

IN THE HIGH COURT OF JUDICATURE FOR THE STATE OF
TELANGANA AT: HYDERABAD
(SPECIAL ORIGINAL JURISDICTION)

W.P. NO. 22193 OF 2020

BETWEEN:

Mehta & Modi realty Kowkur LLP,
Represented by Mr. Mangilipelli Jayaprakash
Registered Office at 5-4-187/3/4
Soham Mansion, IInd Floor,
MG Road, Secunderabad- 500003.

... Petitioner

AND

1. **The Union of India,**
Ministry of Finance,
Department of Revenue,
Represented by its Secretary (Revenue)
Room No. 46, North Block
New Delhi- 110001
2. **The State of Telangana,**
Rep. by its Principal Secretary,
Revenue (CT) Department,
Telangana Secretariat,
Hyderabad.
3. **Goods and Services Tax Council,**
Rep. by its Secretary
Office of the GST Council Secretariat
5th Floor, Tower II, Jeevan Bharti Building,
Janpath Road, Connaught Place,
New Delhi-110001.
4. **Commissioner of Central Goods and Services Tax,**
Secunderabad GST Commissionerate,
Room No. 800, 7th Floor, GST Bhavan,
Hyderabad, Telangana State- 500004
5. **Chief Commissioner of GST Hyderabad,**
GST Hyderabad Zone,
Kendriya Shulk Bhavan,
L.B. Stadium Road, Basheer Bagh,
Hyderabad-500004, Telangana State
6. **Commissioner of State Tax,**
CT Complex, Nampally,
Hyderabad- 500001

... Respondents

For MEHTA & MODI REALTY KOWKUR LLP
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**COMMON AFFIDAVIT IN REPLY TO THE COUNTER AFFIDAVIT and
ADDITIONAL COUNTER AFFIDAVIT FILED ON BEHALF OF
RESPONDENT NOS. 1,3, 4 and 5.**

I, Mangilipelli Jayaprakash, S/o. M. Venkataiah, aged forty-five years, working as the Senior Manager at the Petitioner LLP having its office at 55-4-4187/3/4 Soham Mansion, IIInd Floor, MG Road, Secunderabad-500003, do hereby solemnly affirm and state on oath as follows:

1. That I am the Senior Manager at the Petitioner herein and as such I am well acquainted with the facts of the case and swear to the contents of this affidavit.
2. At the outset, the Petitioner denies all allegations and averments made by the Respondent Nos. 1, 3 and 4 in their common Counter Affidavit unless specifically admitted hereinafter.
3. The Petitioner submits that short issue in the Writ Petition is whether the Respondents Nos. 1 and 2 can outrightly take away the entitlement to Input Tax Credit ("ITC") by the Impugned Notifications. The Petitioner's case is that the Impugned Notifications are *ultra vires* the CGST, 2017 and TGST Act, 2017 respectively since Section 16(1) only empowers the Respondent Nos.1 and 2 to "prescribe" conditions and restrictions for taking ITC. The Impugned Notifications taking away the ITC entitlement are neither conditions/restrictions nor are they prescribed. The Petitioner relies upon the detailed averments and submissions made in its Affidavit in support of the Writ Petition ("**Affidavit**") and is not reproducing the same herein for the sake of brevity.

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4. On the other hand, the Counter Affidavit ("**Counter**") states that the government has the power to choose the rates of taxation by prescribing any "condition", including the condition of no ITC so long as the same is recommended by the Respondent No. 3. The Respondent Nos. 1,3, 4 and 5 have also filed an Additional Counter Affidavit ("**Additional Counter**") placing reliance on an amendment to Rule 42 and Rule 43 of the Central Goods and Service Tax Rules, 2017 ("**Rules**") which was brought into effect from 1 April 2019.
5. The Petitioner submits that both, the Counter and the Additional Counter have fundamentally misconstrued the provisions of the CGST Act and the CGST Rules.
6. As stated in the Writ Petition, the backbone of the GST regime in India is the seamless transfer of ITC from one stage to another in the chain of value addition. This ITC is an inbuilt mechanism in the design of GST for incentivizing tax compliance by traders.
7. The Petitioner states that Section 16 is the governing provision under the CGST which entitles every registered person to take ITC subject to conditions and restrictions as may be prescribed. So long as the "*conditions and restrictions*" under Section 16 are met, every registered person is entitled to ITC. However, the Impugned Notifications, under the guise of a "condition and restriction", takes away the entitlement to ITC itself to those who supply construction services. The Respondent Nos. 1, 3, 4 and 5's averments in the Counter and Additional Counter that the Central Government has wide powers to prescribe rates by imposing any condition has

