

the irregular credit and have not gained anything from such availment. Therefore, there should not be any interest liability on mere availment of credit (Copy of electronic credit ledger is enclosed as Annexure IX).

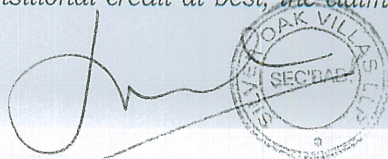
67. Without prejudice to above, Noticee submits that the Finance Act, 2022 vide Section 110 has proposed an amended to the section 50 which is in accordance with the GST Council in its 45th meeting GST Council Meeting has clearly stated that the interest in cases of ineligible ITC availed and utilized should be charged at 18% w.e.f. 01.07.2017. The press release evidencing the same is as under *"In the spirit of earlier Council decision that interest is to be charged only in respect of net cash liability, section 50 (3) of the CGST Act to be amended retrospectively, w.e.f. 01.07.2017, to provide that interest is to be paid by a taxpayer on "ineligible ITC availed and utilized" and not on "ineligible ITC availed". It has also been decided that interest in such cases should be charged on ineligible ITC availed and utilized at 18% w.e.f. 01.07.2017."*
68. It is further submitted that ITC was not utilized and have been maintained sufficient balance of ITC in the electronic credit ledger throughout the subject period. The copy of Electronic credit ledger is enclosed as annexure IX
69. Noticee submits that as the entire credit is reversed before the utilization, the interest liability does not arise. In this regard, reliance is further placed on:
- a. Commissioner Cus., C.E. & S.T. v. Bharat Dynamics Ltd. 2016 (331) E.L.T. 182 (A.P.) wherein it was held that *"6. From the findings arrived at by the Tribunal as reproduced above, it is obvious that in March, 2010, the appellant in accordance with the relevant provision of law, did seek clarification from the department to know whether the goods on clearance to the respondent-assessee are exempted from payment of Excise duty in terms of the notification and only in the absence of such clarification from the department, they took CENVAT credit during the intervening period i.e. from September, 2010 to March, 2011. It is also clearly observed that after getting clarification from TRU in April, 2011, the appellant reversed the entire amount of Cenvat credit. In that view of the matter, the specific contention put forth by the learned standing counsel that the respondent-assessee without any*



eligibility, has taken the Cenvat credit, as such, they are liable to pay interest, is not sustainable.”

- b. CCE & ST, LUT Bangalore Vs. Bill Forge Pvt. Ltd—2012 (26) S.T.R. 204 (Kar.) wherein it was held that “21. Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. Section do not stipulate interest is payable from the date of book entry, showing entitlement of Cenvat credit. Interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly.”
- c. B. Girijapathi Reddy & Company v. Commissioner — 2016 (344) E.L.T. 923 (Tri-Hyd);
- d. GantaRamanaiah Naidu v. Commissioner — 2010 (18) S.T.R. 10 (Tribunal)
- e. J.K. Tyre & Industries Ltd. Vs. CCE x., Mysore—2016(340) E.L.T 193 (Tri.-LB);
- f. Commissioner v. Strategic Engineering (P) Ltd. — 2014 (310) E.L.T. 509 (Mad.);
- g. Commissioner v. Bombay Dyeing and Mfg. Co. Ltd. — 2007 (215) E.L.T. 3 (S.C.);

70. Noticee further wishes to rely on **Commercial Steel Engineering Corporation v. State of Bihar — 2019 (28) G.S.T.L. 579 (Pat.)** wherein it was held that “The Assistant Commissioner of State Taxes has somewhere got confused to treat the transitional credit claimed by the dealer as an availment of the said credit when in fact an availment of a credit is a positive act and unless carried out for reducing any tax liability by its reflection in the return filed for any financial year, it cannot be a case of either availment or utilization. It is rightly argued by Mr. Kejriwal that even if the respondent no.3 was of the opinion that the petitioner was not entitled to such transitional credit at best, the claim could



From the above referred submissions, it is clear that no interest is applicable when the credit is reversed before utilization. Further, the same was also clarified in the 45th GST Council Meeting wherein it was recommended to state that interest is applicable only on utilization and is not applicable on mere availment. Hence, Noticee request you to drop the further proceedings in this regard.

