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H N A & Co LLP
Chartered Accountants
(Formerly known as Hiregange & Associates LLP)

Date: 31.07.2023
To
The Additional/Joint Commissioner of Central Tax,
Secunderabad GST Commissionerate,
GST Bhavan, 7th Floor,
L.B Stadium Road, Basheerbagh,
Hyderabad, Telangana-500004.

Dear Sir,

Sub: Filing of Reply to Show Cause Notice in Form GST DRC – 06.

Ref: SCN No. 06/2023-24 vide DIN: 20230556YS000000B958 dated 19.05.2023 pertaining to **M/s. Nilgiri Estates.**

1. We have been authorized by M/s. Nilgiri Estates to submit a reply to the above referred SCN No. 06/2023-24 dated 19.05.2023 and represent before your good office and to do necessary correspondence in the above referred matter. A copy of authorization is attached to the SCN reply.
2. In this regard, we are herewith submitting the reply to the SCN along with authorization letter and other annexures referred to in the reply.

We shall be glad to provide any other information in this regard. Kindly acknowledge receipt of the reply and post the hearing at the earliest.,

Thanking You,

Yours faithfully,

For M/s. H N A & Co. LLP
(Formerly known as Hiregange & Associates LLP)
Chartered Accountants

R. Lakshman Kumar

CA Lakshman Kumar K
Partner

HNA & CO LLP Hyderabad Chartered Accountants

केन्द्रीय कर एवं सीमा शुल्क आयुक्त का कार्यालय
Office of the Commissioner of Central Tax & Customs
31 JUL 2023
Secunderabad GST Commissionerate

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FORM GST DRC – 06

[See rule 142(4)]

Reply to the Show Cause Notice

1.GSTIN	36AAHFN0766P1ZA	
2.Name	M/s Nilgiri estates	
3.Details of Show Cause Notice	SCN No. 06/2023-24 vide DIN :20230556YS000000B958	Date of issue: 19.05.2023
4.Financial Year	2017-18 to 2019-20	
5.Reply		
Given as Annexure A		
6.Documents uploaded: YES		
7.Option for personal hearing	Yes- Required	☐ No

8.Verification –

I hereby solemnly affirm and declare that the information given hereinabove is true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.

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Signature of Authorised Signatory

ANNEXURE A

FACTS OF THE CASE:

A. M/s. Nilgiri Estates (hereinafter referred as "Noticee") located at 5-4-187/3, 2nd Floor, Soham Mansion, M.G.Road, Secunderabad, Telangana-500003 *inter alia* engaged in the business of Construction of Villas & Works Contract Services falling under the SAC code 9954 and is registered with the Goods and Service Tax Department vide GSTIN 36AAHFN0756F1ZA in the state of Telangana.

B. Noticee is the owner of the land situated at Ac. 10-06 gts., is Sy. No. 100/2, Rampally Village, Keesara Mandal, Medchal, Malkajgiri District and during the subject period, Noticee is engaged in construction of villas in the project, by name and style viz., 'Nilgiri Estate' and have been selling the same to various customers.

C. Since the transaction involves sale of land and provision of construction service, Noticee has discharged the GST on the value of construction services and have not paid any GST on value of land as the same is out of the purview of GST.

D. While entering into agreement with the customers, the Noticee has clearly mentioned the value towards the land and the value towards construction services. Therefore, the Noticee has paid the GST on construction services which is in compliance with CGST Act, 2017 and there is no short payment of GST.

E. Noticee has disclosed the above referred details in their monthly returns and have also filed the Annual Returns for the period FY 2017-18 to 2019-20.

F. Subsequently, the GST deparument has conducted the audit for the period July 2017 to March 2019 and have issued a Spot memo vide DIN No. 20220956YS000041414A dated 21.09.2022 intimating various discrepancies with regards to non-payment of GST.

G. In this regard, Noticee filed a detailed reply vide letter dated 31.10.2022 clarifying the discrepancies as stated in the spot memo. (Copy of spot memo and letter is enclosed as **Annexure-___** & _____). However, the department did not consider the submissions made by the Noticee in its letter dated 31.10.2022 and issued Form GST DRC-01 Part A vide DIN 20230356YS0000666A1F dated 21.03.2023 (Copy of DRC-01 is enclosed as **Annexure-_____**).

H. Consequently, Noticee was issued Show Cause Notice Sl No. 06/2023-24 vide DIN 20230556YS000000B958 dated 19.05.2023 (Copy of the SCN is enclosed as **Annexure-____**) for FY 2017-18 to 2019-20, requiring to show cause as to why: -

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i. The tax amount of Rs.1,21,41,750/- (Rupees One Crore Twenty One Lakh Forty One Thousand Seven Hundred and Fifty only) (CGSTRs.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 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 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 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

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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 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 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;

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xix. Penalty should not be imposed on them in terms of Section 73 of the CGST Act, 2017 read 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 ineligiblSe 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.

I. Noticee herein below makes the below submissions in response to the allegations and propositions made in the impugned SCN which are independent and without prejudice to one another;

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Submissions

1. Noticee submits that they deny all the allegations made in Show Cause Notice (SCN) dated 19.05.2023 as they are not factually/legally correct.

2. Noticee submits that the provisions (including Rules, Notifications & Circulars issued thereunder) of both the CGST Act, 2017 and the Telangana GST Act, 2017 are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act, 2017 would also mean a reference to the same provision under the TGST Act, 2017. Similarly, the provisions of CGST Act, 2017 are adopted by IGST Act, 2017 thereby the reference to CGST provisions be considered for IGST purpose also, wherever arises.

