केन्द्रीय कर, केन्द्रीय उत्पाद शुल्क एवं सेवा कर आयुक्त का कार्यालय
OFFICE OF THE COMMISSIONER OF CENTRAL TAX, CENTRAL EXCISE & SERVICE TAX
सिकंदराबाद जीएसटी आयुक्तालय, जीएसटी भवन ,एल बी स्टेडियम रोड,
SECUNDERABAD GST COMMISSIONERATE, GST BHAWAN, L.B.STADIUM ROAD
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OR No.25/2023-24-Sec-Adjn-ADC (GST) Date:12.10.2023
DIN: 20231056YO000081863E

मूल आदेश सं. / **ORDER-IN-ORIGINAL NO.28/2023-24-SEC-ADJN-ADC(GST)**

**(Passed by SHRI B. VIJAY, Additional Commissioner of Central Tax, Central Excise and Service Tax, Secunderabad GST Commissionerate)**

| | p`stavanaa | PREAMBLE |
|---|---|---|
| 1 | यह प्रति उस व्यक्ति के निजी उपयोग के लिए नि:शुल्क दी जाती है जिसे यह जारी किया गया है। | This copy is granted free of charge for the private use of the person to whom it is issued. |
| 2 | सीजीएसटी नियम, 2017 के नियम 108(1) के अनुसार, धारा 107 की उप-धारा (1) के तहत अपीलीय प्राधिकारी को संबंधित दस्तावेजों के साथ फॉर्म जीएसटी एपीएल-01 में इलेक्ट्रॉनिक रूप से या अन्यथा के रूप में एक अपील दायर की जाएगी। आयुक्त सीमा शुल्क और अप्रत्यक्ष कर हैदराबाद (अपील-द्वितीय) आयुक्तालय, सातवीं मंजिल, जीएसटी भवन, एलबी स्टेडियम रोड, बशीरबाग, हैदराबाद, टीएस-500004 द्वारा अधिसूचित किया जा सकता है, और एक अनंतिम पावती जारी की जाएगी (अपील प्राधिकारी द्वारा) अपीलकर्ता को तत्काल। | As per Rule 108 (1) of the CGST Rules, 2017 an appeal to the Appellate Authority under sub-section (1) of section 107 shall be filed in FORM GST APL-01, along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner of Customs & Indirect Taxes Hyderabad (Appeals-II) Commissionerate, Seventh Floor, GST Bhavan, LB Stadium Road, Basheerbagh, Hyderabad, TS-500004, and a provisional acknowledgement shall be issued (by the Appellate Authority) to the appellant immediately. |
| 3 | सीजीएसटी नियम, 2017 के नियम 108 (2) के अनुसार फॉर्म जीएसटी एपीएल-01 में निहित अपील के आधार और सत्यापन के रूप में नियम 26 में निर्दिष्ट तरीके से हस्ताक्षर किए जाएंगे। | As per Rule 108 (2) of the CGST Rules, 2017 the grounds of appeal and the form of verification as contained in FORM GST APL-01 shall be signed in the manner specified in Rule 26 thereof. |

| | | |
|---|---|---|
| 4 | सीजीएसटी नियम, 2017 के नियम 108(1) के अनुसार, उप-नियम (1) के तहत अपील दायर करने के सात दिनों के भीतर निर्णय या आदेश की एक प्रमाणित प्रति प्रस्तुत की जानी चाहिए और एक अंतिम पावती, जिसमें अपील संख्या होगी उसके बाद अपीलीय प्राधिकारी या इस संबंध में उसके द्वारा अधिकृत अधिकारी द्वारा फॉर्म जीएसटी एपीएल-02 में जारी की जानी चाहिए:<br>बशर्ते कि जहां निर्णय या आदेश की प्रमाणित प्रति फॉर्म जीएसटी एपीएल-01 दाखिल करने की तारीख से सात दिनों के भीतर प्रस्तुत की जाती है, वहां अपील दायर करने की तारीख अनंतिम पावती जारी करने की तारीख होगी और जहां प्रति सात दिनों के बाद प्रस्तुत की जाती है, अपील दायर करने की तिथि ऐसी प्रति प्रस्तुत करने की तिथि होगी।<br>स्पष्टीकरण - इस नियम के प्रावधानों के लिए, अपील को तभी दायर माना जाएगा जब अंतिम पावती, अपील संख्या को इंगित करते हुए, जारी की जाती है। | As per Rule 108 (3) of the CGST Rules, 2017 a certified copy of the decision or order appealed against shall be submitted within seven days of filing the appeal under sub-rule (1) and a final acknowledgement, indicating appeal number shall be issued thereafter in FORM GST APL-02 by the Appellate Authority or an officer authorized by him in this behalf:<br>Provided that where the certified copy of the decision or order is submitted within seven days from the date of filing the FORM GST APL-01, the date of filing of the appeal shall be the date of the issue of the provisional acknowledgement and where the said copy is submitted after seven days, the date of filing of the appeal shall be the date of the submission of such copy.<br>Explanation– For the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgement, indicating the appeal number, is issued. |
| 5 | सीजीएसटी अधिनियम, 2017 की धारा 107 (6) के अनुसार, सीजीएसटी अधिनियम, 2017 की धारा 107(1) के तहत कोई अपील तब तक दायर नहीं की जाएगी जब तक कि अपीलकर्ता ने भुगतान नहीं किया है-<br>(k) पूर्ण रूप से, कर, ब्याज, जुर्माना, शुल्क और दंड की राशि का ऐसा हिस्सा, जो आक्षेपित आदेश से उत्पन्न होता है, जैसा कि उसके द्वारा स्वीकार किया जाता है; तथा<br>(K) उक्त आदेश से उत्पन्न विवाद में कर की शेष राशि के दस प्रतिशत के बराबर राशि, अधिकतम पच्चीस करोड़ रुपये के अधीन, जिसके संबंध में अपील दायर की गई है। | As per Section 107 (6) of CGST Act, 2017 no appeal shall be filed under Section 107(1) of CGST Act, 2017 unless the appellant has paid—<br>(a) In full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and<br>(b) A sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, subject to a maximum of twenty-five crore rupees, in relation to which the appeal has been filed. |

Sub: GST-Audit- Short payment of GST due to adopting wrong method of valuation, Short payment of tax due to difference in tax rate, Short payment of GST on comparison of Tax liabilities declared in GSTR-1 and GSTR-3B, Excess availment of ITC in GSTR 3B on comparison with GSTR 2A, Non-reversal of ITC on receipt of Credit Notes, Short payment of Interest towards late payment of tax, Non-payment of GST under RCM as per Section 9(4) of CGST Act,2017 on Rent paid to Unregistered person and Irregular availment of Input Tax Credit [Section

17(5)] during the period F.Y. 2017-18, 2018-19 & 2019-20 by M/s. Nilgiri Estates Secunderabad, GSTN 36AAHFN0766F1ZA -Issuance of Order In Original - Reg.

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**INTRODUCTION:**

M/s. Nilgiri Estates, 5-4-187/3, 2nd Floor, Soham Mansion, M.G. Road, Secunderabad, Telangana - 500003 (hereinafter referred as 'the assessee' or 'the taxpayer') having GSTN:36AAHFN0766F1ZA are engaged in the Construction of Residential Complexes & Works Contract Services falling under the SAC code 9954.

**BRIEF FACTS OF THE CASE:**

2. During GST Audit of the books of the accounts of the taxpayer conducted in the month of September,2022, covering the period from July 2017 to March 2020, the following discrepancies were noticed;

**(I)- Short payment of GST due to adopting wrong method of valuation:**

**(A).** During the course of audit, on verifying the payment of tax towards the amount received for sale of constructed buildings to customers, it was found that in the project, the taxpayer has applied the value of land arbitrarily i.e. approximately half of the total sale value and reduced the same from the total sale value for arriving the taxable value instead of the same to be taken as one third of the total amount charged for supply in terms of the Notification No.11/2017-Central Tax (Rate) dt.28.06.2017. By not applying the proper method of valuation the taxpayer has short paid the tax of Rs. Rs.1,21,41,750/- (CGST- Rs.60,70,875/- and SGST Rs.60,70,875/-) during the period starting from July,2017 onwards.

**(B). Statutory provisions during the disputed period is as furnished hereunder:**

(a)- ***Section 9. Levy and collection.-***

*(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value*

*determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.*

(b)-

**_Notification No. 11/2017-Central Tax (Rate)_**

*New Delhi, the 28th June, 2017*

*G.S.R......(E).- In exercise of the powers conferred by sub-section (1) of section 9, sub- section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby notifies that the central tax, on the intra-State supply of services of description as specified in column (3) of the Table below, falling under Chapter, Section or Heading of scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table:-*

**_Table_**

| Sl No. | Chapter, Section or Heading | Description of Service | Rate (per cent.) | Condition |
|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) |
| 1 | **Chapter 99** | **All Services** | | |
| 2 | **Section 5** | **Construction Services** | | |
| 3 | **Heading 9954** (Construction services) | (i) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. (Provisions of paragraph 2 of this notification shall apply for valuation of this service) | 9 | - |
| | | (ii) composite supply of works contract as defined in clause 119 of section 2 of Central Goods and Services Tax Act, 2017. | 9 | - |
| | | (iii) construction services other than (i) and (ii) above. | 9 | - |

*2. In case of supply of service specified in column (3) of the entry at item (i) against serial no. 3 of the Table above, involving transfer of property in land or undivided share of land, as the case may be,* ***the value of supply of service and goods portion in such supply shall be equivalent to the total amount charged for such supply less the value of land or undivided share of land, as the case may be, and the value of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount***

***charged for such supply.***

*Explanation .– For the purposes of paragraph 2, "total amount" means the sum total of,-*

(a) *consideration charged for aforesaid service; and*

(b) *amount charged for transfer of land or undivided share of land, as the case may be.*

(c)- As per the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 cited above, GST is payable on the service of construction of building or civil structure at the rate of 9% and the value of supply of service shall be two third of the total amount charged for service including transfer of land or undivided share of land.

**(C). Contraventions**- In view of the statutory provisions above it was found that by not following the method for valuation provided in the notification no. 11/2017-Central Tax (Rate) dated 28.06.2017 as one third of the total value as the value of land, the taxpayer arbitrarily declared approximately half of the total value as the value of land, the taxpayer contravened the provisions of Section 9 of CGST Act,2017 read with Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 and short paid the tax of Rs.1,21,41,750/- (CGST- Rs.60,70,875/- and SGST Rs.60,70,875/-) on the differential value.

**(D).** Since the taxpayer has not paid the short paid tax amount of Rs.1,21,41,750/- therefore the discrepancy is brought to notice of them vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt. 21.03.2023 issued under the provisions of Section 73/74 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the short paid tax amount of Rs.1,21,41,750/- for the period F.Y. 2017-18 (from July,2017) to March, 2020. The taxpayer did not submit any reply or document evidencing the payment of tax towards the short paid tax of Rs.1,21,41,750/- for the period F.Y. 2017-18 (from July,2017) to March, 2020. Since the taxpayer has not paid the short paid tax of Rs.1,21,41,750/- hence, the same is liable to be recovered in terms of Section 74 of CGST Act, 2017 along with interest payable under the provisions of Section 50 of CGST Act,2017. As the taxpayer has deliberately avoided to pay tax on two third of total amount received for sale of constructed building and declared less value of taxable services which are liable to GST in their periodical returns filed with the Department with an intention to evade payment of GST, it appeared that the taxpayer is liable for penal action in terms of the provisions of Section 122(2)(b) read with Section 74(1) of CGST Act, 2017.

**(II) - Short payment of tax due to difference in tax rate-**

**(A).** During the course of audit, on verifying the returns it was observed that during the period F.Y. 2017-18 (From July,2017 to March,2018) the taxpayer has paid tax at the rate of 12% instead of 18% specified in Notification No.11/2017 CT (Rate) dt.28.06.2017 including CGST and SGST which caused a short payment of Rs.19,82,815/- including CGST of Rs.9,91,407/- and SGST of Rs.9,91,407/- for the period F.Y. 2017-18 (From July,2017 to March,2018).

**(B). Statutory Provisions:-** Statutory provisions of Section 9 read with Notification No. 11/2017 CT (Rate) dt.28.06.2017 as discussed supra.

**(C). Contraventions-** In view of the statutory provisions above it was found that by adopting incorrect rate of tax of 12% (CGST- 6% and SGST- Rs.6%) instead of total 18% (CGST-9% and SGST- 9%) provided in the Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017, the taxpayer has contravened the provisions of Section 9 of CGST Act,2017 read with Notification No.11/2017-Central Tax (Rate) dated 28.06.2017 and short paid the tax of Rs.19,82,815/- including CGST of Rs.9,91,407/- and SGST of Rs.9,91,407/- during the period of F.Y. 2017-18 (From July,2017 to March,2018).

**(D)** Since the taxpayer has not paid the short paid tax amount of Rs.19,82,815/- therefore the discrepancy was brought to notice of them vide

Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73/74 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the short paid tax amount of Rs.19,82,815/- for the period F.Y. 2017-18 (from July,2017 to March, 2018). The taxpayer did not submit any reply or document evidencing the payment of tax towards the short paid tax of Rs.19,82,815/- for the period F.Y. 2017-18 (from July,2017 to March, 2018). Since the taxpayer has not paid the short paid tax of Rs.19,82,815/- hence, the same appeared liable to be recovered in terms of Section 74 of CGST Act, 2017 along with interest payable under the provisions of Section 50 of CGST Act,2017. As the taxpayer has deliberately adopted incorrect lesser rate of tax to avoided to pay tax in their periodical returns filed with the Department with an intention to evade payment of GST, it appeared that the taxpayer is liable for penal action in terms of the provisions of Section 122(2)(b) read with Section 74(1) of CGST Act, 2017.

**(III)- Short payment of GST on comparison of Tax liabilities declared in GSTR-1 and GSTR-3B:**

**(A)-** During the course of audit, on comparison of tax liability declared in GSTR-1 with GSTR-3B it was observed that there is short payment of total tax of Rs.27,16,554/- (IGST- Rs.0/-, CGST- Rs.13,58,277/- and SGST Rs.13,58,277/-) during the period of F.Y.2018-19. The details are given hereunder.