71. Noticee submits that the impugned notice has alleged that the Noticee has excess claimed ITC of Rs. 18,73,254/- (CGST Rs. 9,36,627/- SGST Rs. 9,36,627/-) in GSTR-3B as compared to the tax declared by the suppliers of Noticee in GSTR-01.

Month	As per GSTR-2A	As per GSTR-3B	Shortfall (-)/ Excess (+) in liability
Apr-18	6,00,454	4,37,896	- 1,62,558
May-18	5,14,035	5,61,670	47,636
Jun-18	6,70,830	4,70,881	- 1,99,949
Jul-18	3,97,231	6,93,107	2,95,877
Aug-18	2,36,039	50,99,712	48,63,673
Sep-18	17,29,922	- 21,40,415	- 38,70,337
Oct-18	10,19,208	15,21,728	5,02,520
Nov-18	8,60,712	9,95,080	1,34,368
Dec-18	20,21,874	16,41,727	- 3,80,147
Jan-19	10,62,926	15,33,878	4,70,952
Feb-19	17,13,174	19,38,196	2,25,021
Mar-19	42,22,662	30,25,158	- 11,97,504
Total	1,50,49,067	1,57,78,618	7,29,551

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74. 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.

75. 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 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;”

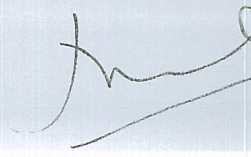
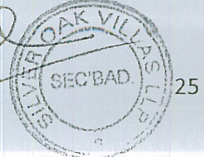
76. As seen from Section 16(2)(c), ITC can be availed subject to Section 41 of the GST Act which deals with the claim of ITC and the provisional acceptance thereof.

“Section 41. Claim of input tax credit and provisional acceptance thereof

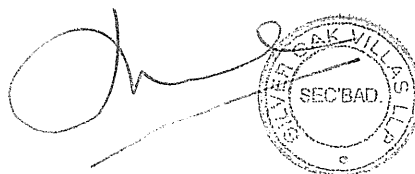
1. Every registered person shall, ***subject to such conditions and restrictions as may be prescribed, be entitled to take the credit of eligible input tax, as self-assessed, in his return and such amount shall be credited on a provisional basis to his electronic credit ledger.***

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.

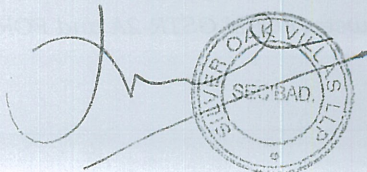



77. In this regard, it is submitted that Section 42, *ibid* specifies the mechanism for matching, reversal, and reclaim of ITC wherein it was clearly stated the details of every inward supply furnished by a registered person shall be matched with the corresponding details of outward supply furnished by the supplier in such manner and within such time as may be prescribed.
78. 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 been extended then the date of matching relating to the claim of the input tax credit shall also be extended accordingly.
79. 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.
80. 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.
81. 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.

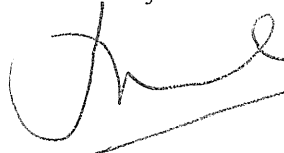


82. Noticee further submits that Finance Act, 2022 has omitted Section 42, 43 and 43A of the CGST Act, 2017 which deals ITC matching concept. Noticee submits that the substituted Section 38 of the CGST Act, 2017 now states that only the eligible ITC which is available in the GSTR-2B (Auto generated statement) 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.
83. 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 statute. Hence, request you to drop the proceedings initiated.
84. 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.



85. 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.
86. 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.
87. 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.
88. 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.
89. 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.
90. 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 apprehension 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.