In Re: Impugned notice is not valid

Notice has been issued based on assumptions and presumptions.

3. Noticee submits that impugned SCN is issued with prejudged and premeditated conclusions on various issues raised in the notice. That being the case, issuance of SCN in that fashion is bad in law and requires to be dropped. In this regard, reliance is placed on **Oryx Fisheries Pvt. Ltd. v. Union of India — 2011 (266) E.L.T. 422 (S.C.).**

4. Noticee submits that 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, Noticee relies on the decision of the Hon'ble Supreme Court in case Oudh **Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC)**

Notice is vague and lack of details

5. Noticee submits 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

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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, Noticee wishes to rely on the

a) In the case of **CCE v. Brindavan Severages (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 ORs. 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/Avatc 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.

6. Noticee further submits 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.

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Notice issued is in gross violation of the natural justice principles.

7. Notice submits that the impugned Notice has been issued without considering the submissions made by the Noticee vide their letter dated 08.07.2022 and 31.10.2022 (Copy of the letters are enclosed as Annexure-_____) which indicates that the same is in gross violation of the principle of natural justice. In this regard, Noticee submits 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

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In Re: Noticee is not required to pay GST on land value

8. Noticee submits that as stated in the background facts, Noticee is an owner of land situated at Ac. 10-06 gts., in Sy. No. 100/2, Rampally Village, Keesara Mandal, Medchal, Malkajgiri District, During the subject period, Noticee was engaged in sale of land and construction of villas in the project namely 'Nilgiri Estate'.

9. Noticee submits that 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.

10. Noticee submits that whenever the customers come to purchase Villa's in Phase-II, Noticee has 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 (Copy of Agreement enclosed as Annexure ___)
    b. Sale deed towards sale of land which was registered in Sub-registrar office (Copy of sale deed enclosed as Annexure ____).
    c. Agreement of Construction for provision of construction services which was also registered in sub-registrar office (Copy of agreement of construction is enclosed as Annexure ____)

11. Since the sale of land is neither a supply of goods nor a supply of service in accordance with Paragraph 5 of Schedule-III, Noticee 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 the Noticee.

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12. In this regard, the impugned notice vide Para 2(I) alleged that *"During the course of audit, on verifying the payment of tax towards the amount received for sale of constructed buildings to customers, it is 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."*

13. In this regard, Noticee submits 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. In this regard, Noticee submits that 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.**

14. 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.

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15. Further, sub-section (5) of Section 15 is the only sub-section that is left unexamined. This sub-section starts with a non-obstance 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 subsection 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.

16. 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.

17. 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(u) 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."*

18. Reliance is also be placed 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

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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.*

19. 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.

20. 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 COR 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.

21. 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 Sl. 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

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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 the transaction to which the computation provisions cannot be applied must be regarded as never intended to be subjected to charge of tax.

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 (42) 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*".

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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. - (2015) 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 51, 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.*

22. 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.

23. 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.

24. Further, even assuming the deemed valuation adopted by the department as per Notification No. 11/2017-CT(Rate) is correct, the Noticee submits that 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

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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. We should also understand there would be cases where the land value is less than 1/3rd value and in such cases the Government is collecting less taxes.

25. 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 1/3rd of the total amount charged itself shows that the Government has acted arbitrarily and without any scientific reason to arrive at the basis of 1/3rd.

26. 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. Few of the decisions which had discussed this issue are as follows:

a. **Supreme Court in case of Wipro Limited Vs UOI 2015 (319) ELT 177 (SC)** while examining the validity of deemed value of loading and unloading as 1% of the FOB value for the purpose of determining the assessable value for calculating the customs duty it was held that "*31. In contrast, however, the impugned amendment dated 5-7-1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not*

ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on-board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultra vires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on-board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

This decision clearly states that when the actual value is available, the prescription of deemed value is not valid as the same is arbitrary and irrational. Since the background of the present issue and the issue involved in these decisions are one and the same, it can be concluded that the taxpayer can claim the actual value of land as deduction wherever available and the deeming of 1/3rd value as land value is arbitrary and irrational and will not hold good.

b. **The Supreme Court in case of Indian Acrylics Vs UOI 1999 (113) ELT 372 (SC) it was held that** "*7. The exchange rate fixed by the Reserve Bank of India is the accepted and determinative rate of exchange for foreign exchange transactions. If it is to be deviated from to the extent that the notification dated 27th March 1992 does, it must be shown that the Central Government had good reasons for doing so. The Reserve Bank of India's rate, as we have pointed out, was Rs. 25.95, the rate fixed by the notification dated 27th March 1992 was Rs. 31.44, so that there was difference of as much as Rs. 5.51. In the absence of any material placed on record by the respondents and in the absence of so much as a reason stated on*

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affidavit in this behalf, the rate fixed by the notification dated 27th March, 1992 must be held to be arbitrary.