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nothing to do with the issue at hand and does not take away the statutory entitlement of ITC provided under Section 16(1). In fact, Section 16(1) does not even pertain to GST rates. Therefore, the very basis of the Counter and the Additional Counter is erroneous and irrelevant to the present Writ.

8. Without prejudice to the above, the Petitioner further submits that the only activities where ITC cannot be taken is expressly provided in the CGST Act under Section 17(5). It is not the Respondent Nos.1, 3, 4 and 5's case that the Petitioner's supply of construction services fall under any of the specified activities under Section 17 (5). Thus, Impugned Notifications taking away the ITC entitlement has violated the scheme of the CGST Act.
9. In addition, the Counter Affidavit selectively quotes the Detailed Agenda Note to the 33rd GST Council Meeting and the Minutes of the 34th GST Council Meetings and relies upon them to justify the Impugned Notifications. However, the Detailed Agenda Note and the Minutes do not remedy the jurisdictional defects which the Impugned Notifications fundamentally suffer from.
10. Without prejudice, the Petitioner states that the "Detailed Agenda Note" also refers to several State Government representatives who have raised serious concerns such as the denial to ITC being completely "alien" to the very spirit of GST. The relevant extracts is reproduced herein below,

- a. The Hon'ble Minister for Punjab stated that the foundation of GST was to reward honest tax payers and the current

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proposal was "alien to the spirit of GST". The State representative further noted that 5% without ITC would lead to all sorts of evasion such as over valuation and under valuation. (See Para 12.11 at Pg. 31 of the Detailed Agenda Note at **Annexure P-11**)

- b. The representative for Delhi stated that if under construction projects are brought under GST without ITC, it would lead to generation of black money. (See Para 13.6 at Pg. 11 of the Minutes of the 33 GST Council Meeting @ **Annexure P-12**)
- c. The representative for Delhi stated that presence of the ITC chain was beneficial to the buyers. It was also beneficial to tax authorities since the entire value chain remained exposed for scrutiny allowing for plugging of evasion which would not be possible under the 5% without ITC scheme. (See para 25.15 at Pg. 23 of the 33 GST Council Meeting @ **Annexure P-12**)
- d. The representative for the State of Chhattisgarh clearly explained how the 5% without ITC lead to an increase in tax in the case of high rise buildings, low end finish houses as well as affordable houses. The only benefit of 5% without ITC was in the case of premium houses in high rise building. (See Para 25.21 at Pg. 25 of the 33 GST Council Meeting @ **Annexure P-12**). In this regard, the Petitioner is enclosing an illustrative chart demonstrating the estimated GST payable in case of affordable, High income group pre and post the Impugned Notification along with brochure and price lists of the Petitioner as **Annexure P-13**.

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11. In addition to the above, the fact that ITC encouraged every transaction in white was also supported by the State of West Bengal in the 31st GST Council Meeting held on 22 December 2018. The State of West Bengal observed that the introduction of composition scheme in real estate sector had the risk of encouraging transactions in cash. The relevant extracts of the Minutes of the 31st GST Council Meeting is at **Annexure P-14**.

12. The Petitioner states that the discussions recorded in the Minutes of the Respondent No.3's meetings establish how 5% without ITC is alien to the GST scheme. In addition, the removal of ITC chain raises serious concerns of generating black economy and has the opposite effect of increasing the tax burden in the case of affordable housing and non-premium flats. In this regard, the Petitioner is enclosing a copy of the letter filed by Confederation of Real Estate Developer's Associations of India (CREDAI) to the Hon'ble Prime Minister of India dated 10 August 2018 that proposed GST at the rate of 12 % with ITC to achieve the Government's stated objective of housing for all by 2022. **(Annexure P-15)**

13. In any case, the Petitioner submits that the Impugned Notifications are *ultra vires* Section 16(1) even if the Respondent No.3 has given its recommendation, for providing a rate of 5 % without ITC since the Impugned Notification is neither a condition nor a restriction and, is not "prescribed" under the CGST Act.