Amount in Rs.

| Period | GSTR-1 Details | | | GSTR-3B details | | | Tax short paid (GSTR 1- GSTR 3B) | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | IGST | CGST | SGST | IGST | CGST | SGST | IGST | CGST | SGST | Total |
| June,18 | 0 | 50,580 | 50,580 | 0 | 0 | 0 | 0 | 50,580 | 50,580 | 1,01,160 |
| March,19 | 0 | 22,00,571 | 22,00,571 | 0 | 8,92,874 | 8,92,874 | 0 | 13,07,697 | 13,07,697 | 26,15,394 |
| **TOTAL** | **0** | **22,51,151** | **22,51,151** | **0** | **8,92,874** | **8,92,874** | **0** | **13,58,277** | **13,58,277** | **27,16,554** |

As given in the table above, the tax paid in the monthly GSTR 3B returns filed under Section 39 of the CGST Act,2017 is comparatively less than the same declared in the monthly details of outward supplies furnished under Section 37 of CGST Act,2017 for the same periods.

**(B)- Statutory provisions-**

a). *The provisions of **Section 37 of the CGST Act,2017** for Furnishing details of outward supplies are as hereunder-*

*(1) Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 or section 51 or section 52, shall furnish, electronically, in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected during a tax period on or before the tenth day of the month succeeding the said tax period and such details shall be communicated to the recipient of the said supplies within such time and in such manner as may be prescribed:*

b). The provisions of **Section 39 of CGST Act,2017** (Furnishing of returns) stipulates that-

*(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, **tax payable, tax paid** and such other particulars, in such form and manner, and within such time, as may be prescribed;*

*(7) Every registered person who is required to furnish a return under sub-section (1), other than the person referred to in the proviso thereto, or sub-section (3) or sub-section (5), shall pay to the Government the tax due as per such return not later than the last date on which he is required to furnish such return:*

c). As per the provisions of **Section 49 of the CGST Act,2017** for payment of tax, interest, penalty and other amounts.-

*(8) Every taxable person shall discharge his tax and other dues under this Act or the rules made thereunder in the following order, namely:-*

*(a) self-assessed tax, and other dues related to returns of previous tax periods;*

***(b) self-assessed tax, and other dues related to the return of the current tax period;***

*(c) any other amount payable under this Act or the rules made thereunder including the demand determined under section 73 or section 74.*

**(C). Contraventions**- From the above, it appeared that by short payment of tax of Rs.27,16,554/- in the GSTR-3B Return in spite of declaring excess tax liability in GSTR 1 outward supplies details of months June,2018 and

March,2019, the Tax Payer has contravened the provisions of the Section 39(1); 39(7) & 49 of the CGST Act, 2017.

**(D).** Since the taxpayer has not paid the differential tax amount of Rs.27,16,554/- therefore the discrepancy was brought to notice of them vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73/74 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the short paid tax amount of Rs.27,16,554/-. The taxpayer did not submit any reply or document evidencing the payment of the short paid tax. The short paid tax of Rs.27,16,554/- appeared liable to be recovered in terms of Section 73 of CGST Act, 2017 along with interest payable under the provisions of Section 50 of CGST Act,2017 and penalty as applicable in terms of the Provisions of Section 122(2)(a) read with Section 73 of CGST Act,2017.

**(IV) Excess availment of ITC in GSTR 3B on comparison with GSTR 2A:**

**(A).** During the course of audit, on verification of records, it was observed that the taxpayer has availed excess input tax credit to the tune of **Rs.38,58,144/- (IGST- Rs.3,77,768/-, CGST- Rs.17,40,188/- & SGST – Rs.17,40,188/-)** during the period of FY 2017-18, 2018-19 and 2019-20. The details are given in the table hereunder;

Amount in Rs.

| Month | As per table 4A of GSTR 3B (Other than RCM) | | | | As per GSTR 2A returns downloaded (Invoices issued by suppliers for the month) | | | | Excess ITC availed in 3B than the tax paid invoices are available in 2A | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | IGST | CGST | SGST | CESS | IGST | CGST | SGST | CESS | IGST | CGST | SGST | CESS |
| Sept,17 | 22137 | 1151479 | 1151479 | 0 | 0 | 1311594 | 1311594 | 0 | 22137 | Nil | Nil | Nil |
| Oct,17 | 0 | 646063 | 646063 | 0 | 22138 | 638165 | 638165 | 0 | Nil | 7898 | 7898 | Nil |
| Nov,17 | 22137 | 529971 | 529971 | 0 | 0 | 597919 | 597919 | 0 | 22137 | Nil | Nil | Nil |
| Dec,17 | 0 | 503698 | 503698 | 0 | 0 | 418059 | 418059 | 0 | Nil | 85639 | 85639 | Nil |
| Feb,18 | 0 | 1510854 | 1510854 | 0 | 0 | 1249408 | 1249408 | 0 | Nil | 261446 | 261446 | Nil |
| Mar,18 | 0 | 1340960 | 1340960 | 0 | 0 | 1089850 | 1089850 | 0 | Nil | 251110 | 251110 | Nil |
| **2017-18** | | | | | | | | | 44274 | 606093 | 606093 | Nil |
| May,18 | 46328 | 685194 | 685194 | 0 | 49286 | 621064 | 621064 | 0 | Nil | 64130 | 64130 | Nil |
| July,18 | 165461 | 397651 | 397651 | 0 | 12981 | 513067 | 513067 | 0 | 152480 | Nil | Nil | Nil |
| Aug,18 | 11758 | 1262839 | 1262839 | 0 | 11758 | 1010147 | 1010147 | 0 | Nil | 252692 | 252692 | Nil |
| Sept,18 | 65220 | 847235 | 847235 | 0 | 0 | 410681 | 410681 | 0 | 65220 | 436554 | 436554 | Nil |
| Oct,18 | 0 | 454507 | 454507 | 0 | 16978 | 381575 | 381575 | 0 | Nil | 72932 | 72932 | Nil |
| Nov,18 | 0 | 612948 | 612948 | 0 | 0 | 603697 | 603697 | 0 | Nil | 9251 | 9251 | Nil |

| | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Dec,18 | 0 | 745118 | 745118 | 0 | 16301 | 717898 | 717898 | 0 | Nil | 27220 | 27220 | Nil |
| Jan,19 | 0 | 447003 | 447003 | 0 | 201 | 439771 | 439771 | 0 | Nil | 7232 | 7232 | Nil |
| Mar,19 | 0 | 737473 | 737473 | 0 | 0 | 674798 | 674798 | 0 | Nil | 62675 | 62675 | Nil |
| **2018-19** | | | | | | | | | 217700 | 932685 | 932685 | |
| July,19 | 107866 | 456392 | 456392 | 0 | 0 | 426735 | 426735 | 0 | 107866 | 29657 | 29657 | Nil |
| Sept,19 | 0 | 284359 | 284359 | 0 | 0 | 235008 | 235008 | 0 | Nil | 49351 | 49351 | Nil |
| Oct,19 | 0 | 328904 | 328904 | 0 | 7928 | 311323 | 311323 | 0 | Nil | 17581 | 17581 | Nil |
| Nov,19 | 7928 | 194439 | 194439 | 0 | 0 | 199840 | 199840 | 0 | 7928 | Nil | Nil | Nil |
| Dec,19 | 0 | 406008 | 406008 | 0 | 0 | 341968 | 341968 | 0 | Nil | 64040 | 64040 | Nil |
| Feb,20 | 0 | 287026 | 287026 | 0 | 0 | 246245 | 246245 | 0 | Nil | 40781 | 40781 | Nil |
| **2019-20** | | | | | | | | | 115794 | 201410 | 201410 | Nil |
| | | | | | | | | **Grand Total=38,58,144** | 377768 | 1740188 | 1740188 | Nil |

In view of the table above, the excess input tax credit availed is irregular in terms of Section 16(2) (c) of the CGST Act, 2017 as the taxes involved thereon are not paid by the respective suppliers.

**(B) Statutory Provisions:-** The statutory provisions to avail input tax credit are stipulated in the Section 41, Section 16 of CGST Act,2017 and Rule 36 of CGST Rules,2017. Section 41 provides that the input tax credit shall be credited to the Electronic Credit Ledger provisionally whereas every registered person shall be entitled to take credit of input tax if it qualifies the conditions and restrictions laid down. The statutory provisions of Section 41 of CGST Act,2017 are reproduced hereunder in details;

***(a). Section 41. Claim of input tax credit and provisional acceptance thereof.***

*(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.*

*(2) The credit of input tax availed by a registered person under sub-section (1) in respect of such supplies of goods or services or both, the tax payable whereon has not been paid by the supplier, shall be reversed along with applicable interest, by the said person in such manner as may be prescribed:*

The conditions and restrictions are stipulated under Sections 16, 17, 18 etc. of CGST Act,2017 and Rules such as Rule 36 to 45 etc. of CGST Rules, 2017. Requisite provisions of Section 16 of CGST Act,2017 and Rule 36 of CGST Rules,2017 are reproduced hereunder;

***(b). Section 16 of the CGST Act,2017 - Eligibility and Conditions For Taking Input Tax Credit-***

*(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.*

***(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-***

*(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*

*(b) he has received the goods or services or both.*

***(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply;*** *and*

*(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.*

***(c). Rule 36 of CGST Rules 2017 - Documentary requirements and conditions for claiming input tax credit-***

*(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely-*

*(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;*

*(b)* ***an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax;***

*c) a debit note issued by a supplier in accordance with the provisions of section 34;*

*(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;*

*(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54.*

*(2) Input tax credit shall be availed by a registered person only if all the applicable particulars as specified in the provisions of Chapter VI are contained in the said document, and the relevant information, as contained in the said document, is furnished in FORM GSTR-2 by such person:*

**(C)** As discussed above, in terms of the provisions of Section 16(2)(c) of CGST Act,2017 and Rule 36 (1)(b) of CGST Rules,2017, to avail ITC against invoices being in possession of a recipient of supply, it is also mandatory to be the tax i.e. GST involved therein paid. Thus the ITC availed by a recipient is subject to payment of tax by the supplier in terms of the provisions of Section 39 of CGST Act,2017 read with Rule 61 of CGST Rules,2017. Further the details of outward supplies of Goods or Services or both are to be furnished in Form GSTR 1 in terms of Section 37 of CGST Act,2017 read with Rule 59 of CGST Rules,2017. Further the form and manner for ascertaining the details of inward supplies are also stipulated in the provisions of Section 38 of CGST Act,2017 read with Rule 60 of CGST Rules,2017. The statutory provisions above are reproduced hereunder;

***(a). Section 37. Furnishing details of outward supplies –***

*(1) Every registered person, other than an Input Service Distributor, a non-resident taxable person and a person paying tax under the provisions of section 10 or section 51 or section 52, shall furnish, electronically [1][subject to such conditions and restrictions and] in such form and manner as may be prescribed, the details of outward supplies of goods or services or both effected during a tax period on or before the tenth day of the month succeeding the said tax period and such details [2][shall, subject to such conditions and restrictions, within such time and in such manner as may be prescribed, be communicated to the recipient of the said supplies]:*

***(b). Rule 59. Form and manner of furnishing details of outward supplies-***

*(1) Every registered person, other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017), required to furnish the details of outward supplies of goods or services or both under section 37, shall furnish such details in **FORM GSTR-1** for the month or the quarter, as the case may be, electronically through the common portal, either directly or through a Facilitation Centre as may be notified by the Commissioner.*

***(c). Section 39. Furnishing of returns-***

*(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed:*

***Provided** that the Government may, on the recommendations of the Council, notify certain class of registered persons who shall furnish a return for every quarter or part thereof, subject to such conditions and restrictions as may be specified therein.*

***(d). Rule 61. Form and manner of furnishing of return -***

*(1) Every registered person other than a person referred to in section 14 of the Integrated Goods and Services Tax Act, 2017 (13 of 2017) or an Input Service Distributor or a non-resident taxable person or a person paying tax under section 10 or section 51 or, as the case may be, under section 52 shall furnish a return in **FORM GSTR-3B,** electronically through the common portal either directly or through a Facilitation Centre notified by the Commissioner, as specified under -*

***(e). Section 38. Communication of details of inward supplies and input tax credit-***

*(1) The details of outward supplies furnished by the registered persons under sub-section (1) of section 37 and of such other supplies as may be prescribed, and an auto-generated statement containing the details of input tax credit shall be made available electronically to the recipients of such supplies in such form and manner, within such time, and subject to such conditions and restrictions as may be prescribed.*

*(2) The auto-generated statement under sub-section (1) shall consist of—*

*(a) details of inward supplies in respect of which credit of input tax may be available to the recipient; and*

***(f). Rule 60. Form and manner of ascertaining details of inward supplies.-***

*(1) The details of outward supplies furnished by the supplier in **FORM GSTR-1** or using the IFF shall be made available electronically to the concerned registered persons (recipients) in **Part A** of **FORM GSTR-2A,** in **FORM GSTR-4A** and in **FORM GSTR-6A** through the common portal, as the case may be.*

**(D). Contravention: -** On examination of the facts in view of the statutory provisions discussed above it was found that there is an excess availment of ITC of Rs.38,58,144/- (IGST- Rs.3,77,768/-, CGST- Rs.17,40,188/- & SGST – Rs.17,40,188/-) involving input tax credit of IGST of Rs.44,274/-, CGST- Rs.6,06,093/- & SGST- Rs.6,06,093/- in F.Y. 2017-18, IGST of Rs.2,17,700/-, CGST of Rs.9,32,685/- and SGST Rs.9,32,685/- in F.Y. 2018-19 and IGST of Rs.1,15,794/-, CGST- Rs.2,01,410/- and SGST of Rs.2,01,410/- in F.Y. 2019-20 as given in details in Table above. By availing irregular input tax credit of Rs.38,58,144/- during the period F.Y. 2017-18 to 2019-20 the taxpayer has contravened the provision of Section 16, 41, 39 of CGST Act, 2017 and Rule 36, 39 and 60 of CGST Rules 2017.

**(E)-** Since the taxpayer has not paid the tax equal to irregular availed Input Tax Credit of Rs.38,58,144/- therefore the discrepancy was brought to notice of them vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C. No. V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the reversal or payment of tax equal to irregular availed Input Tax Credit of Rs.38,58,144/-. The taxpayer did not submit any reply or document evidencing the reversal or payment of tax equal to irregular input tax credit availed. Since the taxpayer has not paid or reversed the irregular availed Input Tax Credit, the same appeared liable to be recovered in terms of Section 73 of CGST Act, 2017 along with interest payable under the provisions of Section 50 of CGST Act,2017 and penalty as applicable in terms of the Provisions of Section 122(2)(a) read with Section 73 of CGST Act,2017.

