

GOVERNMENT OF TELANGANA
COMMERCIAL TAXES DEPARTMENT

Proceedings of the
STATE TAX OFFICER-II,
M.G.ROAD-S.D.ROAD CIRCLE, BEGUMPET DIVISION.
(Present : Venkateshwar Rao Sheri)

GSTIN: 36ABCFM6774G2ZZ
ARN: AD3604240088518

Date: 24-08-2024

SUMMARY OF ORDER PROCEEDINGS
for the Financial Year 2019-20 under GST Act, 2017
[See Rule 142 (1) and Section 73]

SUB: Goods and Services Tax Act, 2017 (for brevity 'GST Act, 2017') – M.G.Road-S.D.Road Circle - Begumpet Division, Hyderabad –M/s. MODI REALTY (MIRYALAGUDA) LLP (for brevity 'taxpayer') – Conduct of general audit for the financial year 2019-20 under GST Act – Notice issued in ADT-01 - Records produced - Examination/scrutiny made of the same – Certain discrepancies / deficiencies/ anomalies noticed - Proposed to assess under Section 73 of CGST Act, 2017 - Show Cause Notice issued in DRC 01 – Reply Filed – Orders Passed – Regarding.

- REF: 1. Commissioner (ST), Telangana, Hyderabad Audit Authorization in GST Portal on dt. 20-04-2024
2. Joint Commissioner (ST), Begumpet Division, Hyderabad Audit Authorization In Ref No. BGPT-DIVN/STO-II/10/MGSD/2024-25 dt. 28-05-2024.
3. STO-II, M.G. Road - S.D. Road Circle notice issued in GST Form DRC-01 vide Ref No. ZD360524058370H, Dated. 29-05-2024.
4. M/s. MODI REALTY (MIRYALAGUDA) LLP, Reply filed in DRC-06, ARN : ZD360624021446H, dated. 09-06-2024.
5. STO-II, M.G. Road - S.D. Road Circle Reminder-01 notice issued for Reply and Personal Hearing vide Ref No. ZD360624021980F, Dated. 10-06-2024.
6. STO-II, M.G. Road - S.D. Road Circle, Errata to Summary of Show Cause Notice dt. 22-06-2024
7. M/s. MODI REALTY (MIRYALAGUDA) LLP, Reply filed in DRC-06, ARN : ZD3606240109670H, dated. 26-06-2024.
8. STO-II, M.G. Road - S.D. Road Circle Reminder-02 notice issued for Reply and Personal Hearing vide Ref No. ZD3606241229671, Dated. 29-06-2024.
9. STO-II, M.G. Road - S.D. Road Circle Reminder-03 notice issued for Reply and Personal Hearing vide Ref No. ZD360724073585Z, Dated. 20-07-2024.
10. STO-II, M.G. Road - S.D. Road Circle Final Opportunity-cum- Personal Hearing Notice-1 Dated. 30-07-2024.
11. STO-II, M.G. Road - S.D. Road Circle Final Opportunity-cum- Personal Hearing Notice -2 Dated. 09-08-2024.
12. M/s. MODI REALTY (MIRYALAGUDA) LLP, Reply filed in DRC-06, ARN : ZD360824054433B, dated. 17-08-2024.

M/s. MODI REALTY (MIRYALAGUDA) LLP, located at SOHAM MANSION, 2ND FLOOR, 5-4-187/3 AND 4, M.G ROAD, SECUNDERABAD, 500003 are a registered taxpayer under the provisions of GST Act, 2017 with GSTIN 36ABCFM6774G2ZZ and assessee on the rolls of the state jurisdictional tax office i.e., the Assistant Commissioner (ST), M.G.Road-S.D.Road Circle of Begumpet Division, Hyderabad. They are carrying on business in "trading of Goods as per the Portal" is that, (HSN 00440290) CONSTRUCTION SERVICES IN RESPECT OF COMMERCIAL OR INDUSTRIAL BUILDINGS AND CIVIL STRUCTURES(HSN 00440410) WORKS CONTRACT SERVICES.

In consequent to the GST General Audit authorized as required under the provisions of Section 65, read with Rule 101 of CGST Act and Rules, 2017 in respect of the above-mentioned taxpayer for the financial year 2019-20, the audit of the taxpayer is accordingly undertaken.

