

Date: 22nd December 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. Kadakia and Modi for the period from Jul17 to Mar'20 - Certain Objections - Issue of Sport Memo - Submission of Reply - Reg.

Ref: Spot memo reference C.No.V/Audit-II/C-1/68/2021-22/Gr.14

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 'Kadakia and Modi Housing'. We are registered with department vide GST No. 36AAHFK8714A1ZJ 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 claimed 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. 40,64,300/- (CGST - Rs.20,32,150/- & SGST - Rs.20,32,150/-) 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 Sy. No. 1139 of Shamirpet Village, Shamirpet Mandal, Medchal, Malkajgiri District and during the subject period, we are engaged in construction of villas in the project namely 'Kadakia and Modi Housing' and have been selling the same to various customers.
5. Further, we would like to bring to your notice that whenever the customers come to purchase a villa's, we have been entering into 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.
6. 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."*
7. 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

8. 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.1,02,588/- on the same.
9. In this regard, we would like to bring to your notice that we have received the above said consideration to refrain the customers to not to breach the contract of buying an immovable property and as the customers breached the agreement to buy the immovable property, the consideration received in this regard got forfeited. With respect to the GST payment, we would like to bring to your notice

that as per the Circular No. 178/10/2022-GST dated 3rd August 2022 it was clear that the amount forfeited from the customers for breaching the contract shall be considered as only compensation or penalty and the same shall not be treated as consideration and the transaction cannot be considered as a supply. For ease of reference the same is extracted below:

7.1.5: Similarly, forfeiture of earnest money by a seller in case of breach of 'an agreement to sell' an immovable property by the buyer or by Government or local authority in the event of a successful bidder failing to act after winning the bid, for allotment of natural resources, is a mere flow of money, as the buyer or the successful bidder does not get anything in return for such forfeiture of earnest money. Forfeiture of Earnest money is stipulated in such cases not as a consideration for tolerating the breach of contract but as a compensation for the losses suffered and as a penalty for discouraging the non-serious buyers or bidders. Such payments being merely flow of money are not a consideration for any supply and are not taxable. The key in such cases is to consider whether the impugned payments constitute consideration for another independent contract envisaging tolerating an act or situation or refraining from doing any act or situation or simply doing an act. If the answer is yes, then it constitutes a 'supply' within the meaning of the Act, otherwise it is not a "supply".

10. From the above explanation, it is precise that once it is not a supply under the GST there is no need to pay the taxes on the same and hence, we request you to consider the same and drop the proceedings in this regard.

Period	Amount forfeited in Rs.	CGST	SGST	Total	Remarks
2017-18	25,000	2,250	2,250	4,500	No liability to pay GST as explained in above paragraphs
2018-19	73,938	6,654	6,654	13,308	
2019-20	4,71,000	42,390	42,390	84,780	No liability to pay GST as explained in above paragraphs. Further, the audit party has stated that we have received an amount of Rs.4,71,000/- during the period 2019-20 but the same is not factually correct. To evidence the same, we are enclosing the copy of ledger as Annexure _____. The demand

					amount shall be reduced to the extent of differential amount.
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11. 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.
12. Further, we would like to submit that the audit party has calculated the GST @18% on forfeited amounts, however, we have not collected any GST on the same. Hence, the forfeited amounts to be considered as inclusive of tax in accordance with Rule 35 of CGST Rules, 2017 and the spot memo to that extent needs to be dropped.

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

13. 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 Mar'18 as specified Notification No.11/2017 CT (Rate) dated 28th June 2017 and required us to pay the short-paid GST of Rs. 54,844/-.
14. In this regard, we would like to bring to your notice that we will be paying the same through DRC-03. Hence, we request you to give some time for paying the same and requests to drop further proceedings in this regard.

Para - IV: Non-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.20,11,576/-.
16. In this regard, we would like to bring to your notice that we have already paid the applicable taxes in accordance with the amounts received from our customers and the same has been disclosed in GSTR-3B returns. Hence, we request you to drop further proceedings in this regard.
17. We would like to submit that just because there is a difference in details declared in GSTR-01 and GSTR-9, it cannot be considered as conclusive evidence to state that there is a short payment of GST. This fact was also clarified by the CBIC in its press release dated 4.06.2019 which reads as follows
It may be noted that irrespective of when the supply was declared in FORM GSTR-1, the principle of declaring a supply in Pt. II or Pt. V is essentially driven by when was tax paid through FORM GSTR-3B in respect of such supplies. If

the tax on such supply was paid through FORM GSTR-3B between July, 2017 to March, 2018 then such supply shall be declared in Pt. II and if the tax was paid through FORM GSTR-3B between April, 2018 to March, 2019 then such supply shall be declared in Pt. V of FORM GSTR-9.