**(V) Non-reversal of ITC on receipt of Credit Notes:-**

**(A).** During the course of audit, on verification of records, it was observed that the taxpayer has received Credit Notes amounting of **Rs.1,69,159/- (IGST Rs.0/-, CGST- Rs.84,580/- and SGST -Rs.84,580/-)** GSTR 2A returns in the period F.Y.2017-18, 2018-19 and F.Y.2019-20 as detailed in the table given hereunder, where the input tax credit availed has to be reversed as per the provisions of the Section 34 of the CGST Act,2017.

Amount in Rs.

| Period | Value | IGST | CGST | SGST | Total |
|---|---|---|---|---|---|
| 2017-18 | 108012 | 0 | 6802 | 6802 | 13603 |
| 2018-19 | 60846 | 0 | 5245 | 5245 | 10490 |
| 2019-20 | 805923 | 0 | 72533 | 72533 | 145066 |
| **TOTAL** | **974781** | **0** | **84580** | **84580** | **169159** |

As per the table given above, the taxpayer has availed input tax credit of Rs.1,69,159/-. In terms of the provisions of Sec.34(2) read with Sec.16 of the CGST Act, 2017, wherever such credit notes have been issued by the suppliers, relevant portion of input tax credit involved in such credit notes, is required to be reversed by the recipient taxpayer. The relevant portion of Sec.34(2) and Sec.16 of the CGST Act 2017 reads as under;

**(B) Statutory Provisions:**

***Section 34. Credit and debit notes.-***

*(1) Where one or more tax invoices have been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services or both supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient 2 [one or more credit notes for supplies made in a financial year] containing such particulars as may be prescribed .*

*(2) Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than [the thirtieth day of November] following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier,* ***and the tax liability shall be adjusted*** *in such manner as may be prescribed:*

*Provided that no reduction in output tax liability of the supplier shall be permitted, if the incidence of tax and interest on such supply has been passed on to any other person.*

**Section 16:** The statutory provisions of Section 16 of the CGST Act,2017 are discussed above.

**(C).** In view of the above where any credit note is issued under Sec.34 (2) of the CGST Act, 2017, the output tax liability is reduced by the supplier as per the procedure prescribed under the law subject to the proviso. Here it appeared that by not reversing the input tax credit equal to the amount of credit notes received, the taxpayer has not followed the procedure prescribed under Sec.34 and Section 16 of the CGST Act, 2017. Where the suppliers have issued the credit notes reducing their tax liability the taxpayer is not eligible to avail the input tax credit of such tax amount involved in the credit notes and they have to reverse the input tax credit availed to the extent the credit notes is issued by the suppliers.

**(D)** **Contraventions:-** From the foregoing, it appeared that after issuing the credit notes the supplier has adjusted the tax liability towards the invoices involved, whereas the recipient taxpayer has failed to reverse the input tax credit of Rs.1,69,159/- (IGST Rs.0/-, CGST- Rs.84,580/- and SGST -Rs.84,580/-) availed in their GSTR 3B returns in F.Y.2017-18 (from July,2017 ), 2018-19 & 2019-20 as prescribed under Section 16 of the CGST Act 2017 read with Sec.34(2) of the CGST Act, 2017. By irregularly availing input tax credit of Rs.1,69,159/- in the period F.Y. 2017-18 (from July,2017), 2018-19 & 2019-20 and not reversing the same the taxpayer has contravened the provisions of Section 16 of CGST Act,2017 and Section 34 of CGST Act,2017 and therefore the same appeared liable to be recovered along with interest and penalty as applicable in terms of Section 73 of CGST Act,2017.

**(E)** Since the taxpayer has not paid the tax equal to irregular availed Input Tax Credit of Rs.1,69,159/- therefore the discrepancy was brought to notice of the taxpayer vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the reversal or payment of tax equal to irregular availed Input Tax Credit of Rs.1,69,159/-. The taxpayer did not submit any reply or document evidencing the payment of the irregular input tax credit availed. Since the taxpayer has not paid or reversed the irregular availed Input Tax Credit, the same is liable to be recovered in terms of Section 73 of CGST Act, 2017 along with interest payable under the provisions of Section 50 of CGST Act,2017 and penalty as applicable in terms of the Provisions of Section 122(2)(a) read with Section 73 of CGST Act,2017.

**(VI): Short payment of Interest towards late payment of tax:**

**(A).** During the course of audit, on verification of records, it was observed that there is delay in filing of GSTR-3B return of the month of August,2017 in F.Y. 2017-18 which resulted in delayed payment of tax causing liability of Interest payable thereon. The details are given in the table given hereunder;

Amount in Rs.

| Period | Tax paid in cash in IGST | Tax paid in cash in CGST | Tax paid in cash in SGST | No of days delayed | Interest on CGST | Interest on SGST | Total |
|---|---|---|---|---|---|---|---|
| 2017-18 (Aug,17) | 0 | 60040 | 60040 | 24 | 710 | 710 | 1420 |
| | | | | **TOTAL** | **710** | **710** | **1420** |

As given above, the taxpayer is liable to pay total interest @18% (on cash portion) which worked out to **Rs.1,420**/- **(CGST- Rs.710/- and SGST- Rs.710/-)** for the F.Y. 2017-18 in terms of Section 50 (1) of the CGST Act, 2017.

**(B)- Statutory Provisions:** The method of payment of tax has been stipulated under Section 39, 49 and 50 of CGST Act,2017 read with Rule 61 of the CGST Rules,2017, as are reproduced hereunder;

***Section 49. Payment of tax, interest, penalty and other amounts.-***

*(3) The amount available in the electronic cash ledger may be used for making any payment towards tax, interest, penalty, fees or any other amount payable under the provisions of this Act or the rules made thereunder in such manner and subject to such conditions and within such time as may be prescribed.*

**The provisions of Section 50 of CGST Act,2017 are as follows;**

*(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:*

***Provided** that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect* *of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.*

*As per* ***Notification No. 13/2017 – Central Tax Dt.28.06.2017****, the rate of interest towards Section 50(1) is 18% and towards Section 50 (3) is 24%.*

*All other provisions are discussed supra.*

The above provisions infer that every registered person other than specified persons, shall for every calender month furnish a GSTR 3B return declaring the tax particulars and shall pay the tax as per the return by debiting the electronic cash or electronic credit ledger by the due date of furnishing return. Further in case of delay in payment of tax, interest at the rate of 18% is payable towards the tax amount paid by debiting the electronic cash ledger.

**(C)- Contraventions-** Here, as per the GSTR 3B returns, the taxpayer has paid the tax delayed at the time of filing GSTR 3B returns. However, they have not paid the interest amount payable thereon in terms of Section 50 of CGST Act,2017. By not paying the interest on delayed payment of tax of Rs.1,420/- as given in detail in the table above during the period F.Y. 2017-18, the taxpayer has contravened the provisions of Section 39(7) and Section 50 of CGST Act,2017.

**(D)** The non payment of interest of Rs.1,420/- was brought to notice of the taxpayer vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the interest amount of Rs.1,420/-. The taxpayer agreed to pay but not submitted any documentary evidencing towards the payment of the interest. Since the taxpayer has not paid the interest on delayed paid taxes, the same is liable to be recovered in terms of Section 73 of CGST Act, 2017 read with Section

50 of CGST Act, 2017 along with penalty as applicable in terms of the Provisions of Section 122(2)(a) read with Section 73 of CGST Act,2017.

**(VII) Non-payment of GST under RCM as per Section 9(4) of CGST Act,2017 on Rent and Hamali paid to Unregistered person:-**

**(A).** During the course of audit, on verification of Books of Account, it is observed that, the taxpayer has not paid GST under RCM on Rent paid during July, 2017 to October,2017 in terms of Section 9(4) of CGST Act,2017 in respect of the expenses made towards unregistered persons as detailed below;

**(i) GST on Rent under RCM-**

| Period | Value | CGST | SGST | Total |
|---|---|---|---|---|
| Sept.2017 | 16823 | 1514 | 1514 | 3028 |
| Oct,2017 | 8412 | 757 | 757 | 1514 |
| **TOTAL** | **25235** | **2271** | **2271** | **4542** |

**(ii) GST on Hamali Charges paid under RCM-**

| Period | Value | CGST | SGST | Total |
|---|---|---|---|---|
| Sept.2017 | 6926 | 623 | 623 | 1246 |
| Oct,2017 | 3463 | 312 | 312 | 624 |
| **TOTAL** | **10389** | **935** | **935** | **1870** |
| **Grand Total** | **35624** | **3206** | **3206** | **6412** |

In terms of Section 9(4) of the CGST Act, 2017 read with Notification No. 8/2017-Central Tax (Rate), dated 28.06.2017 as amended, GST is payable under Reverse Charge Mechanism (RCM) by the registered person in respect of supply of goods or services or both received from an unregistered person (where the aggregate value of such supplies of Goods or Service or both received by a registered person from any or all the suppliers who is or are not registered exceeds Rs.5,000/- in a day). Accordingly, GST is payable under Reverse Charge Mechanism (RCM) by the recipient of service in respect of the expenses made such as rent paid on receiving the service of renting of property from an unregistered person which is classified under SAC 997212 as per the scheme of classification of services under GST and attracts GST @ 18% vide Notification No.11/2017- Central Tax (Rate), dated 28.06.2017. Further, the support services such as Hamali services received from unregistered persons are also taxable at the rate of 18% in terms of Notification No. 11/2017- Central Tax (Rate), dated 28.06.2017 vide entry no.23 for SAC Code 9985.

**(B)- Statutory provisions-**

**(a)- *Section 9. Levy and collection.-***

*(4) [The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.]*

***Notification No. 11/2017-Central Tax (Rate)***

*New Delhi, the 28th June, 2017*

*G.S.R......(E).- In exercise of the powers conferred by sub-section (1) of section 9, sub- section (1) of section 11, sub-section (5) of section 15 and sub-section (1) of section 16 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on the recommendations of the Council, and on being satisfied that it is necessary in the public interest so to do, hereby notifies that the central tax, on the intra-State supply of services of description as specified in column (3) of the Table below, falling under Chapter, Section or Heading of scheme of classification of services as specified in column (2), shall be levied at the rate as specified in the corresponding entry in column (4), subject to the conditions as specified in the corresponding entry in column (5) of the said Table:-*

***Table***

| Sl No | Ch./Section or Heading | Description of Service | Rate (%) | Condition |
|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) |
| 16 | **Heading 9972** | Real estate services. | 9 | - |
| | **Heading 9985** (Support services) | (i) Supply of tour operators services. *Explanation.*-"tour operator" means any person engaged in the business of planning, scheduling, organizing,arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours. | 2.5 | 1. Provided that credit of input tax charged on goods and services used in supplying the service has not been taken [Please refer to *Explanation* no. (iv)] The bill issued for supply of this service indicates that it is inclusive of charges of accommodation and transportation required for such a tour and the amount charged in the bill is the gross amount charged for such a tour including the charges of accommodation and transportation required for such a tour. |
| | | (ii) Support services other than (i) above | 9 | - |

**(C)- Contraventions-** In view of the above statutory provisions, it appeared that by not paying tax of Rs.6,412/- towards expenses made on supplies received from unregistered persons during the period from July,2017 to 12th October,2017, the Taxpayer has contravened the provisions of the Section 9(4) of the CGST Act, 2017.

**(D)-** The non payment of tax of Rs.6,412/- was brought to notice of the taxpayer vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the tax amount of Rs.6,412/-. The taxpayer agreed to pay but not submitted any documentary evidencing towards the payment of the tax amount. Since the taxpayer has not paid the tax along with applicable interest, the same is liable to be recovered in terms of Section 73 of CGST Act, 2017 read with Section 50 of CGST Act,2017 along with penalty as applicable in terms of the Provisions of Section 122(2)(a) read with Section 73 of CGST Act,2017.

**(VIII)- Irregular availment of Input Tax Credit [Section 17(5)]:**

**(A)-** During the course of audit, on verification of records, it was observed that the taxpayer has availed ineligible input tax credit for a total amount of **Rs.88,320/- (CGST – Rs.44,160/- and SGST- Rs.44,160/-)** 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 of F.Y. 2017-18, 2018-19 and 2019-20.

| Service Category | Period | Value | IGST | CGST | SGST | Total |
|---|---|---|---|---|---|---|
| Car Rent Charges | 2017-18 | 29,684 | 0 | 2,672 | 2,672 | 5,344 |
| | 2018-19 | 2,45,502 | 0 | 22,095 | 22,095 | 44,190 |
| | 2019-20 | 1,85,500 | 0 | 16,695 | 16,695 | 33,390 |
| Medical Reimbursement | 2019-20 | 29,982 | 0 | 2,698 | 2,698 | 5,396 |
| **Total** | | **4,90,668** | **0** | **44,160** | **44,160** | **88,320** |

Basing on the nature of supply involved, it was found the taxpayer has availed input tax credit on supplies used in personal consumption such as medical expenditure and Car rent expenses. Since the input tax credit on such supplies falls under the category of blocked credit under Section 17(5) of CGST Act,2017, the availment of such input tax credit was found irregular and the same is liable to be recovered.

**(B)- statutory Provisins:**

**Section 17 (5) of CGST Act, 2017 :**

*17(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—*

*(a) [motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—*

*(A) further supply of such motor vehicles; or*

*(B) transportation of passengers; or*

*(C) imparting training on driving such motor vehicles;*

*(aa) vessels and aircraft except when they are used—*

*(i) for making the following taxable supplies, namely:—*

*(A) further supply of such vessels or aircraft; or (*

*(B) transportation of passengers; or*

*(C) imparting training on navigating such vessels; or*

*(D) imparting training on flying such aircraft;*

*(ii) for transportation of goods;*

*(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):*

*Provided that the input tax credit in respect of such services shall be available—*

*(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;*

*(ii) where received by a taxable person engaged—*

*(I) in the manufacture of such motor vehicles, vessels or aircraft; or*

*(II) in the supply of general insurance services in respect of such motor vessels or aircraft insured by him;*

*(b) [the following supply of goods or services or both—*

*(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft*

*referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:*

*Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;*

*(ii) membership of a club, health and fitness centre; and*

*(iii) travel benefits extended to employees on vacation such as leave or home travel concession:*

*(iv) Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force*

*(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;*

*(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.*

***Explanation.—For the purposes of clauses (c) and (d), the expression ―construction‖ includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;***

*(e) goods or services or both on which tax has been paid under section 10;*

*(f) goods or services or both received by a non-resident taxable person except on goods imported by him;*

*(g) goods or services or both used for personal consumption;*

*(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and*

*(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.*

**(C)- Contravention: -** On examination of the facts of the taxpayer in view of the statutory provisions discussed above it was found that by availing input tax credit of Rs.88,320/- towards expenditure made for personal consumption and hiring of motor vehicles during the period F.Y. 2017-18 to 2019-20 the taxpayer has contravened the provisions of Section 17(5) of CGST Act, 2017 and the same is irregular.