This decision states the when the government is prescribing a deemed value deviating from the actual value available, then it must have a good reason for doing so. If there is no reason, the deemed value shall become invalid. On-going through the GST Council Meeting Minutes, it is quite evident that no reason has been recorded while deeming the value of land as 1/3rd of total amount.

c. The Supreme Court in case of Hindustan Polymers case Vs Collector of CE 1989 (43) ELT 165 (SC) held that the Excise Duty cannot be levied on notional values. The Supreme Court has made the following observations *"The scheme of the old Section 4 is indisputedly to determine the assessable value of the goods on the basis of the price charged by the assessee, less certain abatements. There was no question of making any additions to the price charged by the assessee. The essential basis of the "assessable value" of old Section 4 was the wholesale cash price charged by the assessee. To construe new Section 4 as now suggested would amount to departing from this concept and replacing it with the concept of a notional value comprising of the wholesale cash price plus certain notional charges. This would be a radical departure from old Section 4 and cannot be said to be on the same basis. It has to be borne in mind that the measure of excise duty is price and not value.".*

From this decision, it can be understood that the valuation cannot be extended beyond levy and in the instant case, the levy is on supply of goods and service wherein section 15 prescribes valuation mechanism for supply of goods and services. However, the notification No.11/2017-CT(R) dated 28.06.2017 prescribes the valuation mechanism for the transactions involving land, wherein it proposed to tax the notional value of 2/3rd of the value of the consideration received from their customers.

27. The valuation adopted by the Noticee is also supported by the Gujarat High Court decision in case of Munjaal Manishbhai Bhatt Vs UOI 2022-TIOL-663-HC-AHM-GST wherein the High Court has held that deeming fiction of 1/3rd land deduction is ultra-vires the statutory provisions wherever the actual land value is available. The relevant extract is as follows

"Thus, mandatory application of deeming fiction of 1/3 of total agreement value towards land even though the actual value of land is ascertainable is clearly

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contrary to the provisions and scheme of the CGST Act and therefore ultra-vires the statutory provisions."

28. Noticee would like to submit that from the above referred decision, 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, Noticee would like to submit that the compliance made by the Noticee 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.

In Re: Short payment of tax due to difference in tax rate

29. Noticee submits 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.

30. In this regard, Noticee submits that the actual differential tax is only Rs. 9,98,852/-) but not Rs. 19,82,815/-. Out of Rs. 9,98,852/-, the Noticee has 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 (Copy of statement enclosed as Annexure- _____).

31. 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/- (Copy of statement enclosed as Annexure-_____). 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. AD360819000S125 (Copy of DRC-03 enclosed as Annexure-____) 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 (Copy of DRC-03 enclosed as Annexure-___). Thereby, there is short payment as alleged by the impugned notice and the same needs to be dropped to that extent.

32. Further, Noticee submits that the above referred explanation has been already submitted to department during the course of audit but the same was not

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considered while issuing the present Show Cause Notice. This shows that the impugned notice has been issued without proper examination of facts and the same is invalid.

In Re: No Short payment of GST on comparison of Tax Liability declared in GSTR-1 and GSTR-3B.

33. The impugned notice has alleged that the Noticee has 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 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.

34. In this regard, Noticee would like to bring to your notice 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.

35. Thus, difference amount of Rs. 5,15,480/- has been already paid through DRC-03 on 9th August 2019 vide ARN No.AD3608190006125 (Copy of DRC-03 and Statement showing the difference between GSTR-01 and GSTR-3B is enclosed as annexure -_____). Therefore, it is requested to drop proposed demand in this regard.

36. Further, Noticee submits that the above referred explanation has been already submitted to department during the course of audit but the same was not considered while issuing the present Show Cause Notice. This shows that the impugned notice has been issued without proper examination of facts and the same is invalid.

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57. Without prejudice to the above, Noticee submits that even if the matching mechanism is in place, the unmatched ITC amount will get directly added to the electronic liability ledger of the assessee under sub-section (5) of Section 42 and there is no requirement to reverse the ITC availed.

58. Noticee submits that only in exceptional cases like missing dealer etc. the recipient has to be called for to pay the amount which is coming out from Para 18.3 of the minutes of 28th GST Council meeting held on 21.07.2018 in New Delhi which is as under:

*"18.3---- He highlighted that a major change proposed was that no input tax credit can be availed by the recipient where goods or services have not been received before filing of a return by the supplier. This would reduce the number of pending invoices for which input tax credit is to be taken. There would be no **automatic reversal of input tax credit** at the recipient's end where tax had not been paid by the supplier. **Revenue administration shall first try to recover the tax from the seller and only in some exceptional circumstances like missing dealer, shell companies, closure of business by the supplier, input tax credit shall be recovered from the recipient by following the due process of serving of notice and personal hearing.** He stated that though this would be part of IT architecture, in the law there would continue to be a provision making the seller and the buyer jointly and severally responsible for recovery of tax which was not paid by the supplier but credit of which had been taken by the recipient. This would ensure that the security of credit was not diluted completely."*

Thereby, issuing the notice without checking with our vendors the reason for non-filing of the returns etc. runs against the recommendations of the GST council.

59. Without prejudice to above, Noticee submits that even if there is differential ITC availed by the Noticee, the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules based on which Noticee has availed ITC. Further, Noticee submits 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 the Noticee hence the impugned notice needs to be dropped.

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60. Noticee submits that the fact of payment or otherwise of the tax by the supplier is neither known to us nor is verifiable by us. Thereby it can be said that such condition is impossible to perform and it is a known principle that the law does not compel a person to do something which he cannot possibly perform as the legal maxim goes: ***lex non-cogit ad impossibilia***, as was held in the case of:

    a. *Indian Seamless Steel & Alloys Ltd. Vs UOI, 2003 (153) ELT 945 (Bom.)*
    b. *Hico Enterprises Vs CC, 2005 (189) ELT 135 (T-LB). Affirmed by SC in 2008 (228) ELT 161 (SC)*

Thereby it can be said that the condition, which is not possible to satisfy, need not be satisfied and shall be considered as deemed satisfied.