In the course of and as a part of processing the Audit undertaken in due process of law, the taxpayer vide reference 1st cited, has been issued 'Notice for conducting Audit' via prescribed "Form GST ADT-01" dated 20-04-2024 as required under the provisions of Rule 101 and Sec.65 of CGST Act,2017 duly intimating / notifying the authorized Audit of their books of accounts and records and with a direction to attend in person or through an authorized representative on dated. 07-05-2024 before the undersigned at aforementioned address with the relevant books of accounts and records and in the light of Section 65 of CGST Act, 2017 they are asked to render their assistance for timely completion of the Audit for the financial year 2019-20 as required for Audit.

The Notice was served as prescribed under the provisions of Section 169 of CGST Act, 2017 i.e., by way of communicating to the e-Mail address of the taxpayer so given at the time of GST registration or as amended from time to time.

The taxpayer having received the ADT-01 appeared in person and produced Profit and Loss Account, Balance Sheet, Purchase and Sale Statements etc., On due examination of the same with reference to the material available in the GST Common Portal, their tax liabilities and other discharged liabilities are hereby proposed to assess with the following results:-

1) Input Tax on Inward Supplies :-

The Tax Payer claimed Input Tax Credit in GSTR3B / GSTR 9 returns filed by them for the year 2019-20 as under:

IGST Rs.	00.00
CGST Rs.	50,92,638.00
SGST Rs.	50,92,638.00

On verification of the ITC claim of the taxpayer among the Form GSTR-3B / GSTR 9 and Purchase details filed to Audit, the following variations are noticed.

The eligible for Input Tax Credit as per the Table 8A of GSTR 9 is arrived as under:

Particulars	CGST	SGST	Total
Input Tax as per Table 8A of GSTR 9	4821333	4821333	9642667
Less: Credit Notes	88182	88182	176364
Net ITC Eligible	4733151	4733151	9466302

The Tax Payer claimed excess ITC in GSTR3B / GSTR 9 compared with the ITC as per the Table 8A of GSTR 9:

Particulars	CGST	SGST	Total
ITC claimed in GSTR 3B / GSTR 9	5092638	5092638	10185276
Less: Net ITC Eligible as per Table 8A of GSTR 9	4733151	4733151	9466302
Excess ITC Claimed	359487	359487	718974

While bringing forward to the notice of the taxpayer about the above excess claimed ITC amounting to Rs.7,18,974/- (i.e., Rs.3,59,487/- towards CGST and Rs.3,59,487/- towards SGST respectively), the taxpayer is hereby directed to pay the same by generating Form GST DRC-03 or if having any objections, as to file their reply.

2) Output Tax on Outward Supplies :-

The Tax Payer reported Output Tax in GSTR3B / GSTR 9 Returns filed by them for the year 2019-20 as under:

IGST Rs. 00.00
CGST Rs. 26,02,094.40
SGST Rs. 26,02,094.40

As seen from the Financial Statement (Profit and Loss Account) compared with the Output Taxes reported in GSTR 3B / GSTR 9 the following variations noticed in Output Turnovers and Taxes Reported.

Particulars	Output Turnover Reported
Supplies made to un-registered persons (B2C)	27887160
Supplies made to registered persons (B2B)	1025000
Total Reported	28912160

Particulars	Turnover	CGST Proposed @ 9%	SGST Proposed @ 9%	Total Output Tax Proposed
Output Turnover as per Financial Statements (Profit and Loss Account)	719208021			
Less: Output Turnover Reported	28912160			
Shortly Reported Output Turnover Now Proposed to Tax @ 18%	690295861	62126627	62126627	124253255

While bringing forward to the notice of the taxpayer about the above Shortly reported Output Tax amounting to Rs. 12,42,53,255/- (i.e., Rs.6,21,26,627/- towards CGST and Rs.6,21,26,627/- towards SGST respectively), the taxpayer is hereby directed to pay the same by generating Form GST DRC-03 or if having any objections, as to file their reply.

Therefore, it is proposed to assess for year April 2019 to March 2020 for the net tax proposed to be payable indicated under Section 73 of the SGST/CGST Act as under:

S. No.	Particulars	CGST Tax	SGST Tax	Total Tax
1	Proposed to Disallow Excess claim of Input Tax compared with Table 8A of GSTR 9 and GSTR 3B / GSTR 9	359487	359487	718974
2	Shortly Reported Output Tax proposed compared with Financial Statements (Profit and Loss Account) and GSTR 3B / GSTR 9	62126627	62126627	124253255
Total Tax Due to the Department		62486114	62486114	124972229

In addition to above, the following punitive measures will be taken up while passing final orders.