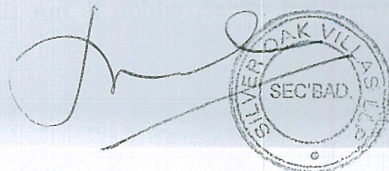
From this, it is clear that input tax credit can be availed even if the same is not indicated in Form GSTR 2A and hence the notice issued is contrary to the same.

91. 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.
92. 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.

93. 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

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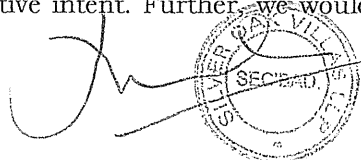
which Noticee has availed ITC. Further, Noticee submits that the value of such supplies including taxes has been paid to such vendors thereby satisfying all the other conditions specified in Section 16(2) of the CGST Act, 2017. As all the conditions of Section 16(2) are satisfied, the ITC on the same is eligible to the Noticee hence the impugned notice needs to be dropped.

94. 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 (156) 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.

95. Noticee submits that Section 76 of CGST Act, 2017 provides the recovery mechanism to recover the tax collected by the supplier but not paid to the government. Further, Section 73 and 74 also provides the recovery mechanism to recover the GST collected by way of issue of notice. In this regard, Noticee submits that the revenue department cannot straight away deny the ITC to the recipient of goods or services without exercising the above referred powers.
96. 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.
97. 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



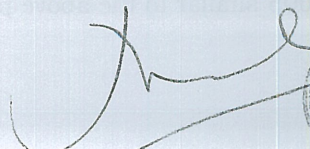
submit that the department cannot be a mute spectator or maintain sphinx like silence or dormant position. In this regard, Noticee wish to rely on recent Madras High Court decision in case of M/s. **D.Y. Beathel Enterprises Vs State Tax officer (Data Cell), (Investigation Wing), Tirunelveli** 2021(3) 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."

98. 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."*



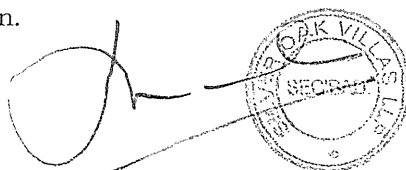

99. Noticee further submits that for the default of the supplier, the recipient shall not be penalized therefore the impugned notice shall be dropped. In this regard, reliance is placed on **On Quest Merchandising India Pvt Ltd Vs Government of NCT of Delhi and others 2017-TIOI-2251-HC-DEL-VAT** wherein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

100. Noticee further submits that in case of Hon'ble Karnataka High Court in a writ petition filed by **M/s ONXY 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"*

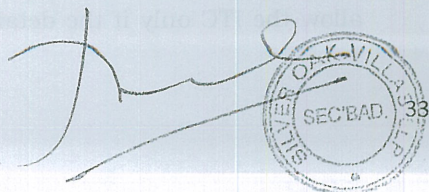
101. Noticee submits that under the earlier VAT laws there were provisions similar to Section 16(2) *ibid* which have been held by the Courts as unconstitutional. Some of them are as follows

- 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.



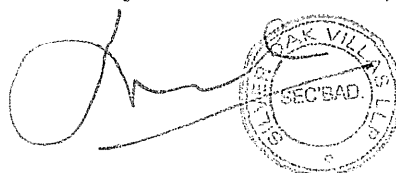
The decisions in the above cases would be equally applicable to the present context of Section 16(2) *ibid*

102. 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.
103. Similarly, it is only Rule 36(4) of CGST Rules, 2017 as inserted w.e.f. 09.10.2019 has mandated the condition of reflection of vendor invoices in GSTR-2A with Adhoc addition of the 20% (which was later changed to 10% & further to 5%). At that time, the CBIC vide Circular 123/42/2019 dated 11.11.2019 categorically clarified that the matching u/r. 36(4) is required only for the ITC availed after 09.10.2019 and not prior to that. Hence, the denial of the ITC for non-reflection in GSTR-2A is incorrect during the subject period.
104. 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.