**(D)-** Since the taxpayer has not paid the tax equal to irregular availed Input Tax Credit of Rs.88,320/- therefore the discrepancy was brought to notice of them vide Spot Memo dated 21.09.2022 vide DIN 20220956YS000041414A. Further, the taxpayer was again communicated regarding the discrepancy vide Final Audit Report No.518/2022-23 dated 04.11.2022 and DRC 01A vide C.No.V/Audit-II/C-1/28/2021-22/Gr-15 dt.21.03.2023 issued under the provisions of Section 73/74 of CGST Act,2017 read with Rule 142(1A) of CGST Rules,2017 demanding the reversal or payment of tax equal to irregular availed Input Tax Credit of **Rs.88,320/-.** The taxpayer did not submit any reply or document evidencing the payment of tax towards the short payment in the both of the months. Since the taxpayer has not paid or reversed the irregular availed Input Tax Credit, the same is liable to be recovered in terms of Section 74 of CGST Act, 2017 along with interest payable under the provisions of Section 50 of CGST Act,201.

**(E)-** As the taxpayer has deliberately availed input tax credit in contravention of the provisions of Section 17(5) ibid during the period July 2017 to March 2020 as detailed herein above and mis-stated the eligible input tax credit in their Electronic credit ledger and GSTR-3 B Returns during the period July 2017 to March 2020 concerning the above ineligible input tax credit on the said input/input services with intention to evade payment of GST in cash, it appeared that the tax payer is liable for penal action in terms of the provisions of Section 122(2)(b) read with Section 74(1) of CGST Act, 2017.

3. The statutory provisions of demand of tax or ITC erroneously availed and utilized for any reason other than fraud and willful statement are given in Section 73 of the CGST Act,2017 which stipulates that;

***Section 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts-***

*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or*

*utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.*

*(2) The proper officer shall issue the notice under sub-section (1) at least three months prior to the time limit specified in sub-section (10) for issuance of order.*

*(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.*

*(4) The service of such statement shall be deemed to be service of notice on such person under sub-section (1), subject to the condition that the grounds relied upon for such tax periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.*

*(5) The person chargeable with tax may, before service of notice under subsection (1) or, as the case may be, the statement under sub-section (3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*

*(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1) or, as the case may be, the statement under sub-section (3), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*

*(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*

*(8) Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.*

*(9) The proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty equivalent to ten per cent. of tax or ten thousand rupees, whichever is higher, due from such person and issue an order.*

*(10) The proper officer shall issue the order under sub-section (9) within three years from the due date for furnishing of annual return for the financial year to which the*

*tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.*

*(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.*

***Section 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful- misstatement or suppression of facts.-***

*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*

*(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.*

*(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.*

*(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.*

*(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.*

*(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.*

*(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as*

*provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.*

*(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five per cent. of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.*

*(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.*

*(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.*

*(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.*

***Explanation 1**.- For the purposes of section 73 and this section,-*

*(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;*

*(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under 1[sections 122 and 125] are deemed to be concluded.*

***Explanation 2**.- For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer.*

**The provisions of Section 50 of CGST Act,2017 are as follows;**

*(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:*

***Provided** that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished* *after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.*

*(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.*

*(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed].*

As per **Notification No. 13/2017 – Central Tax Dt.28.06.2017**, the rate of interest towards Section 50(1) is 18% and towards Section 50 (3) is 24%.

4. As per the provisions above, it appeared to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised for any reason other than the fraud or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to ten per cent of tax or ten thousand rupees whichever is higher read with the provisions of Sub section (8) above.

5. Further, as per 6 (1) of Telangana GST Act,2017, 'Without prejudice to the provisions of this Act, the officers appointed under the Central Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify'.

6. In terms of Section 125 of the CGST Act, 2017 any person, who contravenes any of the provisions of the CGST Act, 2017 or any Rules made thereunder for which no penalty is separately provided for in

CGST/Telangna GST Act,2017, shall be liable to a penalty which may extend up to Rs.25,000/-.

7. In the instant case, as discussed above, it appeared that the amount of tax involved is not less than Rs.5,000/- and is not qualified to consider as a 'minor breach' of tax regulations or procedural requirements as envisaged under Section 126 of the CGST Act, 2017 and so the Tax Payer is liable for imposing penalty upon him after giving him an opportunity of being heard.

8. In view of the foregoing, a notice vide SCN No.06/2023-24 dated 19.05.2023 was issued M/s. Nilgiri Estates (GSTN 36AAHFN0766F1ZA) to show cause to the Additional/ Joint Commissioner of Central Tax, Secunderabad GST Commissionerate, Hyderabad, as to why:

(i) The tax amount of Rs.1,21,41,750/- (Rupees One Crore Twenty One Lakh Forty One Thousand Seven Hundred and Fifty only) (CGST- Rs.60,70,875/- and SGST -Rs.60,70,875/-) short paid during the period F.Y. 2017-18 to F.Y. 2019-20 should not be demanded from the taxpayer under Section 74(1) of the CGST Act,2017 and TSGST Act,2017;

(ii) Interest payable in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(i) above;

(iii) Penalty equal to the tax amount demanded in para 8(i), should not be imposed on them in terms of Section 74 (1) of the CGST Act, 2017 read with Section 122(2)(b) of CGST Act,2017 and TSGST Act,2017;

(iv) The tax amount of Rs.19,82,815/- (Rupees Nineteen Lakh Eighty Two Thousand Eight Hundred and Fifteen only) (CGST-Rs.9,91,407.5/- and SGST -Rs.9,91,407.5/-) short paid during the period F.Y. 2017-18 should not be demanded from the taxpayer under Section 74 of the CGST Act,2017 and TSGST Act,2017;

(v) Interest payable in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(iv) above;

(vi) Penalty equal to the tax amount demanded in para 8(iv), should not be imposed on them in terms of Section 74(1) of the CGST Act, 2017 read with Section 122(2)(b) of CGST Act,2017 and TSGST Act,2017;

(vii) The tax amount of Rs.27,16,554/- (Rupees Twenty Seven Lakh Sixteen Thousand Five Hundred and Fifty Four only) (CGST-Rs.13,58,277/- and SGST -Rs.13,58,277/-) short paid during the period F.Y. 2018-19 should not be demanded from the taxpayer under Section 73(1) of the CGST Act,2017 and TSGST Act,2017;

(viii) Interest payable in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(vii) above;

(ix) Penalty should not be imposed on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and TSGST Act,2017 towards the tax amount demanded in para 8(vii);

(x) the tax amount equal to Input Tax Credit of Rs.38,58,144/- (Rupees Thirty Eight Lakh Fifty Eight Thousand One Hundred and Forty Four only/- (IGST Rs.3,77,768/-, CGST-Rs.17,40,188/- and SGST -Rs.17,40,188/-) being the ineligible input tax credit tax wrongly availed by the taxpayer during the period F.Y.2017-18 (July,2017 to March,2018), F.Y. 2018-19 and F.Y. 2019-20 should not be demanded from them under Section 73(1) of the CGST Act,2017 read with Section 20 of IGST Act,2017 and TSGST Act,2017;

(xi) Interest payable in terms of Section 50 of the CGST Act, 2017 read with Section 20 of IGST Act,2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(x) above;

(xii) Penalty should not be imposed on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and Section 20 of IGST Act,2017 and TSGST Act,2017 towards the tax amount demanded in para 8(x);

(xiii) the tax amount equal to Input Tax Credit of Rs.1,69,160/- (Rupees One Lakh Sixty Nine Thousand One Hundred and Sixty only/- (CGST – Rs.84,580/- and SGST- Rs.84,580/-) towards credit notes received during the period F.Y.2017-18 (July,2017 to March,2018), F.Y. 2018-19 and F.Y. 2019-20 should not be demanded from them under Section 73(1) of the CGST Act,2017 read with Section 20 of IGST Act,2017 and TSGST Act,2017;

(xiv) Interest payable in terms of Section 50 of the CGST Act, 2017 read with Section 20 of IGST Act,2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(xiii) above;

(xv) Penalty should not be imposed on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and Section 20 of IGST Act,2017 and TSGST Act,2017 towards the tax amount demanded in para 8(xiii);

(xvi) Interest amount of Rs.1,420/- (Rupees One Thousand Four Hundred and Twenty Only) (CGST- Rs.710/- and SGST- Rs.710/-) payable on late payment of tax in cash in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 as discussed in para 2(VI) should not be demanded in terms of Section 50(1) of CGST Act,2017;

(xvii) the tax amount of Rs.6,412/- (Rupees Six Thousand Four Hundred and Twelve only) (CGST-Rs. 3,206/- and SGST- Rs.3,206/-) short paid by the taxpayer under RCM during the period F.Y.2017-18 (July,2017 to March,2018) should not be demanded from them under Section 73(1) of the CGST Act,2017 and TSGST Act,2017;

(xviii) Interest payable in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(xvii) above;

(xix) Penalty should not be imposed on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and TSGST Act,2017 towards the tax amount demanded in para 8(xvii);

(xx) the tax amount equal to Input Tax Credit of Rs.88,320/- (Rupees Eighty Eight Thousand Three Hundred and Twenty only/- (CGST – Rs.44,160/- and SGST- Rs.44,160/-) being the ineligible input tax credit (blocked credit) wrongly availed by the taxpayer during the period F.Y.2017-18 (July,2017 to March,2018), F.Y. 2018-19 and F.Y. 2019-20 should not be demanded from them under Section 74(1) of the CGST Act,2017 and TSGST Act,2017;

(xxi) Interest payable in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 should not be demanded on the tax amount mentioned in para 8(xx) above;

(xxii) Penalty equal to the tax amount demanded in para 8(xx) should not be imposed on them in terms of Section 74(1) of the CGST Act, 2017 read with Section 122(2)(b) of CGST Act,2017 and TSGST Act,2017;

(xxiii) Penalty of Rs.25,000/- (Rupees Twenty Five Thousand Only) should not be imposed on them under Section 125 CGST Act, 2017 and also Rs.25,000/- in terms of section 125 of the Telangana GST Act, 2017 read with Section 6(1) of the Telangana State Goods and Services Tax Act, 2017, for contravention of the above detailed provisions of the CGST Act, 2017.

**REPLY TO THE SHOW CAUSE NOTICE:**

9. The taxpayer through their authorized representative's letter dated 31.07.2023 submitted followings:

9.1. **Impugned notice is not valid:**

(i) **Notice has been issued based on assumptions and presumptions:** The Taxpayer submitted that impugned SCN is issued with prejudged and premeditated conclusions on various issues raised in the notice. The subject SCN is issued based on mere assumption and unwarranted inference, interpretation of the law without considering the intention of the law, documents on record, the scope of activities undertaken, and the nature of activity involved, the incorrect basis of computation, creating its own assumptions, presumptions. Further, they have arrived at the conclusion without actual examination of facts, provisions of the CGST Act, 2017. In this regard, they relied on the decision of the Hon'ble Supreme Court in case Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC).

(ii) **Notice is vague and lack of details:** The taxpayer submitted that the impugned notice has not backed by any legal provisions under which it is issued. This shows that the impugned notice is vague and lack details and it is settled law that once there is no allegation in the Show Cause Notice based on which the demand is proposed then the demand cannot be sustained as SCN is the basis/foundation for raising any demand and it shall specify the charges based on which the demand is proposed along with relevant statutory provisions. In this regard, the taxpayer relied on the decision made in the case of;

(a) CCE v. Brindavan Beverages (2007) 213 ELT 487(SC) wherein it was held that *"The show-cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details, and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice."*

(b) Larger bench decision in case of Crystic Resins (India) Pvt. Ltd., vs CCE, 1985 (019) ELT 0285 Tri. -Del has made the following observations on uncertainty in the SCN and said the SCN is not valid. *"If show cause notice* *is not properly worded in as much as it does not disclose essential particulars of the charge any action based upon it should be held to be null and void."*

*"The utmost accuracy and certainty must be the aim of a notice of this kind, and not a shot in the dark ........."*

(c) Dayamay Enterprise Vs State of Tripura and 3 OR's. 2021 (4) TMI 1203 - Tripura High Court

(d) Mahavir Traders Vs Union of India (2020 (10) TMI 257 - Gujarat High Court)

(e) Teneron Limited Versus Sale Tax Officer Class II/Avato Goods and Service Tax & Anr. (2020 (1) TMI 1165 - Delhi High Court)

(f) Nissan Motor India Private Limited, Vs the State of Andhra Pradesh, The Assistant Commissioner (CT) (2021 (6) TMI 592 - Andhra Pradesh High Court)

From the invariable decisions of various High Courts, it is clear that the notice without details is not valid and the same needs to be dropped.

Further they submitted that the impugned notice has been issued both for CGST and SGST. However, as per Section 6 of the CGST Act, 2017, a separate notice shall be issued for CGST and SGST. This shows that the Notice is issued not in accordance with the law and the same needs to be dropped.

(iii) **Notice issued is in gross violation of the natural justice principles:** The taxpayer submitted that the impugned Notice has been issued without considering the submissions made by the them vide their letter dated 08.07.2022 and 31.10.2022, which indicates that the same is in gross violation of the principle of natural justice. In this regard, they submitted that the;

A. Hon'ble Supreme Court in the case of Dharampal Satyapal Limited Vs DC of Gauhati 2015 (320) ELT 3 (SC) held that

*"18. Natural justice is an expression of English Common Law. Natural justice is not a single theory - it is a family of views. In one sense administering justice itself is treated as natural virtue and, therefore, a part of natural*

*justice. It is also called the 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism'. Moral naturalism captures the essence of common-sense morality - that good and evil, right and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.*

*19. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi-judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must be given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'. The principles of natural justice developed over a period of time and which is still in vogue and valid even today were : (i) rule against bias, i.e. nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e. audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order".*

B. Chennai Citi Centre Holdings Pvt Ltd Vs the Designated Committee under the Sabka Vishwas Legacy Dispute Resolution scheme, 2019. 2021-TIOL-1711-HC-MAD-ST.