A) As per Section 73 read with Rule 122 of CGST Act, 2017, a Penalty as required on the tax due will be levied at the time of assessment proceedings without any further notice.

B) As per Section 50 of CGST Act, 2017 the legitimate Interest @18% PA will be levied on the excess claim of Input Tax at the time of assessment proceedings without any further notice.

Thus, the total Tax, Penalty and Interest for the period from April 2019 to March 2020 is proposed in addition to the Taxes reported as under:

S. No.	Act	Tax	Interest	Penalty	Total
1	CGST	62486114	44990002	6248611	113724728
2	SGST	62486114	44990002	6248611	113724728
3	TOTAL	124972229	89980005	12497223	227449456

Accordingly a notice in DRC-01 has been issued vide Reference No. ZD360524058370H, Dated. 29-05-2024, and requested to file their objections if any on or before dated. 15-06-2024.

In response to the DRC-01 notice issued the Tax Payer filed DRC 06 vide ARN: ZD360624021446H, dated. 09-06-2024 and requested time of (15) days for filing of their reply.

A Reminder-1 Notice filing the Reply along with Personal Hearing issued vide Ref No. ZD360624021980F, Dated. 10-06-2024 by providing the time as requested by them i.e. up to dated.26-06-2024.

On further scrutiny of the records it is noticed that, while issuing the Show Cause Notice, a Typographical Error was noticed in the Output Turnover as per Financial Statements (Profit and Loss Account). Output Turnover as per Financial Statements (Profit and Loss Account) mentioned in the Show Cause Notice is Rs. 71,92,08,021/-, where as actual Output Turnover as per Financial Statements (Profit and Loss Account) is Rs. 7,28,11,291/-, the same is now rectified and intimated the actual turnovers and taxes proposed will be as under:

Particulars	Turnover	CGST Proposed @ 9%	SGST Proposed @ 9%	Total Output Tax Proposed
Output Turnover as per Financial Statements (Profit and Loss Account)	72811291			
Less: Output Turnover Reported	28912160			
Shortly Reported Output Turnover Now Proposed to Tax @ 18%	43899131	3950922	3950922	7901844

Therefore, the net tax proposed to be payable indicated under Section 73 of the SGST/CGST Act for year April 2019 to March 2020 may be considered as under:

S. No.	Particulars	CGST Tax	SGST Tax	Total Tax
1	Proposed to Disallow Excess claim of Input Tax compared with Table 8A of GSTR 9 and GSTR 3B / GSTR 9	359487	359487	718974
2	Shortly Reported Output Tax proposed compared with Financial Statements (Profit and Loss Account) and GSTR 3B / GSTR 9	3950922	3950922	7901844
Total Tax Due to the Department		4310409	4310409	8620817

Accordingly, an ERRATA to the Show Cause Notice has been issued on dated. 22-06-2024 and requested to file their objections within (15) days from the date of notice issued.

In response to the ERRATA issued the Tax Payer filed DRC 06 vide ARN: ZD3606241096070H, dated. 26-06-2024 and requested time of (15) days for filing of their reply.

A Reminder-2 Notice filing the Reply along with Personal Hearing issued vide Ref No. ZD3606241229671, Dated. 29-06-2024 by providing the time as requested by them i.e. up to dated.15-07-2024, but the Tax Payer failed to file their objections within the stipulated time provided.

A Reminder-3 Notice filing the Reply along with Personal Hearing issued vide Ref No. ZD360724073585Z, Dated. 20-07-2024 by providing time up to dated. 29-07-2024, but the Tax Payer failed to file their objections within the stipulated time provided.

A Notice for Final Opportunity-cum-Personal Hearing has been issued on dt. 30-07-2024 by providing time up to dated. 08-08-2024, but the Tax Payer failed to file their objections within the stipulated time provided.

A Notice for Final Opportunity-cum-Personal Hearing-2 has been issued on dated. 09-08-2024 by providing time up to dated. 17-08-2024.

In receipt of the notices the Tax Payer filed their reply in DRC 06 vide ARN: ZD360824054433B, dated. 17-08-2024, and claimed as under:

In Re: No Excess claim of ITC

4. Noticee submits that the impugned notice has alleged that there is an excess availment of ITC in OSTR-3B when compared to GSTR-2A of Rs.3,59,487/- in CGST and Rs.3,59,487/-in SGST.