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105. 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.
106. 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.
107. 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



A handwritten signature in black ink is written over a circular official stamp. The stamp contains the text "SECRETARIAT" at the top, "GOVT. OF INDIA" at the bottom, and "SECY (E)" in the center.

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).

108. 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 interest on the same. Hence, the impugned notice to that extent needs to be dropped.

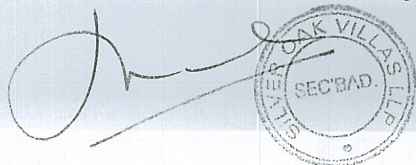
109. Noticee wishes to rely on recent decisions in case of:

- a. **Jurisdictional High Court decision in case of Bhagyanagar Copper Pvt Ltd Vs CBIC and Others 2021-TIOL-2143-HC-Telangana-GST**
- b. **M/s. LGW Industries limited Vs UOI 2021 (12) TMI 834-Calcutta High Court**
- c. **M/s. Bharat Aluminum Company Limited Vs UOI & Others 2021 (6) TMI**
- d. **M/s. Sanchita Kundu & Anr. Vs Assistant Commissioner of State Tax 2022 (5) TMI 786 - Calcutta High Court**

110. Noticee submits that in the case of **Global Ltd. v. UOI - 2014 (310) E.L.T. 833 (Guj.)** it was held that denial of ITC to the buyer of goods or services for default of the supplier of goods or services, will severely impact working capital and therefore substantially diminishes ability to continue business. Therefore, it is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution.

111. Noticee submits that the denial of ITC to the buyer of goods or services for default of the supplier of goods or services, is wholly unjustified and this causes the deprivation of the enjoyment of the property. Therefore, this is positively violative of the provision of Article 300A of the Constitution of India - **Central Excise, Pune v. Dai Ichi Karkaria Ltd., SC on 11 August 1999 [1999 (112) E.L.T. 353 (S.C.)]**

112. Noticee submits that the denial of ITC to the buyer of goods or services for default of the supplier of goods or services, clearly frustrates the underlying



objective of removal of cascading effect of tax as stated in the Statement of object and reasons of the Constitution (One Hundred and Twenty-Second Amendment) Bill, 2014. it is an established principle of law that it is necessary to look into the mischief against which the statute is directed, other statutes in pari materia and the state of the law at the time.

113. 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: Benefit of cum-tax under Rule 35 shall be extended

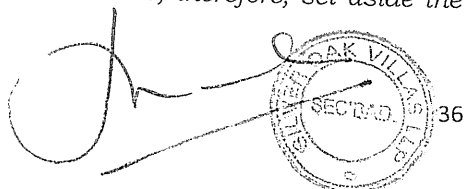
114. Noticee submits that in case any part of the demand sustains then, the same shall be re-quantified after allowing the benefit of cum-tax u/r. 35 of CGST Rules, 2017 since Noticee has not collected any GST from the customers to the extent of alleged short/non-payment of GST.

In Re: Interest under Section 50 is not applicable

115. Noticee submits that when the principal amount is not payable there is no question of payment of interest. In this regard, reliance is placed on the Judgment of Hon'ble Supreme Court in the case of Pratibha Processors Pvt. Ltd Vs UOI 1996 (88) E.L.T. 12 (S.C.).

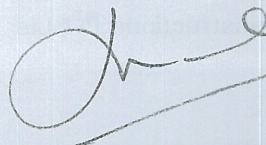
In Re: Demand under Section 74 is not applicable:

116. Without prejudice to the above, Noticee submits that when the time limit for issuance of notice under Section 73 is not expired, the invocation of Section 74 is not warranted. In this regard, reliance is placed on Godavari Khore Cane Transport Company Pvt. Ltd. v. Commissioner 2012 (26) S.T.R. 310 (Tribunal) wherein it was held that *"It thus appears, the allegation of suppression of facts was raised in the show-cause notice for the sole purpose of invoking the proviso to Section 73(1) of the Finance Act, 1994 and not for any other purpose. As a matter of fact, it was not necessary for the department to invoke the proviso to Section 73(1) ibid for demanding service tax from the assessee for the aforesaid period, which is within the normal period of limitation prescribed under Section 73(1). In this scenario, the penalty imposed by the Commissioner under Section 78 of the Finance Act, 1994 on the assessee on the ground of suppression of taxable value of the service cannot be sustained. We, therefore, set aside the*



penalty imposed under Section 78 of the Finance Act, 1994 on the Noticee in Appeal No. ST/68/2009.”