9.2. **Noticee is not required to pay GST on land value:** The taxpayer submitted that they are an owner of land situated at Ac. 10-06 gts., is Sy. No. 100/2, Rampally Village, Keesara Mandal, Medchal, Malkajgiri District. During the subject period, they were engaged in sale of land and construction of villas in the project namely 'Nilgiri Estate'. The building permit for Construction of Villa No's. 1 to 79, on part of the land was provided 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 2nd May 2018. Further, the details of consideration received towards sale of Villa No's 80-185 in Phase-II are reflected in GST period. Whenever the customers come to purchase Villa's in Phase-II, they have been entering the following agreements;

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,
b. Sale deed towards sale of land which was registered in Sub-registrar office, and
c. Agreement of Construction for provision of construction services which was also registered in sub-registrar office.

Since the sale of land is neither a supply of goods nor a supply of service in accordance with Paragraph 5 of Schedule-III, they 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 same was disclosed in the periodical returns filed by them. In this regard, the allegation was made at Para 2(I) of the impugned notice. With this regard, the taxpayer submitted that the valuation adopted by the department as per the Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 is not sustainable in law. Under GST, the valuation mechanism has been prescribed in Section 15 of CGST Act, 2017. Section 15(1) states that the **value of supply of goods or services** or both shall be the ***transaction value*** which is the price actually paid or payable for the said supply of goods or services subject to the following conditions:

- that the supplier and recipient are not related and
- the price is the sole consideration

This sub-section is applicable only in the following three scenarios:

- Supply of Goods or
- Supply of Services or
- Both i.e., the composite supply of goods and services

The sub-section would not be applicable in case of a transaction involving the composite supply of goods, services and immovable property. Sub-section (4) states that where the value of supply cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed i.e., the valuation mechanism as prescribed (in the Rules). On perusal of rules 27 to 35 of CGST Rules 2017, it is quite clear that none of the prescribe rules provides for valuation mechanism for transactions involving the supply of goods, service and immovable property. Therefore, even the valuation rules are not applicable in the instant case. Further, sub-section (5) of Section 15 is the only sub-section that is left unexamined. This sub-section starts with a non-obstante clause and states '*Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government shall be determined in such manner as may be prescribed*'. From this sub-section it states that the Central Government would be notifying certain services and the value of such notified supplies shall be determined in the manner as may be prescribed. The word 'prescribed' has been defined under Section 2(87) which means prescribed by rules made under this act on the recommendations of the council. On a strict interpretation of Section 15(5) read with Section 2(87), it is evident that the Central Government can notify the supplies by way of a notification, but the value of such supplies shall be determined as prescribed in rules. Thus, it means the valuation mechanism cannot be notified in a notification itself. Unless the valuation mechanism is prescribed in rules, the same is not valid and the valuation mechanism prescribed by way of Notification is not valid. To support the argument that the word 'prescribe' should be given limited meaning, reliance is placed on the Andhra Pradesh High Court decision in case of GMR Aerospace Engineering [ 2019 (31) G.S.T.L. 596 -A.P.] held that "*The word "prescribe" is* *verb. Generally, no enactment defines the word "prescribe". But the SEZ Act 2005 defines the word "prescribe" under Section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of Rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under Rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in Rule 22 with the terms and conditions prescribed in the notifications issued under any one of five enactments listed in Section 26(1) to find out whether there was any inconsistency."*

Further, the taxpayer also placed their Reliance on Patna High Court decision in case of Larsen & Toubro Ltd. Vs State of Bihar reported in [(2004) 134 STC 354] wherein it was observed as follows:

*"21. The word "prescribed" according to the Clause (r) of Section 2 of the Act means prescribed by Rules made under the Act. When the State Legislature says that something is to be done in accordance with law then that is to be done in that manner and as prescribed and not otherwise.* ***When the State Legislature says that the word "prescribed" means prescribed by the Rules then whatever is to be prescribed for making each and every section or any section of the Act workable must be prescribed under the Rules...***

*26. There is submission of the respondents that the benefit can be given to the petitioners even if there is no rule to prescribe the manner and the extent relating to the deductions in relation to the other charges. We are of the view that this argument should not detain us unnecessarily because* ***if the law requires a thing to be done then the State cannot say that that it stands above law*** *and would not provide/prescribe a particular thing in the Rules and would simply observe the directions issued by the Supreme Court."*

Even assuming that Government has notified the supply of services involving transfer of land or undivided share of land under Section 15(5) in the above-referred notification, the prescription of 1/3rd of the total amount charged as deemed land value will not hold good as the Government does not have the power to prescribe valuation mechanism in a notification under such sub-section and is only having power to notify "supplies". Hence, the same would not hold good.

Further, deemed deduction prescribed under Notification No.11/2017-CT(R) is conditional i.e., it would be applicable only when the transaction involves the transfer of land. Once the transaction does not involve any land then there is no question of 1/3rd deduction. It is pertinent to note that in case of conditional exemption, the claimant has the option to opt for the exemption or not opt for the same. Inference can be drawn from Save Industry Vs CCE 2016 (45) STR 551 (Tri-Chennai) in this regard. If it is made mandatory without giving any option to the assessee, then it would be open to challenge in a case where the actual land value is more.

The valuation mechanism provided in the Act and Rules do not contemplate the valuation of supply involving goods, services and land, therefore the measure of levy fails. However, the valuation mechanism is provided in SI. No. 02 to Notification No. 11/2017-CT(R) and the contemplation of deduction through a notification cannot substitute the statutory machinery. Thereby, the valuation fails and once the valuation fails, the levy fails. The Hon'ble Supreme Court and various High Courts in a catena of judgments have held that notifying the valuation mechanism through a notification is not valid and have struck down such notifications wherein the valuation mechanism is prescribed. Few of the noted judgments in this regard are as follows:

a) *CIT Vs B.C. Srinivasa Shetty 1981 (2) SCC 460 – SC The Supreme Court examined the levy of capital gains tax on sale of goodwill and had noted that the machinery provisions did not provide for calculation of capital gains, which is the measure of tax for imposition of tax on gains from sale of capital assets where the cost of acquisition was not ascertainable. The Court held that the charging sections and the computation provisions together constitute an integrated code and <u>the transaction to which the computation provisions cannot be applied must be regarded as never intended to be subjected to charge of tax.</u>*

b) *The Supreme Court in case of Govind Saran Ganga Saran v. CST, AIR 1985 SC [2002-TIOL-589-SC-CT] held that "6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity." (In the instant case of 1/3rd land deduction, there is a vagueness in the measure on which the GST is applicable as the Notification has not given the option to taxpayers to claim the actual land value as deduction).*

c) *Suresh Kumar Bansal Vs UOI – 2016 (43) S.T.R – Del HC wherein the Hon'ble Delhi High Court in Para 53 held that "As noticed earlier, in the present case, neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components for ascertaining the measure of service tax. The abatement to the extent of 75% by a notification or a circular cannot substitute the lack of statutory machinery provisions to ascertain the value of services involved in a composite contract".*

d) *Federation of Hotels & Restaurants Association of India 2016 (44) STR 3 (Del) wherein it was held that "74. The exemption from service tax on the provision of accommodation for a room having a declared tariff of less than Rs. 1,000 per day or equivalent is by Notification No. 12/2012, dated 17th March 2012. This is not provided in the Act or the Rules. In Commissioner of Central Excise and Customs, Kerala v. Larsen and Toubro Ltd. - (2016) 1 SCC 170, the Supreme Court affirmed the decision of the Orissa High Court in Larsen and Toubro Ltd. v. State of Orissa - (2008) 12 VST 31, to the effect that the machinery provisions for levy of the tax could not be provided by instructions and circulars. It was held by the Orissa High Court that "It is a well-settled principle that in matters of taxation either the statute or the Rules framed under the statute must cover the entire field. Taxation by way of administrative instructions which are not backed by any authority of* *law is unreasonable and is contrary to Article 265 of the Constitution of India.*

The taxpayer submitted that from the above-referred decisions, it is clear that the valuation mechanism shall be prescribed in the Act or Rules and cannot be prescribed by way of a notification. Further, it is important to note that Section 15 of CGST Act prescribes the valuation mechanism only for supply of goods or services or both and does not prescribe valuation mechanism for transactions involving immovable property. When the law provides specific powers to prescribe certain things by issue of notifications, the same would be valid, few of such examples may be notification of rate of tax under section 9 and exemptions under section 11. Further, section 15(5) does not authorize the Government to prescribe the valuation mechanism in Notification. Even section 164 of CGST Act, 2017 states that the Government may on the recommendations of the council, by notification, make rules for carrying out the provisions of this act'. Therefore, the Notifications cannot go beyond the act to prescribe a deemed valuation which is not prescribed in the Act itself.

Further, the taxpayer stated that even assuming the deemed valuation adopted by the department as per Notification No. 11/2017-CT(Rate) is correct, the same is not justified and is unsustainable in law. It is a known fact that the land value may not be the same across the country as the same depends on the location of the land. In metros, the cost of land would be high and in towns and rural areas, it would be low. The cost of construction may not vary much when compared to the land value, whether in metros or in rural areas. Deeming 1/3rd of the total amount charged as land value would lead to levy of GST on the land value in metros, whereas in the non-metros the construction service would not get completely taxed. Thus, levy of GST on land value, indirectly not allowed under Article 246A of the Constitution of India is being levied due to the deeming fiction. During the 15th GST Council meeting, where GST rates on several goods and services were discussed, the Maharashtra and Gujarat State Finance Ministers opposed the 1/3rd land deduction proposed by the Fitment Committee.

Maharashtra State Finance Minister was of the view that the flat cost consists of at least 50% of land cost in Maharashtra. Giving 30% land deduction will lead to litigation and Courts may give adverse judgements on this. He suggested giving the land value according to the ready reckoner or stamp duty value. The discussion in this meeting and consequently issue of notification No.11/2017-CT(R) dated 28.06.2017 deeming the value of land as $1/3^{rd}$ of the total amount charged itself shows that the Government has acted arbitrarily and without any scientific reason to arrive at the basis of $1/3^{rd}$. The taxpayer further stated that the Supreme Court in a catena of decisions held that any action undertaken by the Central Government or State Government arbitrarily would amount to a violation of Article 14 of the Constitution of India and becomes invalid. Further, it was also held that when the actual value is available the statutes or rules cannot prescribe a deemed value ignoring the actual value. They relied on the following decision;

(i) Supreme Court in case of Wipro Limited Vs UOI 2015 (319) ELT 177 (SC)

(ii) The Supreme Court in case of Indian Acrylics Vs UOI 1999 (113) ELT 373 (SC)

(iii) The Supreme Court in case of Hindustan Polymers case Vs Collector of CE 1989 (43) ELT 165 (SC).

The taxpayer further submitted that the valuation adopted by them 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 $1/3^{rd}$ 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."*

From the above referred decision, the taxpayer stated that it is clear that 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, the taxpayer submitted that the compliance made by them is in accordance with the law and there is no short payment of GST, therefore, the demand of Rs. 1,21,41,750/- is requested to be dropped.

9.3. **Short payment of tax due to difference in tax rate:** The taxpayer stated that the impugned notice has alleged that the Noticee has paid the tax at the rate of 12% instead of 18% during FY 2017-18 and has proposed to demand an amount of Rs. 19,82,815/- (CGST Rs. 9,91,407/- SGST Rs. 9,91,407/-) being short payment of tax in terms of provisions of section 74(1) of the CGST Act, 2017. In this regard, the taxpayer submitted that the actual differential tax is only Rs. 9,98,852/- but not Rs. 19,82,815/-. Out of Rs. 9,98,852/-, they 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 and the same has been adjusted with excess output tax paid in earlier months. Further, 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/-. 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 and the difference between Rs.9,98,852/- i.e., Rs. 73,650/- has been paid through DRC-03 dated 15.06.2020 acknowledged vide ARN No. AD360620001467E. Thereby, there is short payment as alleged by the impugned notice and the same needs to be dropped to that extent.

9.4. **No Short payment of GST on comparison of Tax Liability declared in GSTR-1 and GSTR-3B:** The taxpayer stated that the impugned notice has alleged that they have short paid when compared the tax liability with GSTR-01 and GSTR-3B for the month of June 2018 and March 2019 and is proposing to demand an amount of Rs.27,16,554/- (CGST Rs. 13,58,277/-

SGST Rs. 13,58,277/-). In this regard, they submitted that the impugned notice 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/-. Thus, if we take the differences of other months during the period July 2017 to March 2019 then we will be left with a differential amount of Rs. 5,15,480/- only instead of the alleged amount Rs.27,16,554/- as stated in the show cause notice. Thus, difference amount of Rs. 5,15,480/- has been already paid through DRC-03 on 9th August 2019 vide ARN No.AD3608190006125. Therefore, it is requested to drop proposed demand in this regard.

9.5. **Excess availment of ITC in GSTR-3B on comparison with GSTR-2A:** The Taxpayer stated that impugned notice has alleged that the Noticee excessively availed ITC in GSTR-3B when compared with GSTR-2A during the period July 2017 to March 2020 and is proposing to demand an amount of Rs.38,58,144/- (IGST- 3,77,768/- CGST - Rs.17,40,188/- & SGST - Rs.17,40,188/-). In this regard, they submitted that the impugned show cause notice has considered only the months in which there is a less reflection of ITC in GSTR-2A and has ignored the months in which there is an excess reflection of ITC in GSTR-2A. Thus, 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 impugned notice has stated that there is a difference of Rs.44,274/- of IGST, Rs.6,06,093/- of each of SGST and CGST. They submitted 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 impugned notice. Without prejudice to the above, they submitted that 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. Further, they submitted that 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 prevailing during the disputed period. The condition for availment of credit is provided under Section 16(2) of the Central Goods and Service Tax Act, 2017 which do not state that credit availed by the recipient needs to be reflected in GSTR-2A, further notice has also not been bought out as to which provision under the Central Goods and Service Tax, 2017 or rules made thereunder requires that credit can be availed only if the same is reflected in GSTR- 2A. Hence, issuance of the notice on such allegation, which is not envisaged under the provisions of the CGST/SGST Act. As per Section 16(2)(c), ITC can be availed subject to Section 41 of the GST Act which deals with the claim of ITC and the provisional acceptance thereof. From the above-referred section, it is clear that every registered person is entitled to take credit of eligible ITC as self-assessed in his return and the same will be credited to the electronic credit ledger on a provisional basis. In this regard, they submitted that Section 42, *ibid* specifies the mechanism for matching, reversal, and reclaim of ITC wherein it was clearly stated the details of every inward supply furnished by a registered person shall be matched with the corresponding details of outward supply furnished by the supplier in such manner and within such time as may be prescribed.