14. In addition to the Counter-Affidavit, the Respondent Nos. 1,3,4 and 5 have filed the Additional Counter stating that the amended Rule

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42 and 43 of the Central Goods and Services Tax Rules, 2017 deny credit of Inputs / Capital Goods and therefore the denial of ITC has been “prescribed” by way of Rules. The Petitioner denies all averments in relation to the amended Rule 42 and Rule 43 as being erroneous, misleading and baseless.

15. At the outset, the Additional Counter mixes up to extremely different concepts in an indirect tax regime. Rules 42 and 43 read with Section 17 pertains to attribution of ITC exclusively to taxable supply and reversal of such credit that is not attributable to taxable supply. By The working of Section 17 (1) and 17(2) read with Rule 42 (1) can be demonstrated by way of the following illustration,

- a. **Premise:** A registered person has a 60% turnover for taxable supply and 40% turnover towards exempt supply and that, the registered person has a total ITC pool of 1000.
- b. The above total ITC pool of 1000 is denoted by “T”.
- c. Rule 42(1)(b) requires the registered person to identify ITC that is exclusively for purposes other than business. Assume that such ITC is 100. This 100 ITC is denoted by T1.
- d. Rule 42(1)(c) requires the registered person to identify ITC attributable exclusively for exempt supplies. This is T2. For present illustration, it is assumed that T2 is 100 ITC.
- e. Rule 42 (1) (d) requires registered person to identify ITC attributable to supplies identified under Section 17(5) as T3. For present illustration, it is assumed that T3 is 100.

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- f. The balance (here, 750) is the pool of ITC which would be credited to the Electronic credit ledger in terms of Rule 42(1)(e), and is denoted by "C1". Rule 42(1)(e) provides that $C1 = T - (T1 + T2 + T3)$.
- g. Out of the ITC credited to the Electronic credit ledger, Rule 42(1)(f) provides that the ITC attributable to **the Exclusively for Taxable** outward supplies will be allowed to be availed in full. This is T4. For illustration, it is assumed that T4 is 250.
- h. Then the Rule 42(1)(h) provides that left over portion of ITC denoted as $C2 = C - T4$ will be treated as 'Common credit' used/intended to be used for both taxable and non-taxable supply. Out of the 500 ITC available (750-250), 60% of 500 (i.e. 300) is what can be utilized by the registered person and the balance 200 ITC is required to be reversed.
16. The Petitioner submits that the explanation inserted to Rule 42(1)(f) only sought to remedy the situation that there is no exclusive services/inputs that exclusively used/intended to be used for taxable supplies in case of construction services and all inputs/services procured would be treated as common credit and treated as C2 and accordingly arrives the proportionate ITC attributable to the taxable supplies applying the formula given under rule 42(1)(f). The only impact of explanation Rule 42(1)(f) is the above and nothing beyond.
17. The Petitioner submits that prior to the amendments to Rule 42 and Rule 43, a supplier of construction services could attribute certain

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inputs/services for effecting taxable supplies and take full credit of those inputs/services. For example, Doors/Windows procured and used for flats booked before OC and subjected to GST can be said be exclusively used for effecting taxable supplies. The amendment only seeks to address such situations by bringing in proportionality in such situations as well.