117. With respect to non-payment of GST under reverse charge mechanism on unregistered procurements, Noticee would like to submit that there exists a confusion relating to payment of GST on unregistered procurements and the industry has not paid GST on the same as the same is very complex. Understanding the difficulties involved in implementation of RCM on unregistered procurements, the government has removed the same from reverse charge mechanism. This shows that there was a genuine difficulty faced by the trade which was also understood by the Government and removed the same. In these circumstances, it cannot be said that there is a suppression and intention to evade payment of tax. Hence, the question of invocation of Section 74 does not arise.
118. With respect to difference between ITC availed in GSTR-3B and GSTR-2A, Noticee would like to submit that during the period 2017-18 and 2018-19, there is no condition of reflection of invoices in GSTR-2A for availing the ITC and it is only Rule 36(4) of CGST Rules, 2017 as inserted w.e.f. 09.10.2019 has mandated the condition of reflection of vendor invoices in GSTR-2A with adhoc addition of the 20% (which was later changed to 10% & further to 5%). At that time, the CBIC vide Circular 123/42/2019 dated 11.11.2019 categorically clarified that the matching u/r. 36(4) is required only for the ITC availed after 09.10.2019 and not prior to that. Hence, the denial of the ITC for non-reflection in GSTR-2A is incorrect during the subject period.
119. Noticee would like to submit that the Noticee has availed the ITC based on the invoices received from our suppliers and the same were verified by the audit party. After verification, no objection was raised with respect to ITC availed except stating that the ITC was not reflected in GSTR-2A. The ITC availed was disclosed in GSTR-3B and the department is aware of the same, hence, there is no question of suppression of the same. Further, the non-reflection of ITC in GSTR-2A is not in our hands and the same is completely dependent on the filing status of our suppliers. Therefore, the same cannot be considered as suppression as defined in Explanation to Section 74 of CGST Act, 2017.




120. The same view was taken by various High Courts under GST regime and stated that the ITC cannot be denied merely for non-reflection of invoices in GSTR-2A. In this regard, reliance is placed on

- M/s. D.Y. Beathel Enterprises Vs State Tax officer (Data Cell), (Investigation Wing), Tirunelveli 2021(3) TMI 1020-Madras High Court
- Jurisdictional High Court decision in case of Bhagyanagar Copper Pvt Ltd Vs CBIC and Others 2021-TIOL-2143-HC-Telangana-GST
- M/s. LGW Industries limited Vs UOI 2021 (12) TMI 834 -Calcutta High Court
- M/s. Bharat Aluminium Company Limited Vs UOI & Others 2021 (6) TMI 1052 – Chattishgarh High Court

Since the issue involves interpretation and exists confusion during the disputed period, the suppression of facts cannot be invoked.

121. Noticee submits that the suppression of facts cannot be invoked for mere difference between the GSTR-2A and GSTR-3B. In this regard, reliance is placed on NKAS Services Pvt Ltd Vs State of Jharkhand, 2022 (58) G.S.T.L.257 (Jhar) the Hon'ble Jharkhand High Court held that wherein it was held that *"Court finds that upon perusal of GST DRC-01 issued to the petitioner, although it has been mentioned that there is mismatch between GSTR-3B and 2A, but that is not sufficient as the foundational allegation for issuance of notice under Section 74 is totally missing and the notice continues to be vague"*

122. Noticee would like to submit that the impugned order has confirmed the penalty under Section 74 merely on the ground that the Noticee had paid certain taxes on pointing out by the audit officers. In this regard, Noticee submits that the lapse would not have come to light but for the investigation of the department, standing alone cannot be accepted as a ground for confirming suppression, misstatement or misdeclaration of facts. Any shortcomings noticed during the course of verification of records, itself cannot be reasoned that the deficiency was due to *mala fide* intention on the part of Noticee. In this regard relied, on LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata).