Further, they submitted that Rule 69 of CGST Rules, 2017 specifies that the claim of ITC on inward supplies provisionally allowed under Section 41 shall be matched under Section 42 after the due date for furnishing the return in GSTR-03. Further, the first proviso to Rule 69 also states that if the time limit for furnishing Form GSTR-01 specified under Section 37 and Form GSTR-2 specified under Section 38 has been extended then the date of matching relating to the claim of the input tax credit shall also be extended accordingly. The Central Government vide Notification No.19/2017-CT dated 08.08.2017, 20/2017-CT dated 08.08.2017, 29/2017-CT dated 05.09.2017, 44/2018-CT dated 10.09.2018, has extended the time limit for filing GSTR-2 and GSTR-3. Further, vide Notification No.11/2019-CT dated 07.03.2019 stated that the time limit for furnishing the details or returns under Section 38(2) (GSTR-2) and Section 39(1) GSTR 3 for the months of July 2017 to June 2019 shall be notified subsequently.They submitted that from the above-referred Notifications, it is very clear that the requirement to file GSTR 2 and GSTR 3 has differed for the period July 2017 to June 2019 and subsequently, it was stated the due date for filing would be notified separately. In absence of a requirement to file GSTR-2 and GSTR-3, the matching mechanism prescribed under Section 42 read with Rule 69 will also get differed and become inoperative. Once the mechanism prescribed under Section 42 to match the provisionally allowed ITC under Section 41 is not in operation, the final acceptance of ITC under Rule 70 is not possible thereby the assessee can use the provisionally allowed ITC until the due date for filing GSTR 2 and GSTR 3 is notified. Hence, there is no requirement to reverse the provisional ITC availed even though the supplier has not filed their monthly GSTR-3B returns till the mechanism to file GSTR 2 and GSTR 3 or any other new mechanism is made available.

The taxpayer further submitted that Finance Act, 2022 has omitted Section 42, 43 and 43A of the CGST Act, 2017 which deals ITC matching concept. Section 38 of the CGST Act, 2017 now states that only the eligible ITC which is available in the GSTR-2B (Auto generated statement) can be availed by the recipient. Now, GSTR-2B has become the main document relied upon by the tax authorities for verification of the accurate ITC claims. Hence, omission of sections 42, 43 and 43A has eliminated the concept of the provisional ITC claim process, matching and reversals. Once the mechanism prescribed under Section 42 to match the provisionally allowed ITC under Section 41 is not in operation and has been omitted by the Finance Act, 2022 the effect of such omission without any saving clause means the above provisions was not in existence or never existed in the statue. Hence, they requested to drop the proceedings initiated.

Further, the taxpayer submitted that Section 38(1) of the CGST Act, 2017 mandate for filing of GSTR 2 by incorporating the details of the invoices not declared by the vendors. Further, the ITC so declared is required to be matched and confirmed as per provisions of Sec. 42 and 43 of the CGST Act, 2017. Hence, on one hand the law allows the recipient to even claim ITC in respect of the invoices for which the details have not been furnished by the vendors. On the other hand, Rule 60 of the CGST Rules, 2017 which deals with the procedure for filing of GSTR 2 in fact does not provide for its filing at all but only provides for the auto-population of the data filed by the vendors in GSTR 2A/2B. The same therefore clearly runs contrary to Sec. 38 discussed above. The Section 38 read with Rule 60 had prescribed the FORM GSTR 2 which is not made available till 30.09.2022. Notification No. 20 Central Tax dated 10th Nov 2020 has substituted the existing rule to w.e.f. 1.1.2021 meaning thereby the requirement of Form GSTR 2 necessary in order to due compliance of Section 38. In the absence of the said form, it was not possible for the taxpayer to comply with the same. Further, Form GSTR 2 has been omitted vide Notification No. 19/2 Central Tax dated 28.09.2022 w.e.f. 01.10.2022.

Further, they submitted that neither the form has been prescribed by the law nor the same has been communicated to them. Ttherefore, it is not possible to comply with the condition given in Section 42 read with Rule 69, Rule 70 and 71. Hence, the allegation of the impugned notice is not correct. As Section 41 allows the provisional availment and utilization of ITC, there is no violation of section 16(2)(c) of GST Act 2017, therefore, the ITC availed by them is rightly eligible.

Without prejudice to above, they submitted that even if there is differential ITC availed by them, the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules based on which they have availed ITC. Further, they submitted that the value of such supplies including taxes has been paid to such vendors thereby satisfying all the other conditions specified in Section 16(2) of the CGST Act, 2017. As all the conditions of Section 16(2) are satisfied, the ITC on the same is eligible to them.

They further submitted that the fact that there is no requirement to reconcile the invoices reflected in GSTR-2A vs GSTR-3B is also evident from the proposed amendment in Section 16 of GST Act, 2017 in Finance Act, 2021 as introduced in Parliament. Hence, there is no requirement to reverse any credit in absence of the legal requirement during the subject period. 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. 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).

9.6. **Non reversal of ITC on receipt of Credit Note:** The taxpayer stated that impugned notice has alleged that they have irregularly availed ITC of Rs. 1,69,159/- (CGST Rs. 84,580/- SGST Rs. 84,580/-) for the period July 2017 to March 2020. and is alleging to reverse the alleged irregular ITC in terms of section 73 of CGST Act, 2017 along with applicable rate of interest under section 50 and is also imposing penalty under section 122(2)(a) read with section 73 of CGST Act, 2017. In this regard, they submitted that they have made the payment of the same of Rs. 1,69,159/- vide DRC-03 dated 31.07.2023.

9.7. **Short payment of Interest towards late payment of tax:** With regard to nonpayment of interest amount of Rs.1,420/- (CGST Rs. 710/- SGST Rs.710/-) on delayed payment of tax for the period July 2017 to March 2018, the taxpayer submitted 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. During the period July 2017 to March 2018, they 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, they have discharged their 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 the show cause notice. Hence, they requested to drop further proceedings in this regard.

9.8. **GST payment under RCM as per section 9(4) of CGST Act, 2017 on Rent paid and hamali charges to Un-registered person:** In respect of allegation made in the notice that they have not paid GST of Rs.Rs.6,412/- (CGST Rs. 3,206/- SGST Rs. 3,206/-) on Hamali Charges under RCM for the period Jul'17 - Oct'17, they submitted that they have made the payment of the same of Rs.6,412/- vide DRC-03 dated31.07.2023.

9.9. **Irregular availment of Input Tax Credit (Section 17(5)):** With regard to the allegation made in the notice that they have availed ITC of Rs. 88,320/- (CGST- Rs. 44,160/- & SGST- Rs. 44,160/-) in contravention of the provisions of section 17(5) for the period Jul'17 – March'20, the taxpayer submitted that they have reversed an amount of Rs. 88,320/- through DRC-03 on 07.01.2020 vide ARN No.AD3600120000820Z. Hence, they requested to drop the demand in this regard.

9.10. **Penalties and interest are not payable/imposable:**

***(a)* Imposition of interest is not valid:** The taxpayer stated that they are of the vehement belief that the input availed by them is not required to reverse and there is no short payment of GST, therefore, the question of interest and penalty does not arise. Further, it is a natural corollary that when the principal is not payable there can be no question of paying any interest and penalty as held by the Supreme Court in Prathiba Processors Vs UOI, 1996 (88) ELT 12 (SC). They further submitted that on careful perusal of the provisions of Section 50(1) envisages the payment of interest only in case of failure to pay tax to Government and for the period for which it remains unpaid. In the said section, there is no reference as to how to compute the interest payable. Furthermore, Section 50(2) though envisages the period from which the tax computation has to begin, it empowers the Central Government to prescribe the methodology of computation of interest. However, during the disputed period there is no such prescription in the Rules, thereby the interest computed in the impugned notice is not supported by any provisions of law since the time is not prescribed as permitted in the law and manner is not prescribed so far. Accordingly, the impugned notice to that extent needs to be set aside.

Without prejudice to above, the taxpayer further submitted that the Section 50(3) of the CGST Act, 2017 cannot be made applicable for the recovery of the interest in the instant case as the said sub-section specifically included to recover the interest under section 42(10) and section 43(10) which were not in force yet. Therefore, it is clear that the sub-section (3) also fails to recover the interest in case of short payment of tax. Once the provision based on which the interest is confirmed is not correct then the impugned notice fails and needs to be dropped. They further submitted that section 50(3) of the CGST Act, 2017 was amended with retrospective effect from 01.07.2017 (vide section 111 of Finance Act, 2022) as notified through Notification No. 09/2022-CT dated 05.07.2022 to declare that interest is liable only on the portion of ITC utilized and no interest is liable on the mere availment of ITC. Hence, it is clear that interest is not applicable on availment of ITC per se but the utilization of ITC.

Further, Rule 88B of CGST Rules, 2017 was introduced with effect from the 1st July, 2017, vide Notification No. 14/2022-Central tax dated 05.07.2022 stating the manner of calculating interest on the wrongly utilised ITC wherein it was clearly provided that ITC said to be utilised only when the closing balance of ITC falls below the amount of wrongful ITC.

(b) **Imposition of penalty is not valid:** The taxpayer submitted that the impugned show cause notice had not discharged the burden of proof regarding the imposition of the penalty under CGST Act, 2017. In this regard, they relied on the judgment in the case of Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All), wherein it was held that *"It is unjustified in absence of discussion on fundamental conditions for the imposition of penalty under Section 78 of Finance Act, 1994"*.

The taxpayer further submitted that they are of the bonafide belief that the compliance made by them is in accordance with law, and the penalties shall not be imposed when the Noticee has acted on bonafide belief. Hence, the penalties are not applicable. GST being a new law, the imposition of penalties during the initial years of implementation is not warranted. Further, they are under bonafide belief that ITC availed by them are eligible, thus, penalties shall not be imposed. Further, the government has been extending the due dates & waiving the late fees for delayed filing etc., to encourage compliance and in these circumstances imposition of penalties for claiming ITC on bonafide belief is not at all correct and the same needs to be dropped. In addition to above, they submitted that where an authority is vested with discretionary powers, discretion has to be exercised by application of mind and by recording reasons to promote fairness, transparency and equity.

With regard to penalty imposed under Section 122(2)(b) of CGST Act, 2017, the taxpayer submitted that is not attracted to the instant case. To cover under this section, the Noticee should fulfil the following conditions:

(i) The person must be registered with the GST Portal.

(ii) The person must supply goods or services or both.

(iii) The tax is not paid or short paid or erroneously refunded or ITC has been wrongly availed/utilised.

(iv) Intention of fraud, wilful misstatement or suppression of facts to evade tax should be there.

In this regard, it is submitted by them that all the details were furnished at the time of audit conducted by the department. No information has been concealed by them. Moreover, all the disclosures has been put forth before the department already and the amounts where information was called for has been paid vide DRC-03's. Thus, the imposition of penalty is bad in law and is requested to be dropped.

Therefore, on this ground alone the penalty proceedings under the provisions of Section 122 (2) (b) of the CGST Act, 2017 needs to be set aside.

**(c ) Penalty under section 125 is not impossible:** In this regard, the taxpayer submitted that, from section 125, it is clear that the penalty under Section 125 can be imposed only when no penalty is separately provided under CGST Act, 2017. However, in the instant case, the impugned notice has proposed the penalty under Section 122 of CGST Act, 2017. Therefore, the proposal of penalty under Section 125 is not correct and the same needs to be dropped.

**PERSONAL HEARING:**

10. In this case, the taxpayer was offered following personal hearings:

10.1. Personal hearing was fixed on 24.07.2023 and the same was intimated to the taxpayer vide this office letter dated 03.07.2023. The taxpayer did not appear.

10.2. Another, personal hearing was fixed on 14.08.2023 and the same was intimated to the taxpayer vide this office letter dated 26.07.2023. Shri Laxman partner of HNA & Co LLP, authorised representative of M/s. Nilgiri Estates, appeared for personal hearing on 14.08.2023 and he promised to submit additional written submission. He submitted additional submisison vide letter dated 29.08.2023. In this submission, the taxpayer through their authorised representative stated followings:

(i) The taxpayer stated that they have already discharged certain proposed amounts even before the issuance of SCN and certain demands after issuance of SCN which is mentioned in the below table:

| Para No. | Demand amount | Actual difference and paid amount | DRC-03 date | Paid through | Sec |
|---|---|---|---|---|---|
| 1 | 1,21,41,750 | Disputed | NA | NA | 74 |
| 2 | 19,82,815 | 5,89,131 | 09.08.2019 &15.06.2020 | Credit Ledger | 74 |
| 3 | 27,16,554 | 5,15,480 | 09.08.2019 | Credit Ledger | 73 |
| 4 | 38,58,144 | 17,78,059 | NA | NA | 73 |
| 5 | 1,69,159 | 1,69,159 | 31.07.2023 | Credit Ledger | 73 |
| 6 | 1,420 | 1,420 | 31.07.2023 | Cash Ledger | 73 |
| 7 | 6,412 | 6,412 | 31.07.2023 | Cash Ledger | 73 |
| 8 | 88,320 | 88,320 | 07.01.2020 | Credit Ledger | 74 |

(ii) With respect of interest on already paid demands, they stated that they have sufficient credit ledger balance carry forward throughout the disputed period and have discharged the same through Electronic Credit Ledger. Hence, they are of the bona fide belief that they are not liable to discharge the interest under Section 50 of CGST Act, 2017 in accordance with first proviso to Section 50(1) which provides that interest is applicable only on the liability which was discharged through Electronic Cash Ledger. Further, they submitted that they have paid the taxes before issuance of notice. Hence, there is no requirement to issuance notice under Section 73. The taxpayer further submitted that Section 50(3) of the CGST Act, 2017 was amended with retrospective effect from 01.07.2017 vide Section 111 of Finance Act, 2022 as notified through Notification No.09//2022-CT dated 05.07.2022 to declare that interest is liable only on the portion of ITC utilized and no interest is liable on the mere availment of ITC. Further, they submitted that Rule 88B of CGST Act, 2017 was introduced with effect from

1st July, 2017, vide Notification No. 14/2022-Central Tax dated 05.07.2022 stating that the manner of calculating interest on the wrongly utilised ITC wherein it was clearly provided that ITC said to be utilised only when the closing balance of ITC falls below the amount of wrongful ITC. They stated that in the instant case, the interest is not applicable during the period as the closing balance of ITC is higher than the alleged wrongful ITC. Hence, they requested to consider the payment of tax liability through the DRC-03 for the paras 5 and 8 and drop the interest on the same.