61. Noticee submits that Section 76 of CGST Act, 2017 provides the recovery mechanism to recovery the tax collected by the supplier but not paid to the government. Further, Section 73 and 74 also provides the recovery mechanism to recover the GST collected by way of issue of notice. In this regard, Noticee submits that the revenue department cannot straight away deny the ITC to the recipient of goods or services without exercising the above referred powers.

62. Noticee further submits that without impleading the supplier the department cannot deny ITC to the recipient. Further, Section 16(2) of CGST Act, 2017 states that if the tax is not remitted by the supplier the credit can be denied and to ascertain the same, the department should implead the supplier first. In the instant case, no such act is initiated by the department against the supplier instead proposed to deny the ITC to the recipient which is not correct.

63. Noticee submits that if the department directly takes action against the recipient in all cases, then the provisions of Section 73, 74 and 76 would be rendered *otiose*, which is not the legislative intent. Further, we would like to submit that the department cannot be a mute spectator or maintain sphinx like silence or dormant position. In this regard, Noticee wish to rely on recent Madras High Court decision in case of M/s. D.Y. Beathel Enterprises Vs State Tax officer **(Data Cell), (Investigation Wing), Tirunelveli2021(3) TMI 1020-Madras High Court** wherein it was held that

    "12. Therefore, if the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one party, either the seller or the buyer. In the case on hand, the respondent does not appear to have taken any recovery

action against the seller / Charles and his wife Shanthi, on the present transactions.

13. The learned counsel for the petitioners draws my attention to the SCN, dated 27.10.2020, finalising the assessment of the seller by excluding the subject transactions alone. I am unable to appreciate the approach of the authorities. When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him.

14. That apart in the enquiry in question, the Charles and his Wife ought to have been examined. They should have been confronted."

64. Noticee submit that the Input tax credit should not be denied only on the ground of the transaction not been reflected in GSTR-2A. In this regard, Noticee wish to place reliance on the judgement of Hon'ble Kerala High Court in the case of St. Joseph Tea Company Ltd., Paramount Enviro Energies Versus the State Tax Officer, Deputy Commissioner, State GST Department, Kottayam, State Goods and Service Tax Department, Goods and Service Tax Network Ltd. (2021 (7) TMI 988 - Kerala High Court) wherein it was held that *"7. In the circumstances, the only possible manner in which the issue can be resolved is for the petitioner to pay tax for the period covered by provisional registration from 01.07.2017 to 09.03.2018 along with applicable interest under Form GST DRC-03 dealing with intimation of payment made voluntarily or made against the show cause notice (SCN) or statement. If such payment is effected, the recipients of the petitioner under its provisional registration (ID) for the period from 01.07.20217 to 09.07.2018 shall not be denied ITC only on the ground that the transaction is not reflected in GSTR 2A. It will be open for the GST functionaries to verify the genuineness of the tax remitted, and credit taken. Ordered accordingly."*

65. Noticee further submits that for the default of the supplier, the recipient shall not be penalized therefore the impugned notice shall be dropped. In this regard, reliance is placed on On **Quest Merchandising India Pvt Ltd Vs Government of NCT of Delhi and others 2017-TIOL-2251-HC-DEL-VAT** wherein it was held that

"54. The result of such reading down would be that the Department is precluded from invoking Section 9 (2) (g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transaction with a registered

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selling dealer who has issued a tax invoice reflecting the TIN number. In the event ***that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC."***

66. Noticee further submits that in case of Hon'ble Karnataka High Court in a writ petition filed by **M/s OMXY Designs Versus The Assistant Commissioner of Commercial Tax Bangalore 2019(6) TMI 941** relating to Karnataka VAT has held that *"It is clear that the benefit of input tax cannot be deprived to the purchaser dealer if the purchaser dealer satisfactorily demonstrates that while purchasing goods, he has paid the amount of tax to the selling dealer. If the selling dealer has not deposited the amount in full or a part thereof, it would be for the revenue to proceed against the selling dealer"*

67. Noticee submits that under the earlier VAT laws there were provisions similar to Section 16(2) *ibid* which have been held by the Courts as unconstitutional. Some of them are as follows

   a. **Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11-SC-VAT** was rendered favorable to the assessee. This decision was rendered in the context of section 9(2) (g) of the Delhi Value Added Tax Act, 2004 which is a similar provision wherein the credit availment of the recipient is dependent on the action taken by the supplier.

   b. **M/s Tarapore and Company Jamshedpur v. the State of Jharkhand - 2020-TIOL-93-HC-JHARKHAND-VAT** This decision was rendered in the context of section 18 (8)(xvii) of Jharkhand Value Added Tax Act, 2005 similar to the above provision.

   The decisions in the above cases would be equally applicable to the present context of Section 16(2) *ibid*

68. **Noticee further submits 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.**

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69. **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/s. 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.**

70. Noticee submits that Rule 36(4), ibid restricts the ITC on the invoices not uploaded by the suppliers. However, such restrictions were beyond the provisions of CGST Act, 2017 as amended more so when Section 42 & 43 of CGST Act, 2017 which requires the invoice matching is kept in abeyance and filing of Form GSTR-2 & Form GSTR-3 which implements the invoice matching in order to claim ITC was also deferred. Thus, the restriction under Rule 36(4), ibid is beyond the parent statute (CGST Act, 2017) and it is ultra vires. In this regard, reliance is placed on the Apex Court decision in the case of Union of India Vs S. Srinivasan 2012 (281) ELT 3 (SC) wherein it was held *that "If a rule goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, a rule must be in accord with the parent statute as it cannot travel beyond it." (Para 16).*

Once any rule is ultra vires, the same need not be followed. Hence, the proposition to deny the ITC stating that invoices not reflected in GSTR-2A require to be dropped.