18. The Petitioner submits that the purpose and object of Section 17(1) and Section 17(2) read with the explanation to Rule 42(1)(f) and Rule 43 are conceptual different from the purpose and object of the Impugned Notification:

- a. Sections 17(1) provides that where a supplier makes supplies both, in relation to business and for other purposes, ITC is **restricted** to input tax attributable to supplier's business. In contrast, the Impugned Notification is not a restriction, but a complete denial of credit even when the input tax is towards supplier's business.
- b. Section 17(2) provides that where a supplier makes both taxable, including zero rated supplies, as well as non-taxable supplies, the ITC is **restricted** to input tax attributable to taxable supplies. Similar to Section 17(1), Section 17(2) is a **restriction** for utilizing ITC attributable to taxable supply. In contrast, the Impugned Notification is a prohibition on taking ITC even if it is attributable to taxable supply.
- c. Rule 42(1) provides for **computation** of ITC **attributable** to taxable supply. On computation, such amount of ITC that is

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attributable exclusively to non-taxable supply is required to be reversed.

d. In view of the above, the application of Rule 42 ***presupposes the taking of ITC***. In fact, the formula provided under Rule 42(1) categorizes such ITC that is not available as "T2" or "T3" and excludes the same from the pool of available tax. On the other hand, the Impugned Notifications prohibits the very taking of ITC.

e. Since Section 17(1) & (2) and Rule 42 attribute ITC to taxable supply, a reversal computed in the formula provided under Rule 42 contemplates ***only a partial denial*** of ITC based on its attribution to non-taxable supply and ***never a complete prohibition*** as brought about by the Impugned Notification.

19. Given the above, the Petitioner submits that the amendment bringing about *explanation* to Rule 42(1)(f) is for the purpose of computing such amount of ITC taken that has to be reversed and has nothing to do with the Impugned Notifications which prohibit the taking of ITC in the first instance. A detailed illustration in the construction sector demonstrating the impact of *explanation* to Rule 42(1)(f) is enclosed as **Annexure P-16**.

20. The Petitioner submits that the Additional Counter cannot seek to justify the Impugned Notifications by referring to *explanation* to Rule 42(1)(f) merely because it is a rule when the purpose and object of the said Rule is completely different to the object and purpose of the Impugned Notifications.

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21. Similar to Rule 42(1)(f), the Explanation to Rule 43 (1) (i) (c) only provides for a formula for reversing ITC in relation to capital goods and are denied for the same reasons stated above for Rule 42(1)(f).
22. Without prejudice to the aforesaid, and in any case, if said explanation to Rule 42 (1)(f) and Rule 43(1)(i)(c) is a condition “prescribed” for denial of ITC, then there would be no requirement of Impugned Notification in the first instance. Thus, there is no link between the taking away of the right to ITC under the Impugned Notifications and Rule 42 and Rule 43. Thus, the prayers in the Writ Petition ought to be granted.

Para-wise Response to the Counter- Affidavit

23. The averments in Paras 1, 2 and 3 do not require a response.
24. The averments in Para 4 appear to be a summary of the Petitioner’s contentions and are denied to the extent they are incorrect. The Petitioner refers and reiterates Para 2 of its Affidavit in this regard.
25. The averments in Para 5 only reproduce the definitions of Input Tax and ITC under the CGST Act and do not require a response.
26. The averments in Para 6 are denied to the extent that “conditions and restrictions” under Section 16 or Section 148 empower the Respondent No.1 to take away the very entitlement to ITC. As stated above at Paras 6-8, power to prescribe conditions, restrictions, safeguards cannot extend to the taking away a

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statutorily guaranteed right to ITC by way of the Impugned Notifications.

27. The averments of Para 7 are denied for not reflecting the complete scenario. While the Impugned Notifications *state* that they have been issued pursuant to the powers granted to the Respondent No.1 under Sections 9(1), 11(1), 15(5), 16(1) and also 148, it is the Petitioner's case that the Impugned Notifications are *ultra vires* Section 16(1).
28. The averments in Para 8 seek to explain Notification 11/2017-Central Tax (Rate) dated 28.06.2017 and are denied to the extent the same is inaccurate.
29. The averments in Para 9 are denied. As stated above at paras 6-8 and in the Affidavit, the statutory entitlement of ITC under Section 16(1) cannot be taken away by the Impugned Notifications under the guise of a "condition". The "condition" under Section 16(1) is for the purpose of taking ITC whereas the Impugned Notification *eliminates ITC itself* for the Petitioner's services in the guise of a condition.
30. The averments in Para 10 seek to summarise the Petitioner's contentions and are denied to the extent they are incorrect. The Petitioner reiterates its submissions at Para 3 as well as the Grounds raised in its Affidavit along with its submissions made herein above.
31. The averments in Para 11 are denied in their entirety. It is denied that Article 246A(1) of the Constitution of India empowers the

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Respondent Nos.1 and 2 to issue the Impugned Notifications in violation of the CGST Act and TGST Act. It is further denied that the Detailed Agenda Note for the 33rd GST Council meeting makes what is otherwise violative of the provisions of the CGST Act and TGST Act, compliant. Without prejudice, and in any case, the Counter Affidavit only selectively quotes Para 12.10 from the detailed Agenda Note and are denied for the reasons already stated above at Paras 9-12.