**DISCUSSION AND FINDINGS:**

11. I have carefully gone through the show cause notice issued to the taxpayer vide SCN No.06/2023-24 on 19.05.2023, reply to the notice submitted by the taxpayer vide letter dated 31.07.2023, written submission dated 29.08.2023 made by the taxpayer, documents submitted by the taxpayer, oral submission made by the taxpayer during personal hearing and information/data available on records. I would like to examine the case para wise as mentioned in the notice.

12. **Short payment of GST due to adopting wrong method of valuation:**

12.1. It is alleged in the notice that the taxpayer deliberately avoided to pay tax on two third of total amount received for sale of constructed building and declared less value of taxable services in their periodical returns filed with the department with an intention to evade payment of GST. They arbitrarily declared approximately half of the total value as the value of land. Thus, they contravened the valuation method provided in the notification No.11/2017-Central Tax (Rate) dated 28.06.2017. And, they short paid of tax amounting to Rs.1,21,41,750/- (CGST: Rs.60,70,875 + SGST: Rs.60,70,875) for the period from July, 2017 to March, 2020.

12.2. The taxpayer contested the demand raised in the instant case by creating a hypothetical scene and by questioning on the notification No. 11/2017-Central Tax (Rate) dated 28.06.2017. They submitted that in metros, the cost of land would be high and in towns and rural areas, it would be low. The cost of construction may not be vary much when compared to the land value, whether in metros or in rural areas. Deeming 1/3 of the total amount charged as land value lead to levy of GST on the land value in metros, whereas in the non-metros the construction service would not get completely taxed. Like this, creating a hypothetical scene they have raised may questions on the above said notification. And finally, by quoting some case laws they argued that where 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, they stated that their compliance is in accordance with the law and there is no short payment of GST.

12.3. On examination of the facts, provisions & notification No.11/2017-Central Tax (Rate) dated 28.06.2017, and submission made by the taxpayer, I find that the taxpayer's submission in this regard is not tenable and the case laws relied upon by the taxpayer have no relevance to the facts of the instant case. Hence, I hold that the tax demand of Rs.1,21,41,750/- raised in the show cause notice is sustainable and the same is recoverable under Section 74 of CGST Act, 2017 along with interest in terms of Section 50 of CGST Act, 2017 and penalty in terms of 74 of the Act read with Section 122(2)(b) of CGST Act, 2017.

13. **Short payment of tax due to difference in tax rate:**

13.1. In the notice, it is alleged that the taxpayer has deliberately adopted incorrect lesser tax rate i.e.12% instead of 18% as specified in Notification No.11/2017-Central Tax (Rate) dated 28.06.32017 to avoid to pay tax in their periodical returns filed with the department with an intention to evade payment of GST. By adopting incorrect rate of tax, the taxpayer has contravened the provisions of Section 9 of CGST Act, 2017 read with Notification No.11/2017- Central Tax dated 28.06.2017 and short paid the tax of Rs.19,82,815/-(CGST:Rs.9,91,407 + SGST:Rs.9,91,407) for the period from July, 2017 to March, 2018). In this regard, the taxpayer submitted that the actual difference is only Rs.9,98,852/-, not Rs.19,82,815/-. Out of Rs.9,98,852/-, they have issued debit notes for Rs.9,25,202/- (CGST:4,62,601 & SGST:4,62,601) in December, 2018 and disclosed in the books and the same has been adjusted with excess output tax paid in earlier months. The difference of Rs.73,650/- has been paid through DRC-03 dated 15.06.2020 acknowledged vide ARN No.AD360620001467E. Thereby, there is short payment as alleged by the notice and the same needs to be dropped to that extent.

13.2. As seen from the taxpayer's submission in this regard, they did not submit any clarification regarding difference in tax rate. They simply stated that they have issued debit notes of Rs.9,25,202/-. Whether, these debit notes were issued for difference in tax rate or other purpose, in this regard they neither submitted any clarification, nor copy of debit notes and related invoices. The taxpayer has also not submitted the relevant documents in support of their claim that they have adjusted the amount of Rs.9,25,202/- with excess output tax paid in earlier months. Further, it is also noticed form the DRC-03 dated 15.06.2020, the payment of Rs.73,650/- was made for the difference between GSTR-1 and GSTR-3B for the month of March, 2019, whereas the demand was raised for the reason that they have adopted lesser tax rate during the period from July, 2017 to March, 2018. Hence, this amount cannot be treated as payment made towards the liability raised in the notice. Further, they did not say anything about the balance tax demand of Rs.9,83,963/- (19,82,815-9,98,852). Thus, their submission in this regard is absolutely obscure and could not be accepted. Hence, I hold that the tax demand of Rs.19,82,815/- raised in the show cause notice is sustainable and the same is recoverable under Section 74 of CGST Act, 2017 along with interest in terms of Section 50 of CGST Act, 2017 and penalty in terms of 74 of the Act read with Section 122(2)(b) of CGST Act, 2017.

14. **Short payment of GST on comparison of tax liability declared in GSTR-1 and GSTR-3B:**

14.1. It is alleged in the notice that on comparison of tax liability declared in GSTR-1 and GSTR-3B, it was observed that the taxpayer has made short payment of tax amounting to Rs.27,16,554/- (CGST:13,58,227/- and SGST:13,58,227/-) for the Financial Year 2018-19 (for the month June'18 and March'19). In this regard, the taxpayer stated that the impugned notice has considered only the difference 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. They further submitted that on comparison of GSTR-01 and GSTR-3B for the period from July, 2017 to March,2020, the difference in liability is only Rs.5,15,480/- and the same has already been paid by them through DRC-03 on 9th August, 2019. However, they did not submit any documentary evidences in support of their claim.

14.2. In view of the facts and submission made by the taxpayer, I find that the taxpayer's submission in this regard is not acceptable. Hence, I hold that the tax demand of Rs.27,16,554/- raised in the show cause notice is sustainable and the same is recoverable under Section 73 of CGST Act, 2017 along with interest in terms of Section 50 of CGST Act, 2017 and penalty in terms of 73 of the Act read with Section 122(2)(a) of CGST Act, 2017.

15. **Exess availment of ITC in GSTR-3B on comparison with GSTR-2A:**

15.1. It is alleged in the notice that the taxpayer has availed excess input tax credit of Rs.38,58,144/- (IGST:3,77,768, CGST:17,40,188 & SGST: 17,40,188) during the period from July, 2017 to March, 2020 in comparison to GSTR 2A. In this regard, the taxpayer submitted that the impugned show cause notice has considered only the months in which there is a less reflection of ITC in GSTR-2A and has ignored the months in which there is an excess reflection of ITC in GSTR-2A. Thus, 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. They further submitted 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 impugned notice. Without prejudice to the above, the taxpayer also submitted that ITC cannot be denied merely due to non-reflection of invoices in GSTR 2A as all the condition specified under Section 16 of CGST Act, 2017 has been satisfied.

15.2. On examination of the taxpayer's reply dated 12.09.2023 to the notice, I found that they have not furnished the details and documents establishing their claim. Hence, I hold that the irregular availed Input Tax Credit is liable to be recovered from the taxpayer in terms of Section 73 of CGST Act, 2017 along with interest payable under Section 50 of CGST Act, 2017 and penalty in terms of Section 122(2)(a) read with Section 73 of CGST Act, 2017.

16. **Non reversal of ITC on receipt of Credit Notes:**

16.1. It is alleged in the notice that after issuing the credit notes the supplier has adjusted the tax liability towards the invoices involved, whereas the taxpayer had failed to reverse the input tax credit of Rs.1,69,159/- availed in their GSTR-3B returns in Financial Year 2017-18 (July'17 to March'18), 2018-19 and 2019-20. The taxpayer in their reply accepted the objection raised in the notice and paid Rs.1,69,159/- through DRC-03 dated 31.07.2023. Further, they submitted that as per Section 50(3) of CGST Act, 2017 (as amended), there is no interest liability on mere availment of ITC. The taxpayer has submitted above said challan and Electronic Credit Ledger for the disputed period.

16.2. On perusal of the taxpayer's reply and supporting documents, I find that the taxpayer has paid Rs.1,69,159/- towards the demand raised in the notice, thorough DRC-03 dated 31.07.2023 by debiting Electronic Credit Ledger entry no. DI3607230190183 vide ARN:AD3607230117545. Further, as seen from the Electronic Credit Ledger, the taxpayer has never utilised the excess availed credit till the payment made i.e. 31.07.2023. Hence, as per Section 50(3) of CGST Act, 2017 (as amended with retrospective effect from 01.07.2017 vide Section 111 of Finance Act, 2022 and notified though Notification No.09/2022-CT dated 05.07.2022), there is no interest liability on mere availment of ITC. Section 50(3) of CGST Act, 2017 is reproduced hereunder for ready reference;

> ***Section 50(3):*** *Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.*

Section 111 of the Finance Act, 2022 is also reproduced hereunder for ready reference;

> ***111.*** *In section 50 of the Central Goods and Services Tax Act, for sub-Section (3), the following sub-section shall be substituted and shall be deemed to have been substituted with effect from the 1st day of July, 2017, namely:—*
>
> *"(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed."*

In view of the above facts and provision, I agree with the taxpayer's submission and hold that there is no interest liability with regard to payment of Rs.1,69,159/-.

16.3. As per Section 73(8) of CGST Act, 2017, Where any person chargeable with tax under sub-section (1) or sub-section (3) pays the said tax along with interest payable under section 50 within thirty days of issue of show cause notice, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded. In the instant case, the taxpayer did not pay the dues within thirty days of issue of show cause notice. Hence, I hold that the taxpayer is liable for penalty in terms of Section 73(9) read with Section 122(2)(a) of CGST Act, 2017, wherein it is provided that a penalty equivalent to ten per cent of tax or ten thousand rupees, which is higher, shall be imposed.

17. **Short payment of interest towards late payment of tax:**

17.1. It is alleged in the notice that the taxpayer has paid the tax declared at the time of filing GSTR-3B returns, however they have not paid the interest of Rs.1,420/-(CGST:710 & SGST:710) for delayed payment of tax during the period 2017-18(August'17). The taxpayer vide their additional submission dated 29.08.2023 has accepted interest liability and intimated that they have paid their interest liability through DRC-03 dated 31.07.2023 by debiting Electronic Cash Ledger entry No. DC3607230196385 vide ARN:AD3607230117454.

17.2. On verification of the facts and above said DRC-03 dated 31.07.2023, I find that the taxpayer has paid the interested liability of Rs.1420/- as demanded in the show cause notice. Hence, I drop the demand.

18. **Non-payment of GST under RCM as per Section 9(4) of CGST Act,2017 on Rent and Hamali paid to Unregistered person:**

18.1. In the notice, it is alleged that the taxpayer has not paid GST of Rs.6,412/- (CGST: Rs.3206 & SGST: Rs.3206) under RCM towards expenses made on supplies received from unregistered persons during the period from July, 2017 to October, 2017 and hence, they contravened the provisions of Section 9(4) of CGST Act, 2017 read with Notification No.8/2017-Central Tax (Rate) dated 28.06.2017(as amended). The taxpayer vide their reply to notice and additional submission accepted the demand and intimated that they have paid Rs.6,412/- through DRC 03 dated 31.07.20203.

18.2. On verification of the facts and submission along with a copy of DRC-03 submitted by the taxpayer, I find that the taxpayer has paid the tax amount of Rs.6,412/- through DRC-03 dated 31.07.2023 by debiting Electronic Cash Ledger entry No. DC3607230196494, vide ARN:AD360723011750D. Whereas, they have not paid interest and penalty.

Hence, I hold that the amount of Rs.6,412/- paid by the taxpayer is liable for appropriation towards the demand raised at para 8(xvii) of the notice. Further, I also hold that the taxpayer is liable for payment of applicable interest in terms of Section 50 of CGST Act, 2017 and penalty under Section 73 read with Section 122(2)(a) of CGST Act, 2017.

19. **Irregular availment of Input Tax Credit [Section 17(5)]:**

19.1. It is alleged in the notice that the taxpayer has availed input tax credit of Rs.88,320/- (CGST: Rs.44,160 & SGST:44,160) on supplies used in personal consumption such as Medical expenditure and Car rent expenses which fall under the category of blocked credit under Section 17(5) of CGST Act, 2017 during the period from July, 2017 to March, 2020. And, availment of such credit is irregular and the same is liable to be recovered. In this regard the taxpayer submitted that they have reversed an amount of Rs.88,320/- through DRC-03 on 07.01.2020 vide ARN No.AD3600120000820Z.

19.2. On verification of the facts and above said DRC-03 dated 07.01.2020 submitted by the taxpayer, I find that vide above said DRC-03, an amount of Rs.4,43,390/- was paid for tax period September, 2018. Whereas, the demand was raised in the notice is for the period from July, 2017 to March, 2020. Hence, the taxpayer's submission in this regard is not acceptable and I hold that the taxpayer is liable for payment of tax along with applicable interest and penalty as proposed in the notice.

20. The taxpayer in their reply to the notice stated that the notice is vague, having lack of details, has been issued based on assumption and presumptions, and in gross violation of the natural justice principal. However, they did not submit any valid ground in their support. It is seen in their reply that the taxpayer is fond of quoting case laws irrespective of their relevance to the facts. In this regard, I would like to submit that the notice was issued on proper verification of the records during the audit conducted in the month of September, 2022 and objections were raised after due

verification of the discrepancies on legal provisions provided under the laws. Further, I also find that the audit officers have maintained/provided high level natural justice with the taxpayer by issuing Spot Memo, communicating discrepancy vide Final Audit Report and by issuing DRC-01A.

