

Date: 23.12.2022

To
The Assistant Commissioner of Central Tax,
Circle-1, Audit-II Commissionerate,
1-98/8/20, 21,
Sanvi Vamuna Pride,
Krithika Layout, Madhapur,
Hitech City, Hyderabad-500081



Dear Sir,

Sub: Reply to your letter dated 13.12.2022

Ref: Your Letter dated C. No. V/Audit-II/C-I/68/2021-22/Gr-14 dated 13.12.2022

1. We have been asked by the department that whether we have exercised for one time option in Annexure-IV as laid down by the Notification No. 3/2019-CT(R) dated 29.03.2019.
2. With respect to the above, we would like to bring to your notice that we are engaged in provision of construction services on which GST is liable at 18%. For carrying out the above referred activities, we have received various inputs and input services and we have availed ITC on the same.
3. Accordingly, we have paid the GST at 18% by regularly filing the monthly returns i.e., GSTR-1 and GSTR-3B and by utilizing the available ITC without any default in payment. This shows that we have paid all the applicable taxes and there is no short payment of the same. Hence, we would like to submit that the scheme proposed in Notification No. 3/2019-CT(R) dated 29.03.2019 is not applicable to the instant case.
4. Assuming but not admitting that the scheme proposed in above referred Notification is applicable, we would like to submit that it is just a procedure lapse. However, the fact that we have paid the tax at 18% by disclosing the ITC in monthly GSTR-01 and GSTR-3B returns amounts to intimation of opting for the old scheme of taxation.

5. In this regard, we would like to submit that the sole ground of filing the annexure-IV for availing the benefit of notification is only a procedural requirement. We submit that the substantive benefit shall not be denied due to non-fulfilment of procedural requirements when all the substantive conditions of availing the ITC has been duly fulfilled. In the instant case, we have satisfied all the conditions and fulfilled all the procedural requirements for availing the ITC and the same was credited to the electronic credit ledger.
6. Further, we submit that it is settled law that the substantial benefit shall not be denied due to non-fulfilment of procedural conditions and the same was also held by the Hon'ble Supreme Court in various decisions. We submit that while drawing a distinction between a procedural condition of a technical nature and a substantive condition in interpreting statute, the Hon'ble Supreme Court in case of Mangalore Chemicals and Fertilizers Ltd. v. Dy. Commissioner - 1991 (55) E.L.T. 437 (S.C.) held that *"The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they were intended to serve."*
7. We further submit that the procedure has been prescribed to facilitate verification of substantive requirement. The core aspect or fundamental requirement is payment of tax at 18% when ITC is availed. As long as this requirement is met, other procedural deviations can be condoned. It is further submitted that any procedural lapse per se does not disentitle the substantial benefit in view of settled law that substantial benefit cannot be denied resorting to the non-compliance with the procedural law. In this regard, reliance is placed on
 - a. Sambhaji v. Gangabai — 2009 (240) E.L.T. 161 (S.C.) wherein it was held that *"Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. A procedural prescription is the*

handmaid and not the mistress, a lubricant, not resistant in the administration of justice.”

- b. Commissioner of Central Excise, Madras v. Home Ashok Leyland Ltd., reported in 2007 (210) E.L.T. 178 (S.C.) 2007-TIOL-42-SC-CX has held that *“Rule 57A recognizes the right of the manufacturer to take credit for the specified duty paid on the inputs. Whereas Rule 57E is a procedural provision. Rule 57E being procedural and classificatory would not affect the substantive rights of the manufacture of the specified final product to claim the Modvat credit for the duty paid on the inputs subsequent to the date of the receipt of those inputs.”*
8. Without prejudice to the above, we would like to submit that Section 9 of the CGST Act, 2017 (hereinafter referred to as the ‘Act’) provides that there shall be a levy of CGST on all intra-State supplies, on the value determined under Section 15 **at such rates, not exceeding 20%** as may be notified by the government on the recommendation of GST council.
9. It could also be observed that unlike the levy section 9, composition levy section 10 and the exemption section 11(1) of the Act provides for **rate subject to condition and exemption with conditions**. Therefore, it is clear that the absence of power to place conditions in the levy section is deliberate. Hence, rates notified by way of section 9 cannot be subject to condition.
10. Preamble of rate notification 11/2017 CT® dated 28.06.2017 covers section 9(1) (3) (4) – Levy provisions, Sec 11(1) – exempt either absolutely or subject to conditions exempt either whole or any part of the tax leviable thereon - Sec 15(5) – valuation mechanism, sec 16 (1) - specifies subject to such **conditions** as may be **prescribed** by rules, sec 148 - **special procedure** w.r.t registration, furnishing of returns, **payment of tax** and administration of such person. The said powers may not be enough to put conditions in rate notification. Hence, rates notified by way of section 9 cannot be subject to condition. Same usurp delegated legislation, ultra vires to the CGST Act, 2017 and hence unconstitutional as held in catena of decisions.

11. Further, the explanation 3(xii) to rate notification mandates to rate of tax as 1%/5%, such explanation should be considered as ultra virus the provisions of section 9. Even if such explanation was considered as valid, the word “shall” can be considered as directory and not mandatory keeping the intent of GST Law. In this regard, reliance is placed on Lakshmanasami Gounder vs C.I.T. Selvamani And Ors on 1 November, 1991 SCR, Supl. (2) 181 1992 SCC (1) 91.
12. As stated above, the explanation could be considered optional at most if not invalid. Hence, there are 2 options available to the promoters, namely higher rate with ITC, and reduced rate with ITC restriction. Further, an analogy can be taken that in case there are two rate of tax, the rate which is more beneficial can be chosen. In this regard, reliance is placed on Central Excise, Baroda v. Indian Petro Chemicals, (1997) 11 SCC 318 and HCL Ltd Vs Collector of Customs, New Delhi 2002-TIOL-847-SC-CUS-LB.
13. From the above explanations, we humbly requests your good-self to consider the explanations given above and drop the further proceedings in this regard.

We shall be glad to furnish any further information/clarification required in this regard. Kindly acknowledge the receipt of the above and do the needful.

Thanking You,

Yours truly

For M/s. Kadokia and Modi Housing,

Authorised Signature