32. The averments in Para 13 merely state the amendment of Notification 11/2017-Central Tax (Rate) by the Impugned Notifications and do not require a response.
33. The averments in Para 14 are denied for being irrelevant to the present Writ Petition. The Petitioner submits that the *ratio* that Legislature enjoys a very wide latitude in classification in the decisions cited in para 14 have no application to the present Writ since the issue at hand is not that of classification.
34. The averments in Para 15 are denied. As stated above, it is strange to justify the removal of ITC as a “condition / restriction” for taking ITC itself. Further, the Legislature’s wide power in choosing classification and rates of tax cannot take away the assessee’s right to ITC in violation of Section 16. The Petitioner further denies that merely because the Respondent No.3 arrives at a decision, the Impugned Notifications can be issued in blatant violation of Section 16 and the foundational principles of the GST regime.

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35. The averments in Para 16 are denied as being false, and *ex facie* contrary to the provisions of Section 16(1). Section 16(1) expressly provides that the “conditions and restrictions” must be “prescribed”. Section 2(87) defines “prescribed” to mean “prescribed by rules made under the Act on the recommendations of the Council”. Thus, not only must the Council make a recommendation, the condition or restriction must be prescribed by way of Rules made under the CGST or TGST Act. The Impugned Notifications amending a rate notification cannot, under any circumstances, be treated as “rules made under the Act”.
36. The averments in Para 16 of the Counter are further denied since Section 148 cannot override Section 16. The provisions of Section 16 can only be overridden where the CGST Act expressly provides for the same. For instance,
- a. Section 17(5) expressly provides that “**Notwithstanding anything** contained in sub-section (1) of section 16....”. It is an admitted position that the Petitioner’s activities do not fall under Section 17(5).
 - b. Similarly, both Section 19 (2) and Section 19(5) expressly provide that, “**Notwithstanding anything** contained in clause (b) of sub-section (2) of Section 16,.....”.
 - c. Section 43A (1) provides that, “**Notwithstanding anything** contained in sub-section (2) of section 16,...”

Here, Section 148 is not a notwithstanding clause and cannot override the provisions of Section 16.

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37. The averments in Para 17 seek to explain mechanism of ITC thereunder and are denied to the extent they are incorrect. Without prejudice to the above and assuming that para 17 in the Counter is accurate, it in fact supports the Petitioner's case inasmuch as the denial of ITC is neither a condition / restriction or has it been "prescribed".
38. The Petitioner denies the averments in Para 18. It is denied that the Impugned Notifications meet the requirement of being "prescribed". It is also denied that merely because the Respondent No.3 has given its recommendation, the Impugned Notifications are "prescribed" as per the provisions of the CGST Act. The Petitioner reiterates that any conditions or restrictions can only be by way of Rules made under the CGST or TGST Act and cannot be by way of the Impugned Notifications.
39. The Petitioner denies the averments in Para 19. For the reasons already stated herein above at Paras 6-9, it is denied that the Impugned Notifications are in consonance with Section 16 (1) merely because of the recommendation of Respondent No.3. It is also denied that the taking away of the entitlement to ITC is a condition or restriction under Section 16 (1). If the Respondent Nos. 1,3 and 4's averments that ITC can be totally taken away in the guise of a condition or restriction under the very mechanism which provides for ITC are allowed to stand, the very foundation GST and the mechanism under Section 16 are wiped out.
40. The averments in Paras 20 and 21 that Impugned Notifications are as per Section 9 (1) are denied inasmuch as they are irrelevant and

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misleading. Section 9(1) empowers the Respondent No.1 to notify the rates on the recommendation of Respondent No.3. However, Section 9(1) does not empower the Respondent No.1 to take away the entitlement to ITC under Section 16.