21. In respect of interest payable by the taxpayer, I would like to submit that Section 50 of CGST Act, 2017 provides the provisions to collect the interest on delay of tax payment. The relevant extracts are reproduced hereunder for ready reference;

> *(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:*
>
> ***Provided** that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.]*
>
> *(2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.*
>
> *(3) Where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent. as may be notified by the Government, on the recommendations of the Council, and the interest shall be calculated, in such manner as may be prescribed.*

From the above, it is very evident that the taxpayer is liable to pay interest on delay payment of tax. And, I find that the taxpayer submission made in the reply to the notice in this regard is not sustainable.

22. With regard to imposition of penalties under Section 122(2)(b) and Section 125 of CGST Act, 2017 and invocation of Section 74 for issuance of the notice, the taxpayer made following submission;

22.1. **Invocation of Section 74 of CGST Act, 2017:** The taxpayer stated that mere non-payment/short payment of tax does not mean that they have wilfully contravened the provisions with the intent to evade payment of tax. In this regard they relied on Uniworth Textile Ltd. V. Commissioner 2013 (288) E. L. T. 161 (S.C). They further submitted that the notice under Section 74 can be issued only when something positive other than mere inaction of failure on the part of manufacturer/ Service provider is proved - Conscious or deliberate withholding of information by manufacturer/ service provider necessary to invoke suppression of facts and intention to evade payment of tax. In this regard, they relied on CCE, Chempher Drugs & Liniments 1989 (40) E.L.T. 276 (S.C.).

In this regard, I would like to submit that the dependencies were come to light only when audit was conducted, otherwise, would have gone unnoticed. Here it is also pertinent to mention that Explanation 2 of the Section 74 provides "the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer". In the instant case, Section 74 was imposed only where the taxpayer had not declared their correct tax liability in the returns filed with the department. Hence, the taxpayer's submission in this regard is not sustainable.

22.2. With regard to imposition of penalty under Section 122(2)(b), They submitted that to cover under this section, the noticee should fulfil the following conditions;

(i) The person must be registered with the GST Portal.

(ii) The person must supply goods or services or both.

(iii) The tax is not paid or short paid or erroneously refunded or ITC has been wrongly availed/utilised.

(iv) Intention of fraud, wilful misstatement or suppression of facts to evade tax should be there.

They submitted that all the details were furnished at the time of audit conducted by the department. No information has been concealed by them. Moreover, all the disclosures have been put forth before the department already and the amounts where information was called for has been paid vide DRC-03s. Thus, imposition of penalty is bad in law and is requested to be dropped.

In this regard I would like to submit that the corresponding penalty of Section 74 is provided under Section 122(2)(b) of CGST Act, 2017. In the instant case, the penalty under section 122(2)(b) was imposed only where demand was raised under Section 74 of CGST Act, 2017. Hence, I find that the taxpayer's contention in this regard is not acceptable.

22.3. With respect to the imposition of penalty under Section 125 of CGST Act, 2017, the taxpayer submitted that Section 125 can be imposed only when no penalty is separately provided under CGST Act, 2017. In the instant case, the penalty under Section 122 of CGST Act, 2017 has proposed. Therefore, the proposal of penalty under section 125 is not correct and the same needs to be dropped. In this regard, I would like to submit that I examined the facts of the case, entire procedure of the verification proceedings as recorded in the notice and submission made by the taxpayer through their reply to the notice. And, I found that the penalty for non-payment/short payment/irregular availment of credit has been imposed on the taxpayer. Other than non-payment/short payment/irregular availment of credit, they have not committed any mistakes/wrong things during the process of verification and in furnishing the data. Further, grounds for imposition of penalty under Section 125 is not recorded in the notice. In view of the above I find that the separate penalty under Section 125 of CGST Act, 2017 as proposed in the notice is not sustainable.

23. Cross empowerment of provisions of Telangana State Goods and Service Tax Act, 2017 have been provided under Section 6 of the TSGST Act, 2017 to authorize Central Tax officers as the proper officers for the purposes of TSGST Act. Further, Section 20 of the IGST Act 2017 stipulates that the provisions of the CGST Act shall *mutatis mutandis* apply in relation to integrated tax as in relation to Central Tax as if they are enacted under IGST Act 2017. Thereby any reference made under CGST Act 2017 in the order hereafter, may be considered as similar reference has also been made to relevant provisions of IGST Act 2017 and TGST Act 2017

24. In view of the forgoing discussions, I pass following order;

## ORDER

(i) I confirm the tax demand of **Rs.1,21,41,750/- (Rupees One Crore Twenty One Lakh Forty One Thousand Seven Hundred and Fifty only)** (CGST- Rs.60,70,875/- and SGST -Rs.60,70,875/-) being short paid due to adopting wrong method of valuation during the period from July, 2017 to March, 2020 in terms of Section 74 of the CGST Act,2017 and TSGST Act,2017 in view of my discussion and findings at para 12.2 & 12.3 above;

(ii) I order for recovery of interest payable on the tax amount mentioned at para 24(i) above, from them in terms of Section 50(1) of the CGST Act, 2017 read with TSGST Act, 2017;

(iii) I impose a penalty of **Rs.1,21,41,750/- (Rupees One Crore Twenty One Lakh Forty One Thousand Seven Hundred and Fifty only)** towards the tax demand mentioned at para 24(i) above, on them in terms of Section 74 of the CGST Act, 2017 read Section 122(2)(b) of CGST Act,2017 and TSGST Act,2017;

(iv) I confirm the demand of **Rs.19,82,815/- (Rupees Nineteen Lakh Eighty Two Thousand Eight Hundred and Fifteen only)** (CGST- Rs.9,91,407.5/- and SGST -Rs.9,91,407.5/-) being short paid due to difference in tax rate during the period from July, 2017 to March, 2018 in terms of Section 74 of the CGST Act,2017 and TSGST Act,2017 in view of my discussion and findings at para 13.2 above;

(v) I order for recovery of interest payable on the tax amount mentioned at para 24(iv) above, from them in terms of Section 50(1) of the CGST Act, 2017 and TSGST Act, 2017;

(vi) I impose a penalty of **Rs.19,82,815/- (Rupees Nineteen Lakh Eighty Two Thousand Eight Hundred and Fifteen only)** towards the tax amount demanded at para 24(iv) above, on them in terms of Section 74 of the CGST Act, 2017 read Section 122(2)(b) of CGST Act,2017 and TSGST Act,2017;

(vii) I confirm the demand of **Rs.27,16,554/- (Rupees Twenty Seven Lakh Sixteen Thousand Five Hundred and Fifty Four only)** (CGST- Rs.13,58,277/- and SGST -Rs.13,58,277/-) being short paid on comparison of tax liabilities declared in GSTR-1 and GSTR-3B during the period 2018-19 in terms of Section 73(1) of the CGST Act,2017 and TSGST Act,2017 in view of my discussion and findings at para 14.2 above;

(viii) I order for recovery of interest payable on the tax demand mentioned at para 24(vii) above, from them in terms of Section 50(1) of the CGST Act, 2017 and TSGST Act, 2017;

(ix) I impose a penalty of Rs.2,71,655/- (Rupees Two Lakh Seventy One Thousand Six Hundred Fifty Five only) on them in terms of Section 73(9) of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and TSGST Act,2017 towards the tax amount demanded at para 24(vii) above;

(x) I confirm the demand of **Rs.38,58,144/- (Rupees Thirty Eight Lakh Fifty Eight Thousand One Hundred and Forty Four only/-** (IGST Rs.3,77,768/-, CGST- Rs.17,40,188/- and SGST -Rs.17,40,188/-) being the ineligible input tax credit tax wrongly availed by the taxpayer during the period 2017-18 (July,2017 to March,2018), F.Y. 2018-19 and F.Y. 2019-20 in terms of Section 73(1) of the CGST Act,2017 read with Section 20 of IGST Act,2017 and TSGST Act,2017, in view of my discussion and findings at para 15.2 above;

(xi) I order for recovery of interest payable on the tax amount demanded at para 24(x) above, from them in terms of Section 50 of the CGST Act, 2017 read with Section 20 of IGST Act,2017 and TSGST Act, 2017;

(xii) I imposed a penalty of Rs.3,85,814/- (Rupees Three Lakh Eighty Five Thousand Eight Hundred Fourteen only) on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and Section 20 of IGST Act,2017 and TSGST Act,2017 being the 10% tax amount demanded at para 24(x) above;

(xiii) I confirm the demand of **Rs.1,69,160/- (Rupees One Lakh Sixty Nine Thousand One Hundred and Sixty only/-)** (CGST: Rs.84,580/- and SGST: Rs.84,580/-) being irregularly availed ITC towards credit notes received during the period F.Y. 2017-18 (July,2017 to March,2018), F.Y. 2018-19 and F.Y. 2019-20 in terms of Section 73 of the CGST Act,2017 read with TSGST Act,2017, in view of my discussion and findings at para 16.2 above;

(xiv) I order for appropriation of **Rs.1,69,160/- (Rupees One Lakh Sixty Nine Thousand One Hundred and Sixty only/-)** (CGST: Rs.84,580/- and SGST: Rs.84,580/-) already reversed through DRC-03 dated 31.07.2023 by debiting Electronic Credit Ledger entry No. DI3607230190183 vide ARN No. AD3607230117545 towards the irregularly availed ITC as demanded at para 24(xiii) above.

(xv) I drop the interest payable in terms of Section 50 of the CGST Act, 2017 read with TSGST Act, 2017 on the tax amount demanded at para 24(xiii) above, in view of my findings as discussed at para 16.2 above;

(xvi) I impose a penalty of **Rs.10,000/- (Ten Thousand)** towards CGST demand and a penalty of **Rs.10,000/- (Ten Thousand)** towards TSGST demand (as demanded at para 24(xiii) above) on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and TSGST Act,2017 in view of my findings as discussed at para 16.3 above;

(xvii) I drop the demand of interest of **Rs.1,420/- (Rupees One Thousand Four Hundred and Twenty Only)** (CGST- Rs.710/- and SGST- Rs.710/-)

payable on late payment of tax in cash in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 proposed at para 8(xvi) of the notice, as the interest of Rs.1,420/- has already paid by the taxpayer vide DRC-03 dated 31.07.2023 by debiting Electronic Cash Ledger vide ARN No. AD3607230117454;

(xviii) I confirm the tax demand of **Rs.6,412/- (Rupees Six Thousand Four Hundred and Twelve only)** (CGST: Rs. 3,206/- and SGST: Rs.3,206/-) being short paid by the taxpayer under RCM during the period F.Y.2017-18 (July,2017 to March,2018) in terms of Section 73 of the CGST Act,2017 and TSGST Act,2017;

(xix) I order for appropriation of **Rs.6,412/- (Rupees Six Thousand Four Hundred and Twelve only)** (CGST: Rs. 3,206/- and SGST: Rs.3,206/-) already paid by the taxpayer through DRC-03 dated 31.07.2023 by debiting Electronic Cash Ledger entry No. DI3607230196494 vide ARN No. AD360723011750D towards the tax demanded at para 24(xviii) above.

(xx) I order for recovery of interest payable in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017 on the tax amount demanded at para 24(xviii) above;

(xxi) I impose a penalty of **Rs.10,000/- (Ten Thousand)** towards CGST demand and a penalty of **Rs.10,000/- (Ten Thousand)** towards TSGST demand (as demanded at para 24(xviii) above) on them in terms of Section 73 of the CGST Act, 2017 read with Section 122(2)(a) of CGST Act,2017 and TSGST Act,2017 in view of my findings as discussed at para 18.2 above;

(xxii) I confirm the tax amount equal to Input Tax Credit of **Rs.88,320/- (Rupees Eighty Eight Thousand Three Hundred and Twenty only/-** (CGST:Rs.44,160/- and SGST: Rs.44,160/-) being the ineligible input tax credit (blocked credit) wrongly availed by the taxpayer during the period F.Y.2017-18 (July,2017 to March,2018), F.Y. 2018-19 and F.Y. 2019-20 in terms of Section 74(1) of the CGST Act,2017 and TSGST Act,2017 in view of my findings as discussed at para 19.2 above;

(xxiii) I order for recovery of interest payable on the tax amount demanded at para 24(xxii) above, in terms of Section 50 of the CGST Act, 2017 and TSGST Act, 2017;

(xxiv) I impose a penalty of **Rs.88,320/- (Rupees Eighty Eight Thousand Three Hundred and Twenty only/-** on them in terms of Section 74(1) of the CGST Act, 2017 read with Section 122(2)(b) of CGST Act,2017 and TSGST Act,2017 towards the tax amount demanded at para 24(xxii) above;

(xxv) I drop the penalty of **Rs.25,000/- (Rupees Twenty Five Thousand Only)** proposed on them under Section 125 CGST Act, 2017 and also **Rs.25,000/- (Rupees Twenty Five Thousand Only)** in terms of section 125 of the Telangana GST Act, 2017 read with Section 6(1) of the Telangana State Goods and Services Tax Act, 2017 as proposed at para 8(xxiii) of the notice, in view of my findings as discussed at para 22.3 above.

बि. विजय /
12/10/23
**(B. VIJAY)**
**Additional Commissioner**

To
M/s. Nilgiri Estates
5-4-187/3, 2nd Floor,
Soham Mansion, M.G. Road,
Secunderabad, Telangana - 500003

(By Speed Post and through email to Registered email id - gst@modiproperties.com)

Copy submitted to:
1. The Commissioner of Central Tax, Secunderabad Commissionerate, Hyderabad. (By Name to Superintendent, Review)

2. The Commissioner of Central Tax, Audit-II Commissionerate, Door No. 1-98/B/20, 21, Sanvi Yamuna Pride, Krithika Layout,Madhapur, Hitech City, Hyderabad - 500081 – w.r.t SCN issued in File C.No.V/Audit-II/C-1/28/2021-22/Gr-15, dated :19.05.2023 for information.

Copy to:

1) The Deputy/Assistant Commissioner of Central Tax, Secunderabad CGST Division, Secunderabad Commissionerate **with a direction to ensure that DRC 07 is created for this OIO and send compliance to this office.**

2) The Superintendent of Central Tax, Ramgopalpet-II Range for information, **with a direction to create DRC 07 for this OIO and send compliance through Division**.

3) Master file / Spare copy.

OR NO: 25/2023-24-Sec

आ.स.सै.
ON I.G.S.

SPEED-POST
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To
M/S Nilgiri Estates
5-4-187/3, 2nd floor,
Soham mansion,
M.G. Road
Secunderabad, - 500003

DESPATCH
Office of the Commissioner
Central Tax & Customs
Secunderabad GST Commissionerate
L.B. Stadium Road, Basheer Bagh
Hyderabad - 500 004.