123. Noticee wish to further rely on the Patna high Court decision in case of Shiv Kishore Constructions Pvt Ltd Vs UOI 2020 (10) TMI 45 – Patna High Court

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wherein it was held that mere difference between turnover in GSTR-3B and as per TDS return GSTR-2A cannot be considered as suppression of facts.

124. Noticee submits that Section 74 is applicable only when the non-payment or short payment is due to fraud or any willful misstatement or suppression of facts to evade tax.

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

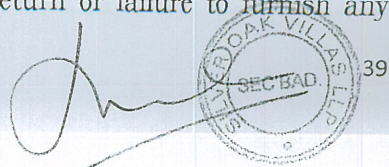
However, in the instant case, Noticee has not suppressed any details to the department. Therefore, the proposal of impugned notice to demand tax under Section 74 is not correct and the same needs to be dropped.

125. Noticee further submits that during the course of audit Noticee has submitted all the relevant information asked for without any hesitation as and when required. Further, respecting the judicial proceedings Noticee has given a proper response against the summons issued by appearing before the department authorities. Noticee submits that no information is suppressed. The allegation of suppression of facts is not correct.

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

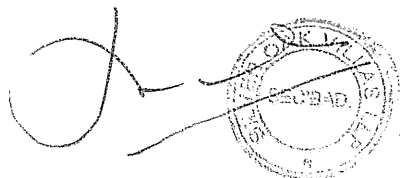
Explanation 2. —For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report, or any other document furnished under this Act, or the rules made thereunder, or failure to furnish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

127. 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

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information on being asked for, in writing by the proper officer. In the present case, Noticee has submitted the required information as and when called for by the department authorities. Further, the audited financial statements were also submitted. Hence, the proposal of impugned notice to impose a penalty is not at all tenable.

128. Noticee further submits that suppression means not providing information that the person is legally required to state but is intentionally or deliberately not stated. Whereas in the instant case full facts of present SCN were well disclosed before authorities as and when requested by way of clear & specific letters. Further, there is no willful misstatement by Noticee in view of the fact that what is believed to be correct as backed by legal provisions was put forth before the authorities.
129. In this regard, the notice submits that suppression or concealing of information 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 Bonafede 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, we 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. -Mum)
 - 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)
130. Noticee submits that mere non-payment/short payment of tax per se does not mean that Noticee has willfully 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.).
131. Noticee submits that no penalty should be imposed for technical or venial breach of legal provisions or where the breach flows from the bonafide belief that the offender is not liable to act in the manner prescribed by the statute. Relied on Hindustan Steel Ltd. v. State of Orissa —1978 (2) E.L.T. (J159) (S.C.).



132. 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. 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 for a deliberate violation of the provisions of the particular statute."* Hence, a Penalty cannot be imposed in the absence of deliberate defiance of the law even if the statute provides for the penalty.
133. Noticee submits that from the above-referred case laws, it is clear that Noticee has not willfully misstated any facts, therefore, the imposition of penalties is not warranted.
134. Noticee submits that Penalty, 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. In this regard wishes to place 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 167 (S.C)
135. Noticee submits that all the entries are recorded in books of accounts and financial statements nothing is suppressed hence the issuance of Notice under Section 74 is not valid. Wishes to place reliance on LEDER FX Vs DCTO 2015-TIOL-2727-HC-MAD-CT; Jindal Vijayanagar Steel Ltd. v. Commissioner — 2005 (192) E.L.T. 415 (Tri-bang).
136. Noticee submits that GST being a new law, the imposition of heavy penalties during the initial years of implementation is not warranted. Further, the government has been extending the due dates & waiving the late fees for delayed filing etc., to encourage compliance.
137. Noticee submits that GST being a new law and trade is not much conversant with the procedures, the imposition of hefty penalty for mere delay in filing of



returns will adversely impact the trade. Further, these hefty penalties may lead to the closure of business of the Noticee hence the same shall be avoided.