41. The averments in Para 22 that Section 16 (1) itself provides for “conditions and restrictions” are denied for the reasons already stated above at Paras 6-9. It is reiterated that “conditions or restrictions” for taking ITC cannot extend to the very elimination of such ITC.
42. The averments in Para 23 are denied since Section 164 has no application in the present case. Neither the original Notification 11/2017 nor the Impugned Notifications have been issued in exercise of the powers to make rules under Section 164. Without prejudice to the above, if the Respondent Nos. 1,3 and 4’s averments are allowed to stand, then basic tenets of delegated legislation and the difference between a Rate notification and Rules are completely wiped out.
43. The averments in Para 24 are denied. For reasons already stated above, it is denied that the issue at hand is one of change of tax rate. In fact, Section 16 does not even deal with tax rate. It is also denied that the Impugned Notifications do not change the Principal Enactment itself. As stated above at paras 6-12, the elimination of ITC by the Impugned Notifications strikes at the foundational principles of GST itself and is in violation of Section 16.

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44. The averments in para 25 and 26 that the Respondent No. 1 is empowered to notify rates of GST along with conditions is denied for the reasons already stated above. It is denied that the issue at hand is the power of the government to notify rates with conditions or restrictions. It is also denied that the Impugned Notifications are valid merely because the Respondent No.3 can make recommendations as per Article 279A (4).
45. The averments in para 27 of the Counter placing reliance on *GTC Industries v. CCE* where it has been held that technicalities of law cannot be permitted to stand in the way of administration of justice is denied as it is inapplicable to the present case. It is denied that the removal of ITC by the Impugned Notifications are a mere "technicality of law". Rather, the removal of credit is in direct violation of Section 16 (1) and the established principle that subordinate legislation that is meant for the purpose of carrying out the provisions of the statute cannot take away what is conferred by the statute. (See *CIT AP v. Taj Mahal Hotel* (1979) 3 SCC 550)
46. The averments in para 28 placing reliance on *Federation of Hotel and Restaurants vs. UOI* (1988 AIR 1291) and *Nitdip Textile Processor VS. UOI* [(2012) 1 SCC 226] are denied inasmuch as the above precedents are in relation to power of the Legislature in classification for taxation and have no application in the present case. The Petitioner reiterates its submissions in Paras 31 and 32 herein above. The decisions relied upon in the Counter Affidavit pertain to the power of the State to pick and choose rates of taxation, which, as stated above, is not the case at hand.

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47. The averments in Para 29 where the Counter relies on *TVS Motor Company v. State of Tamil Nadu and Others* [Civil Appeal No(s). 10560-10564 of 2018] is denied inasmuch as the said decision has no application in the present case.

a. The challenge in *TVS Motor Company* was to the provisions of the parent statute, i.e. Section 19(5)(c) of the Tamil Nadu VAT Act, which sought to deny ITC. In contrast, the challenge in this Writ is to the subordinate Impugned Notifications which seek to take away the entitlement of ITC under Section 16(1).

b. The petitioners in *TVS Motor Company* further challenged Rule 10(9) (a) of the TNVAT Rules which allowed for conditional ITC, i.e. only on the provision of C-Forms. Thus, the VAT scheme ultimately allowed for ITC subject to the fulfilment of certain conditions. In contrast, even though the CGST and TGST Act entitles the assessee to ITC, the Impugned Notifications completely and unconditionally eliminate ITC. The assessee is allowed no choice / fulfilment of any conditions whatsoever for claiming ITC.

c. In any case, the observation of the Hon'ble Supreme Court that ITC is not a vested right has to be read in the context of challenge in *TVS Motor Company*, i.e. the Parent Enactment itself provided for non-availability of ITC in certain conditions. This is vastly different from the present Writ where the Impugned Notifications has forbidden ITC in cases which are not contemplated under the Parent Enactment.

