT(R) dated 13.10.2017 ibid would mean deletion of such provision completely from the statute book as if it had never been passed, and the statute must be considered as a law that never existed. Further, if there is no saving clause in favor of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision. Therefore, we submit that the proviso which was omitted by the Notification No. 38/2017-CT(R) dated 13.10.2017 ibid, which resulted in all the URPs becoming exempt, is deemed to have effect from 01.07.2017, Therefore, we are of the belief that the GST is not required to be discharged on the supplies received from URP's.
32. Without prejudice to above, we would like to bring to your notice that we have already paid the liability by declaring in GSTR-3B returns for the months of Jul'17 and Aug'17. However, the requirement to pay tax under RCM on unregistered procurements are suspended w.e.f. 12.01.2017 and there is no requirement to pay tax under RCM in respect of Rent and Hamali Charges paid after that date.
33. The details of payment and our explanation is as follows

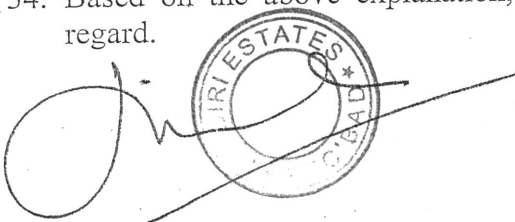
GST on Rent under RCM

Period	Value	CGST	SGST	Total	Remarks
Jul'17	16,823	1,514	1,514	3,028	Paid and Declared in GSTR-3B
Aug'17	16,823	1,514	1,514	3,028	Paid and Declared in GSTR-3B
Sep'17	16,823	1,514	1,514	3,028	We are ready to pay
Oct'17	8,412	757	757	1,514	We are ready to pay

GST on Hamali Charges under RCM

Period	Value	CGST	SGST	Total	Remarks
Jul'17	6,926	623	623	1,256	Paid and Declared in GSTR-3B
Aug'17	6,926	623	623	1,256	Paid and Declared in GSTR-3B
Sep'17	6,926	623	623	1,256	We are ready to pay
Oct'17	3,463	312	312	624	We are ready to pay

34. Based on the above explanation, we request you to drop further proceedings in this regard.



Para – IX: Irregular availment of Input Tax Credit (Section 17(5)):

35. The audit party has observed that we have availed ineligible ITC of Rs. 88,320/- towards certain invoices where availment of input tax credit is inadmissible as per the Section 17(5) of the CGST Act, 2017 for the period from Jul'17 - Mar'20.

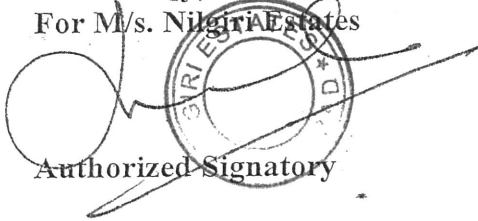
36. In this regard, we would like to bring to your notice that we have reversed an amount of Rs. 88,320/- through DRC-03 on 7th January 2020 acknowledged vide ARN No.AD3600120000820Z (Copy Attached as Annexure - VIII). Hence, we request you to drop further proceedings in this regard.

In view of the above discussion, we understand that the information submitted above is taken into consideration and accordingly the audit objections to be closed with no further action in this regard.

Kindly do the needful and acknowledge this letter.

Thanking you,

Yours truly,
For M/s. Nilgiri Estates


Authorized Signatory

Annexures:

- I. Sample copy of Agreement of Sale, Sale deed and Construction agreement
- II. Copy of ST-3 return along with ledger account of Forfeiture Amount for the period - 2017-18
- III. Copy of GSTR-3B for the month of May 2018 evidencing payment of GST on forfeiture amount along with ledger account of the same
- IV. Statement showing the details of differential taxes up to the FY 2018-19 and difference between the output tax liability as per GSTR-3B Vs as per GSTR-01 & Books.
- V. DRC-03 on 15th June 2020
- VI. DRC-03 dated 09.08.2019 evidencing payment of GST towards difference between GSTR-3B and GSTR-01 along with Statement showing the difference between the same
- VII. Statement showing the details of ITC availed in GSTR-3B, ITC reflected in GSTR-2A and the differences between the same
- VIII. DRC-03 on 7th January 2020
- IX. Copy of CA Certified GST Liability during the period Jul'17 to March 20.