71. Noticee submits that the aforesaid Rule can be considered to be valid only if the provisions of the Act envisage such restriction. Noticee submits that Section 16(2) of the CGST Act, 2017 as presently applicable provides that a registered person shall not be entitled to ITC unless he satisfies the given four conditions. A perusal of the said provisions shall reveal that none of the conditions provides for the furnishing of the details of the invoice in GSTR 1 by the vendors. It may be noted that the actual payment condition under clause (c) cannot be inferred to include the condition of the furnishing of the details in GSTR 1. It is for the simple reason

that the furnishing of the details of outward supplies is u/s 37 of the CGST Act, 2017 which is distinct and at present legally not linked with the furnishing of the return and payment of tax u/s 39 of the said Act. In fact, an amendment made u/s 75 by virtue of Finance Act, 2021 to the effect that the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39 and shall permit the direct recovery of the said tax so declared also confirms that the declaration of the details u/s 37 in GSTR 1 do not confirm the payment of tax. Hence, it can be stated that in absence of any provisions in the Act enabling the formulation of Rule 36(4), the same has to be declared as invalid.

72. The aforesaid view has also been recognized as evident from the rationale for the amendment under discussion (i.e., clause (aa)) as expressly stated in the minutes of the GST Council meeting. The agenda note (supra) clearly has recognized the said gap between the Act and the Rule by stating that the proposed amendment is aimed to "to complete this linkage of outward supplies declared by the supplier with the tax liability, by also limiting the credit availed in FORM GSTR 3B to that reflected in the GSTR2A of the recipient, subject to the additional amount available under rule 36(4)". Hence the amendment by way of clause (aa) leads to a conclusion that the provisions of Rule 36(4) shall not be valid till the said clause is notified.

73. Noticee submit that Section 38(1) of the CGST Act, 2017 permits the recipient to declare the details of the missing invoices in GSTR 2 and claim the ITC thereof subject to eventual matching. Clause (aa) on the other hand seeks to allow the ITC only if the details are furnished by the vendors. Hence, Noticee submit that the law is asking the recipient to do the impossible by (a) not making the provisional claim of ITC by filing GSTR 2 and asking the vendors to accept the liability and (b) determining the eligibility solely based on filings done by the said vendors which are not in the control of the recipient. Hence, based on the doctrine of supervening impossibility that the ITC of the genuine recipient cannot be denied by virtue of the provisions of clause (aa).

74. Noticee submits that based on the above submissions, it is clear that the ITC availed by the taxpayer is rightly eligible and there is no requirement to pay any

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79. Noticee submits that one also needs to consider that Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. Hence not only the levy but even the collection of the tax shall be only by authority of law.

In Re: Non-reversal of ITC on receipt of Credit Note:

80. The impugned notice has alleged that the Noticee has 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.

81. In this regard, it is submitted that the Noticee is making the payment of the same of Rs. 1,69,159/- vide DRC-03 dated _____(Copy of the same is enclosed as **Annexure-**_____).

In Re: Short payment of Interest towards late payment of tax:

82. The impugned notice has alleged that the Noticee has not paid interest on delayed payment of tax for the period July 2017 to March 2018 and is proposing to levy an amount of Rs.1,420/- (CGST Rs. 710/- SGST Rs.710/-) in terms of section 73 of CGST Act, 2017 along with applicable rate of interest under section penalty under section 122(2)(a) read with section 73 of CGST Act, 2017.

83. In this regard, Noticee would like to bring to your notice that Section 50 of CGST Act, 2017 provides for interest on delay in payment of taxes wherein the first proviso provides that interest is applicable only on such liability which was discharged using electronic cash ledger. The first proviso has been inserted retrospectively with effect from 01.07.2017.

84. During the period July 2017 to March 2018, Noticee has already discharged interest on liability discharged through electronic cash ledger while filing the GSTR-3B for the month of September 2017. In subsequent months, Noticee has 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, Noticee requests to drop further proceedings in this regard.

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

85. The impugned notice has alleged that the Noticee has not paid GST on Hamali Charges under RCM for the period Jul'17 - Oct'17 is proposing to levy and amount of Rs.6,412/- (CGST Rs. 3,206/- SGST Rs. 3,206/-).

86. In this regard, the Noticee is making the payment of the same of Rs. 6,412/- vide DRC-03 dated _____(Copy of the same is enclosed as Annexure-_____).

In Re: Irregular availment of Input Tax Credit (Section 17(5)):

87. The impugned notice has alleged that the Noticee has 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 and has alleged that the Noticee had an intention to evade payment of GST in cash and is liable to penal action in terms of provisions of section 122(2)(b) read with section 74(1) of the CGST Act, 2017.

88. In this regard, Noticee would like to bring to your notice that Noticee has reversed an amount of Rs. 88,320/- through DRC-03 on 07.01.2020 vide ARN No.AD3600120000820Z (Copy Attached as Annexure - __). Hence, Noticee requests to drop the demand in this regard.

In Re: Penalties and interest are not payable/imposable:

<u>Imposition of interest is not valid:</u>

89. Noticee submits that Noticee is of the vehement belief that the input availed by Noticee 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).