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48. The averments in Para 30 relying upon *Jayam and Company v. AC* (AIR 2016 SC 444) is completely denied as being inapplicable in the present case. *First*, in *Jayam (Supra)* the challenge was to the provisions of Tamil Nadu Value Added Tax Act itself which was amended to reverse the amount of ITC in certain conditions. In contrast, the challenge in this Writ is to the subordinate Impugned Notifications which seek to take away the entitlement of ITC under Section 16(1). *Second*, the *ratio* in *Jayam and Company* states that a concession given by statute can only be availed if the conditions prescribed are met. In *Jayam*, the Hon'ble Court proceeded on the basis of whether the petitioners therein had met all the conditions for availing ITC and on facts of that case, determined that they had not. It is in the above context, that the Hon'ble Madras High Court held that ITC could be availed only in the manner prescribed under the enabling provision. This is completely inapplicable in the present case as Impugned Notifications do not prescribe any condition before taking ITC, they outrightly prohibit ITC for construction supply.

49. The averments in para 31 are denied as being false, misleading and completely inapplicable. It is denied that ITC is not an absolute right and conditions may be prescribed for its availment by notifications. At the cost of repetition, it is submitted that complete prohibition from taking ITC is neither a condition nor a restriction. Further, when Section 16(1) expressly provides that such conditions or restrictions can only be by way of Rules, the Counter cannot state that such denials can be by way of notifications.

50. The averments in para 31 relying upon *JCB India v. UOI* TIL-23-HC-Mum-GST are denied as being inapplicable to the present case. In

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JCB (Supra) the challenge was to the transitional provisions for ITC under S. 140 of the CGST Act itself. In contrast, the challenge in this Writ is to the subordinate Impugned Notifications which seek to take away the entitlement of ITC under Section 16(1). In addition, the *ratio* in *JCB* was in the context of a challenge to a condition which had to be fulfilled for taking Credit. At the cost of repetition, there are no conditions under the Impugned Notification the satisfaction of which allows for taking of credit. Thus, the *ratio* of *JCB* has no application in the present case.

51. The averments in Para 32 are denied as being misleading. It is reiterated that the Impugned Notification is not a condition to take ITC but a complete removal of ITC itself for construction service. In any event, it is denied that the Impugned Notification constitutes "Rules" under the provisions of CGST Act. Moreover, the power of the Central Government to issue Rules is under Section 164 of the CGST Act. Conspicuously, the Respondent No. 1 did not invoke this power to issue the Impugned Notification thereby making it obvious that the Impugned Notifications were never even intended to be Rules.

52. The Averments in para 33 are denied for reasons already stated above in Paras 6-9. It is denied that the Central Government is empowered to take away the right to credit by issuing the Impugned Notifications. It is denied that merely because Respondent No. 3 recommended a course of action, the Impugned Notifications are not *ultra vires* Section 16(1).

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53. The averments in para 34 are denied. It is denied that the Impugned Notifications do not encourage black economy. The Petitioner reiterates its submission made herein above at Paras 9-12 in this regard.

54. The Petitioner denies the averments in Para 35. It is denied that the Impugned Notifications encourage very small businessmen to participate in the construction sector. As stated at Paras 9-12 hereinabove, the complete removal of ITC chain encourages transactions in cash and promotes black economy.

55. The averments in para 36 are denied in toto and in response, the Petitioner reiterates its submissions in the Writ as well as the submissions made herein above.

Parawise Response to Additional Counter

56. The averments in paras 1 and 2 do not call for any reply.

57. The averments in para 3 are denied as being misleading and for the reasons already stated herein above at Paras 24, 25 and 34. It is denied that Section 16 (1) provides for the completely taking away of ITC in the guise of "conditions and restrictions" meant for taking the ITC. It is denied that Section 148 empowers the Government to take away the entitlement ITC. Section 148 only provides for notification of certain class of persons and the procedures to be followed for registration, furnishing of return, payment of tax and administration of such persons. Section 148 does not provide for removal of the entitlement to ITC.