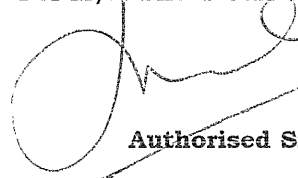
138. Noticee submits that the GST is still under trial-and-error phase and the assesseees are facing genuine difficulties and the same was also held by various courts by deciding in favour of the assessee. Therefore, the imposition of the penalty during the initial trial and error phase is not warranted and this is a valid reason for setting aside the penalties. In this regard, reliance is placed on

- b. **Bhargava Motors Vs UOI 2019 (26) GSTL 164 (Del)** wherein it was held that “The GST system is still in a ‘trial and error phase’ as far as its implementation is concerned. Ever since the date the GSTN became operational, this Court has been approached by dealers facing genuine difficulties in filing returns, claiming input tax credit through the GST portal. The Court’s attention has been drawn to a decision of the Madurai Bench of the Madras High Court dated 10th September, 2018 in W.P. (MD) No. 18532/2018 (Tara Exports v. Union of India) [2019 (20) G.S.T.L. 321 (Mad.)] where after acknowledging the procedural difficulties in claiming input tax credit in the TRAN-1 form that Court directed the respondents “either to open the portal, so as to enable the petitioner to file the TRAN-1 electronically for claiming the transitional credit or accept the manually filed TRAN-1” and to allow the input credit claimed “after processing the same, if it is otherwise eligible in law
- c. The Tyre Plaza Vs UOI 2019 (30) GSTL 22 (Del)
- d. Kusum Enterprises Pvt Ltd Vs UOI 2019-TIOL-1509-HC-Del-GST

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

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

For M/s. Silver Oak Villas LLP


Authorised Signatory



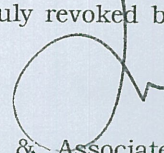
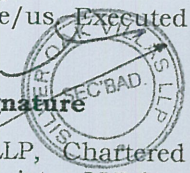
**BEFORE THE ADDITIONAL/JOINT COMMISSIONER OF CENTRAL TAX,
SECUNDERABAD GST COMMISSIONERATE, 7TH FLOOR, GST BHAVAN,
HYDERABAD, TELANGANA - 500004**

Sub: Proceedings under Show Cause Notice vide C.No. V/01/GST/81/2020-GR.12/CIR-I dated 12.01.2022 issued to M/s. Silver Oak Villas LLP.

I, Soham Satish Modi, Managing Partner of M/s Silver Oak Villas LLP hereby authorizes and appoint 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 28 February 2023 at Hyderabad


Signature


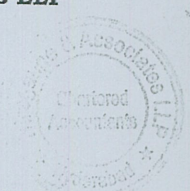
I the undersigned partner of M/s Hiregange & Associates LLP, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates LLP is a registered firm of Chartered Accountants, and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 116 of the CGST Act, 2017. I accept the above-said appointment on behalf of M/s Hiregange & Associates. 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: 28.02.2023

Address for service:

**Hiregange & Associates LLP,
Chartered Accountants,
4th Floor, West Block, Anushka Pride,
Beside SBI Bank, Above Lawrence & Mayo,
Road Number 12, Banjara Hills,
Hyderabad, Telangana 500034**

**For Hiregange & Associates LLP
Chartered Accountants**


**Venkata Prasad P
Partner (M.No. 236558)**


I Partner/employee/associate of M/s Hiregange & Associates 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	Rasika Kasat	CA	243001	
4	Srimannarayana S	CA	261612	