90. Further, Noticee submits that the impugned notice has stated that the Noticee is liable to interest under Section 50 of CGST Act, 2017. In this regard, it is pertinent to examine Section 50 of CGST Act, 2017 which is extracted below 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 failed to pay the tax or any part thereof to the Government within the period prescribed, shall for the period*

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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'

(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) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.

91. Noticee submits 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.

92. Noticee submits that it is settled position of law that when the mechanism to measure fails, the levy also fails, as laid down by Hon'ble Supreme Court in the case of B.C. Srinivasa Setty 1981(2) SCC 460. Accordingly, since the mechanism to compute interest is not set out, the levy of interest also fails.

93. Without prejudice to above, Noticee further submits 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.

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94. Noticee submits that Sub-section (10) of Section 42 deals with the liability in case of matching and reversal of ITC and sub-section (10) of Section 43 deals with liability in case of matching, reversal and reclaim of reduction in output tax liability which were not yet enforced therefore the interest under Section 50(3) is not applicable for any instances. This shows that Section 50(3) is applicable only for specific case and is not applicable for non-payment of tax and for non-payment of GST.

95. Noticee submits that the impugned notice has relied on Section 74 of the CGST Act, 2017 to demand the interest which is not correct. In this regard, Noticee submits that the Section 50 of the CGST Act, 2017 creates the interest liability similar to Section 9 of CGST Act, 2017 which creates the tax liability and Section 74 can be invoked only for recovery of such created liability.

96. Noticee also submits 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. The amended provision reads as under:

"(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."

Thus, it is clear that interest is not applicable on availment of ITC per se but the utilization of ITC.

97. 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. The relevant extracts are given below:

"(3) In case, where interest is payable on the amount of input tax credit wrongly availed and utilised, starting for the period from the date of utilisation of such wrongly availed input tax credit till the date of reversal of such credit or

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payment of tax in respect of such amount, at such rate as may be notified under said sub-section (3) of section 50.

Explanation.—For the purposes of this sub-rule, —(1)input tax credit wrongly availed shall be construed to have been utilised, when the ***balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, and the extent of such utilisation of input tax credit shall be the amount by which the balance inthe electronic credit ledger falls below the amount of input tax credit wrongly availed.***

(2) the date of utilisation of such input tax credit shall be taken to be, —

(a)the date, on which the return is due to be furnished under section 39 or the actual date of filing of the said return, whichever is earlier, if the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, on account of payment of tax through the said return; or

(b) the date of debit in the electronic credit ledger when the balance in the electronic credit ledger falls below the amount of input tax credit wrongly availed, in all other cases.;

Imposition of penalty is not valid:

98. Further, Noticee submits 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, Noticee wishes to rely 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) 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".*

99. Noticee submits that Noticee is of the bonafide belief that the compliance made by the Noticee is in accordance with law. In this regard, Noticee submits that the penalties shall not be imposed when the Noticee has acted on bonafide belief. Hence, the penalties are not applicable.

100. Noticee submits that the Supreme Court in case of CIT Vs Reliance Petro Products Pvt Ltd (SC) 2010 (11) SCC (762) while examining the imposition of penalties under Section 271(1)(c) of Income Tax Act, 1961 held that penalties are not applicable in similar circumstances.

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101. Noticee submits that from the above-referred decision of the Supreme Court, penalties cannot be imposed merely because the assessee has claimed certain ITC which was not accepted or was not acceptable to the revenue when the assessee has acted on the bonafide belief that the ITC is eligible. In the instant case also, Notice has availed the ITC on the bonafide belief that the same is eligible which was not accepted by the department. Therefore, in these circumstances, the imposition of penalties is not warranted and the same needs to be dropped.

102. Noticee submits that it is pertinent to understand that the Supreme Court in the above-referred case has held that the penalties shall not be imposed even though the mens rea is not applicable for the imposition of penalties.

103. Noticee submits that GST being a new law, the imposition of penalties during the initial years of implementation is not warranted. Further, Noticee submits that 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.

104. In addition to above, Noticee submits 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. In this regard the reliance is placed on the judgement of hon'ble Supreme Court in the case of Maya Devi v. Raj Kumari Batra dated 08.09.2010 [Civil Appeal No.10249 of 2003] wherein it was held that *"14. It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi-judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity."*

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105. Further, Noticee extracts the meaning of suppression explained in CGST Act, 2017

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.

106. Noticee submits that from the above-referred Explanation-2 to Section 74 of CGST Act, 2017, the expression 'suppression' means not declaring the information required to be declared in the return or failure to furnish any information on being asked for, in writing by the proper officer. In the present case, Noticee has declared information in their returns and submitted the required information as and when called for by the department authorities. Further, the audited financial statements were also submitted. Hence, the Noticee has suppressed the facts is not at all tenable.

107. Noticee submits that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bona-fide belief that the offender is not liable to act in the manner prescribed by the statute. Relied on **Hindustan Steel Ltd. v. State of Orisse - -1978 (2) E.L.T. (J159) (S.C.)**

108. Noticee submits that Penalty under Section 74, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section. Bona fide belief as to non-taxability of service cannot be reason for imposition of the severe penalty. In this regard wishes to place a reliance on **Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C.)&Commissioner Of Central Excise, Vapi Vs Kisan Mouldings Ltd 2010 (260) E.L.T 147 (S.C).**

109. Noticee submits that this is not the case of wil-full evasion for imposition of the penalty under Section 74 of the CGST Act, 2017. The impugned notice had not discussed how the ingredients of Section 74 of the CGST Act, 2017 satisfied in the present case and as to why & how the penalty is imposable in the present case. The impugned notice had imposed penalty u/sec 74 solely on a ground specifying that the discrepancy was noticed only due to the verification of the

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facts by DGGI Hyderabad. When in fact the Noticee has filed the returns belatedly by paying appropriate tax.