We would like to submit that it is sufficient that if the taxes are properly paid in GSTR-3B irrespective of the details declared in GSTR-01. Hence, the issuance of spot memo based on differences between the GSTR-01 and GSTR-3B is not correct and the same needs to be dropped.

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.16,40,374/- (IGST- 4,34,196/- CGST - Rs.6,03,089/- & SGST - Rs. 6,03,089/-).

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 2020. The same was drawn as a table and given below:

Period	GSTR-3B			GSTR-2A			Difference		
	IGST	CGST	SGST	IGST	CGST	SGST	IGST	CGST	SGST
2017-18	1,88,615	12,98,046	12,98,046	2,11,532	12,74,275	12,74,275	-22,917	23,771	23,771
2018-19	5,61,773	26,44,137	26,44,137	2,96,302	25,78,939	25,78,939	2,65,471	65,197	65,197
2019-20	2,959	19,18,619	19,18,619	2,959	17,07,256	17,07,256	0	2,11,363	2,11,363
Total							2,42,554	3,00,331	3,00,331

20. Further with respect to period 2019-20, we would like to submit that there was only a difference of Rs. 2,082/- (CGST Rs. 1,041/- and SGST Rs. 1,041/-) and the same is shown in the table below:

Particulars	IGST	CGST	SGST
GSTR-3B	2,959	1,918,619	1,918,619
BOA	2,959	1,917,578	1,917,578
	0	1,041	1,041
Reversed in sept'20		-489	-489
Excess claimed		552	552

21. Hence, it is precise that there is only an excess claim of ITC of Rs. 552/- towards CGST and Rs. 552/- towards SGST and the same is within the limit of Rule 36(4) of CGST Rules, 2017. Therefore, to this extent it can be dropped.
22. 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
- a. 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.
 - b. 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.
 - c. 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.
 - d. 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.
 - e. Section 41 allows the provisional availment and utilization of ITC, there is no violation of section 16(2)(c) of CGST Act 2017
 - f. The above view is also fortified from press release dated 18.10.2018
 - g. 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.
 - h. 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 recover 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

23. 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:

- 24. 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. 33,788/-for the period July 2017 to March 2020 and required us to reverse the same.
- 25. In this regard, we would like to bring to your notice that while availing the ITC in monthly GSTR-3B returns, we have reduced the ITC to be reversed on credit

notes and availed only the net ITC in the GSTR-3B returns. This shows that we have already reversed the ITC on such credit notes and the observation of the audit party is not correct. We have not gained any extra benefit from this exercise and the only issue is the separate disclosure of ITC reversals in GST-3B returns. Hence, we request you to drop further proceedings to that extent.

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:

26. 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/-.
27. 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.
28. 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.
29. 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.

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

30. The audit party has observed that we have availed ineligible ITC of Rs. 94,154/- 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 Jul17 - Mar'20.

31. In this regard, we would like to bring to your notice that we will be reversing the same through DRC-03. Hence, we request you to consider the same in this regard.

Para – XI: Short payment of tax against the tax liability declared in table 9P of GSTR-9C

32. The audit party has observed that there is a short payment of tax for the period April 2019 to March 2020 and required us to pay an amount of Rs.4,73,924/-.

33. In this regard, we would like to bring to your notice that we have paid the short payment of tax through various DRC-03s mentioned below:

Sl No	Particulars	CGST	SGST	Debit entry No.	Date
A	GSTR 9 Payable	1,621,219	1,621,219		
B	Less: GSTR 9 Paid	1,384,257	1,384,257		
C	Short paid (A-B)	236,962	236,962		
D	Less: Interest on Cust DRC-03	117,970	117,970	DI36032101 28766	30/03/21
E	Less: RCM DRC-03	14,571	14,571	DC3603210 151115	30/03/21
F	Less: Material Issued to Contractor DRC_03	51,444	51,444	DI36032101 28771	30/03/21
G	Net Diff (C-D-E-F)	52,977	52,977		
H	Less: Excess tax paid in 2017-18 and 2018-19	(39,908)	(39,908)		
I	Difference (G-H)	13,070	13,070		
J	Less: Paid through DRC-03	13,070	13,070	DI36032101 28779	30/03/21
K	Short paid of tax (I-J)	0	0		

34. From the above table, it is precise that there is no short payment of tax as mentioned by the audit note and the same needs to be dropped.

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

35. 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.1,960/-.

36. In this regard, we would like to bring to your notice that we are accepting the same and will be paying the same through DRC-03 and requests you to consider the same.

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. Kadakia and Modi Housing

Authorized Signatory

Annexures:

- I. Sample copy of Agreement of Sale, Sale deed and Construction agreement
- II. DRC-03s dated 30.03.2021