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58. The averments in Para 4 are denied. It is denied that the Central Government is empowered to take away the right to ITC under Section 9(1), Section 11(1), Section 15(5), Section 16(1) and Section 148.
59. The averments in para 5 explaining the effective rate of GST are denied to the extent they are incorrect and the Respondent Nos. 1,3,4 and 5 are put to strict proof of the same.
60. The averments in para 6 seek to summarize the Petitioner's case and are denied to the extent they are incomplete. The Petitioner reiterates Para 3 of the Writ Petition as well as the submissions made herein above and are not being repeated for the sake of brevity.
61. The averments in para 7 of the Additional Counter are denied to the extent the reference to the Constitution of India and the CGST Act is for implying the validity of the Impugned Notifications. None of the provisions referred to in the Additional Counter remedy the Impugned Notifications being *ultra vires* Section 16(1) of the CGST Act as well as the scheme of GST regime in India.
62. The Petitioner denies the averments made in para 8 of the Additional Counter. It is denied that Notification 16/2019-Central Tax has amended the CGST Rules to bring the rules in line with Notification 3/2019. At the outset, it is denied that the amendment pursuant to Notification 16/2019 makes ITC zero in line with the Impugned Notification. The Petitioner reiterates its submissions in paras 14 to 20 herein above in this regard. Without prejudice to the

For MEHTA & MODI REALTY WORKS LLP
M. J. [Signature]
Authorised Signatory

aforesaid, it is strange to say that Rules were amended to bring them in line with the Impugned notification when usually, Rules and Notifications work in tandem.

63. The averments in Para 8, sub-para a) are denied inasmuch as the amendments to Rules 42 and 43 do not effect the denial of ITC under the Impugned Notifications. The Petitioner reiterates its submissions in Paras 14-22 herein above in this regard.
64. The Petitioner denies the averments in Para 9 *in toto*. It is denied that the Government by way of inserting explanation under Rule 42(1)(f) and 43(1)(c) has brought about denial of ITC for construction services. The Petitioner reiterates its submissions in Paras 14-22 herein above in this regard.
65. The averments in Para 10 are denied. The Petitioner reiterates that Rules 42 and 43 are not concerned with the taking away of the right to ITC. The Petitioner reiterates its submissions in Paras 14-22 herein above in this regard. Thus the removal of ITC by way of the Impugned Notifications are *ultra vires* Section 16(1) of the CGST Act.
66. The averments in paras 11 and 12 is a reiteration and summary of Additional Counter's prior submissions and are denied for the all the reasons stated herein above in the present Reply.

For MEHTA & MODI MEHTA & MODI
11. 2. 2018
Authorised Signatory

In view of the above, the Petitioner prays that this Hon'ble Court may be pleased to allow the present Writ Petition and pass such orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

Sworn and signed before me on this
the _____ day of June, 2021
at Hyderabad

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Advocate/Hyderabad

VERIFICATION

I, Mangilipelli Jayaprakash, deponent herein, do hereby declare that the above contents mentioned in paras (1) to (60) are based on the records of the Petitioner and are believed to be true; hence verified on this _____ day of June, 2021 at Hyderabad.

Counsel for Petitioner

For MEHTA & MODI REALTY KOWKUR LLP
M. J. Jayaprakash
Authorised Signatory
DEPONENT

IN THE HIGH COURT OF JUDICATURE FOR THE STATE OF
TELANGANA AT: HYDERABAD

W.P. NO. 22193 OF 2020

CHRONOLOGICAL / RUNNING INDEX

Sl. No.	Exhibit	Description of Document	Date of Document	Date of filing of Document	Page No.
1.		Reply Affidavit filed on behalf of the Petitioner	.06.2021	.06.2021	
2.	P-11	Relevant extracts from the Detailed Agenda Note to 33 rd GST Council Meeting	20.02.2019	-do-	
3.	P-12	Relevant extracts from the Minutes to the 33 rd GST Council Meeting	20.02.2019	-do-	
4.	P-13	Illustrative Chart showing the increase in GST along with price lists	-	-do-	
5.	P-14	Relevant extracts from the Minutes to 31 st GST Council Meeting		-do-	
6.	P-15	CREDAI letter to the Hon'ble Prime Minister of India	10.08.2018		
7.	P-16	Chart demonstrating the impact of amendments to Rule 42		-do-	

Date: .06.2021

Hyderabad

COUNSEL FOR THE PETITIONER