110. Noticee further submits that it was held in the case of Collector of Customs v. Unitech Exports Ltd. 1999 (108) E.L.T. 462 (Tribunal) that- "*It is settled **position that penalty should not be imposed for the sake of levy. The penalty is not a source of Revenue.*** The penalty can be imposed depending upon the facts and circumstances of the case that there is a clear finding by the authorities below that this case does not warrant the imposition of penalty. *The respondent's Counsel has also relied upon the decision of the Supreme **Court in the case of M/s. Pratibha Processors v. Union of India reported in 1996 (88) E.L.T. 12 (S.C.) that penalty ordinarily levied for some contumacious conduct or a deliberate violation of the provisions of the particular statute.*" Hence, Penalty cannot be imposed in the absence of deliberate defiance of law even if the statute provides for a penalty.

111. Noticee submits that the Supreme Court in case of Price Waterhouse Coopers Pvt. Ltd Vs Commissioner of Income Tax, Kolkata S.L.P.(C) No.10700 of 2009 held as follows

"20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars."

112. Further, the Noticee submits that impugned notice has proposed penalty of Rs.1,21,41,750/-, Rs. 19,82,815/- & Rs. 88,320/- towards tax been short paid under section 74(1) read with section 122(2)(b) of the IGST, CGST Act and TSGST Act, 2017 for willful misstatement or suppression of facts to evade tax is incorrect.

113. The relevant extract of section 122(2)(b) is reproduced hereunder for better appreciation:

> ***122 (2)*** *Any registered person who supplies any goods or services or both on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized,-*

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(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

114. In this regard, it is submitted that the penalty u/s 122(2)(b) which is proposed by the department 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.

115. In this regard, it is submitted that all the details were furnished at the time of audit conducted by the department. No information has been concealed by the Noticee. 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.

116. Noticee submits that suppression or concealing of information should be in conjunction with an intent to evade the payment of tax is a requirement for imposing the penalty. It is a settled proposition of law that when the assessee acts with a bonafide belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be an intention of evasion and penalty cannot be levied. In this regard, Noticee wish to rely upon the following decisions of the Supreme Court.

i. Commissioner of C.Ex., Aurangabad Vs. Pendhakar Constructions 2011(23) S.T.R. 75(Tri.-Mumi)

ii. Hindustan Steel Ltd. V. State of Orissa – 1978 (2) ELT (J159) (SC)

iii. Akbar BadruddinJaiwani V. Collector – 1990 (47) ELT 161(SC)

iv. Tamil Nadu Housing Board V Collector – 1990 (74) ELT 9 (SC)

117. Noticee submits that mere non-payment/short payment of tax per se does not mean that Noticee has wilfully contravened the provisions with the intent to evade payment of tax. In this regard, reliance is placed on Uniworth Textiles Ltd. v. Commissioner 2013 (288) E.L.T. 161 (S.C.).

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118. Noticee submits that that notice under Section 74 can be issued only when something positive other than mere inaction or 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 wishes to rely on CCE, Chemphar Drugs &Liniments 1989 (40) E.L.T 276 (S.C).

119. Noticee submits that the intention to evade payment of tax is not a mere failure to pay tax. It must be something more i.e., that Noticee must be aware that tax was leviable/credit was inadmissible and he must act deliberately to avoid such payment of tax. Evade means defeating the provision of the law of paying tax and it is made more stringent by the use of word 'intent'. Where there was scope for doubt whether tax is payable or not, it is nor 'intention to evade payment of tax'. reliance is placed on Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC).

120. 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.

121. Further, the Noticee submits that impugned notice has proposed penalty of Rs.27,16,554/-, Rs. 38,58,144/-, Rs. 1,69,160/- & Rs. 6,412/- towards non-payment of GST under section 73(1) read with section 122(2)(a) of the IGST, CGST Act and TSGST Act, 2017.

122. The relevant extract of section 122(2)(a) is reproduced hereunder for better appreciation:

> *122 (2) Any registered person who supplies any goods or services or both, on which any tax has not been paid or short-paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilized,-*
>
> *(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten percent of the tax due from such person, whichever is higher.*

123. In this regard, it is submitted that all the details were furnished at the time of audit conducted by the department. No information has been concealed by the

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Noticee. 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 under section 122(2)(a) is bad in law and is requested to be dropped.

In re: Penalty under section 125 is not impossible:

124. In this regard, Noticee wish to extract Section 125 for easy reference:

> *125. General penalty. — Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to twenty-five thousand rupees.*

125. Noticee submits that from the above-referred extract, 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.

126. Notice submits that from all the above submissions, it is clear that imposition of penalties is not warranted therefore the impugned notice needs to be dropped.

127. Noticee craves leave to alter, add to and/or amend the above reply.

128. Noticee would also like to be heard in personal before any order being passed in this regard.

For M/s. Nilgiri Estates

Authorised Signatory

BEFORE THE ADDITIONAL/JOINT COMMISIONER OF CENTRAL TAX, GST BHAVAN, 7TH FLOOR, BASHEERBAGH, SECUNDERABAD GST COMMISIONERATE, HYDERABAD

Sub: Proceedings under Show Cause Notice No. 06/2023-24 vide DIN: 20230556YS000000B958 dated 19.05.2023 issued to M/s. Nilgiri Estates

I, _____, _____ of M/s Nilgiri estates hereby authorizes and appoint M/s. H N A & Co. LLP (formerly known as M/s. Hiregange & Associates LLP), Chartered Accountants, Bangalore or their partners and qualified staff who are authorized to act as an authorized representative under the relevant provisions of the law, to do all or any of the following acts: -

a. To act, appear and plead in the above-noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
b. To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
c. To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above-authorized representative or his substitute in the matter as my/our own acts as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed this on _____ at Hyderabad

NILGIRI ESTATES

Signature

I the undersigned partner of M/s. H N A & Co. LLP (formerly known as M/s. Hiregange & Associates LLP), Chartered Accountants, do hereby declare that the said M/s. H N A & Co. LLP is a registered firm of Chartered Accountants, and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 116 of the SGST Act, 2017. I accept the above-said appointment on behalf of M/s. H N A & Co. LLP. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated: __.07.2023

Address for service:
H N A & Co. LLP,
Chartered Accountants,
4th Floor, West Block, Anushka Pride,
Above Himalaya Book World,
Road Number 12, Banjara Hills,
Hyderabad, Telangana 500034

For H N A & Co. LLP
Chartered Accountants

Venkata Prasad P
Partner (M.No. 236058)

I Partner/employee/associate of M/s. H N A & Co. LLP duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

S.No.	Name	Qualification	Membership No.	Signature
1	**Sudhir V S**	CA	219109	
2	**Lakshman Kumar K**	CA	241726	
3	**Srimannarayana S**	CA	231612	
4	**Revanth Krishna K**	CA	262586	
5	**Akash Heda**	CA	269711	

In Re: Excess availment of ITC in GSTR-3B on comparison with GSTR-2A:

37. The 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 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.

38. In this regard, Noticee would like to bring to your notice 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.

39. Noticee would like to submit that once the differences are considered on consolidated basis, the actual difference is only to the tune of Rs.17,78,059/- (IGST - (48,829.95) CGST - 9,15,444 & SGST - 9,13,144) as against the amounts disputed by the impugned notice. Noticee would like to submit the statement showing the details of ITC availed in GSTR-3B, ITC reflected in GSTR-2A and the differences along with the declarations of the suppliers are enclosed as Annexure _____.

40. Without prejudice to the above, Noticee submits 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, Noticee submits 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.

41. Noticee submits that 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

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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. Extract of section 16(2)(c) is given below:

*"**Section 16(2)(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 utilization of input tax credit admissible in respect of the said supply;"*

42. As seen from 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.

"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 referred to in sub-section (1) shall be utilized only for payment of self-assessed output tax as per the return referred to in the said sub-section"*

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.

43. In this regard, it is 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.

44. Further, 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

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been extended then the date of matching relating to the claim of the input tax credit shall also be extended accordingly.

45. 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.

46. 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.

47. 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.

48. Noticee further submits that Finance Act, 2022 has omitted Section 42, 43 and 43A of the CGST Act, 2017 which deals ITC matching concept. Noticee submits that the substituted 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.

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49. 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, request you to drop the proceedings initiated.

50. Noticee submits that Section 38(1) of the CGST Act, 2017 provides as under:

"SECTION 38. Furnishing details of inward supplies. — (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 verify, validate, modify or delete, if required, the details relating to outward supplies and credit or debit notes communicated under sub-section (1) of section 37 to prepare the details of his inward supplies and credit or debit notes and may include therein, the details of inward supplies and credit or debit notes received by him in respect of such supplies that have not been declared by the supplier under sub-section (1) of section 37."

Therefore, the aforesaid provisions 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, Noticee submit that 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.

51. 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.

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52. Further, it is submitted that Section 42 clearly mentions the details and procedure of matching, reversal, and reclaim of input tax credit with regard to the inward supply. However, Section 42 and Rule 69 to 71 have been omitted w.e.f 01.10.2022.

53. Noticee submits that the Rule 70 of CGST Rules 2017 which prescribed the final acceptance of input tax credit and communication thereof in Form GST MIS-1 and Rule 71 prescribes the communication and rectification of discrepancy in the claim of input tax credit in form GST MIS-02 and reversal of claim of input tax credit. Further, Rule 70 has been omitted vide Notification No. 19/2022 Central Tax dated 28.09.2022 w.e.f 01.10.2022.

54. It is submitted that neither the form has been prescribed by the law nor the same has been communicated to the Noticee therefore 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.

55. Noticee submits that 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 Noticee is rightly eligible. Hence, request you to drop the proceedings initiated.

56. The above view is also fortified from the press release dated 18.10.2018 wherein it was stated that *"It is clarified that the furnishing of outward details in FORM GSTR-1 by the corresponding supplier(s) and the facility to view the same in FORM GSTR-2A by the recipient is in the nature of taxpayer facilitation and does not impact the ability of the taxpayer to avail ITC on self-assessment basis in consonance with the provisions of section 16 of the Act. The comprehension that ITC can be availed only on the basis of reconciliation between FORM GSTR-2A and FORM GSTR-3B conducted before the due date for filing of return in FORM GSTR-3B for the month of September 2018 is unfounded as the same exercise can be done thereafter also.*

From this, it is clear that input tax credit can be availed even if the same is not indicated in Form GSTR 2A and hence the notice issued is contrary to the same.

NILGIRI ESTATES