5. In this regard, Noticee is herewith providing the following table:

S.no.	Particulars	CGST (Rs.)	SGST (Rs.)
A	ITC as per updated GSTR-2A	53,75,223	53,75,223
B	Net ITC availed as per GSTR-3B	50,25,574	50,25,574
C	Short availment of ITC (A-B)	3,49,649	3,49,649

6. From the above table, it can be observed that there is in fact short availment of ITC of Rs.3,49,649 in CGST and Rs.3,49,649 in SGST and there is no excess availment of ITC as alleged in the impugned notice. To evidence the same, Noticee is herewith enclosing the Copy of Updated GSTR-2A is enclosed as an Annexure-III. Hence, the demand to this extent needs to be dropped.

7. Without prejudice to the above, Noticee submits that we are rightly eligible for ITC for the following reasons:

a. ITC cannot be denied merely due to non-reflection of invoices in GSTR-2A as all the conditions specified under Section 16 of CGST Act, 2017 have been satisfied.

b. GSTR-2A cannot be taken as a basis to deny the ITC in accordance with Section 41, Section 42, Rule 69 of CGST Rules, 2017.

c. We further submit 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

d. 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.

e. 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.

f. 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.

g. 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.

h. It is submitted that neither the form has been prescribed by the law nor the same has been communicated to the We 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.

i. We further submit that the fact that there is no requirement to reconcile the invoices reflected in GSTR-2A vs GSTR-3B is also evident from the amendment in Section 16 of CGST Act, 2017 vide Section 100 of Finance Act, 2021. Hence, there is no requirement to reverse any credit in the absence of the legal requirement during the subject period.

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

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

Indian Seamless Steel & Alloys Ltd Vs UOI, 2003 (156) ELT 945 (Bom.)

Hico Enterprises Vs CC, 2005 (189) ELT 135 (T-LB). Affirmed by SC in 2008 (228) ELT 161 (SC)

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

l. In the same context, we also wish to place reliance on the decision in case of *Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018- TIOL-11-SC-VAT* and *M/s Tarapore and Company Jamshedpur v. State of Jharkhand - 2020-TIOL-93-HC-JHARKHAND-VAT*

m. Section 41 allows the provisional availment and utilization of ITC, there is no violation of section 16(2)(c) of CGST Act 2017

n. The above view is also fortified from press release dated 18.10.2018

o. Even if there is differential ITC availed, if the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules and the payment was also made to the suppliers, the We is rightly eligible for ITC.

p. 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.

q. We wish to rely on recent decisions in case of

➤ *Suncraft Energy Private Limited Versus The Assistant Commissioner, State Tax, Ballygunge Charge And Others 2023 (8) TMI 174-Calcutta High court affirmed by Supreme Court in case of The Assistant Commissioner of State Tax Vs Suncraft Energy Private Limited 2023 (12) TMI 739-SC order*

➤ *Diya Agencies Versus The State Tax Officer, The State Tax Officer, Union Of India, The Central Board Of Indirect Taxes & Customs, The State Of Kerala 2023 (9) TMI 955 Kerala High Court*

➤ *M/S. Gargo Traders V/s The Joint Commissioner, Commercial Taxes (State Tax) & Ors. 2023 (6) TMI 533 Calcutta High Court*

➤ *M/S. Henna Medicals Versus State Tax Officers, Deputy Commissioner (Arrear Recovery) Office Of The Joint Commissioner, State Goods And Service Tax Kannur, Union Of India, Central Board Of Indirect Taxes & Customs, State Of Kerala-2023 (10) TMI 98-Kerala High Court*

➤ *D.Y. Beathel Enterprises Vs State Tax officer (Data Cell), (Investigation Wing). Tirunelveli 2021(3) TMI 1020-Madras High Court*

➤ *Bhagyanagar Copper Pvt Ltd Vs CBIC and Others 2021-TIOL-2143-HC-Telangana-GST*

➤ *LOW Industries limited Vs UOI 2021 (12) TMI [834-Calcutta High Court*

➤ *Bharat Aluminium Company Limited Vs Uot & Others 2021 (0) TMI 1052-Chattishgarh High Court*

➤ *Sanchita Kundu & Anr. Va Assistant Commissioner of State Tas 2722 (5) TMI 786 Calcutta High Court*

In Re: No short reporting of turnover in OSTR-09 when compared to financials

8. Noticee submits that the impugned notice has alleged that there is short reporting of turnover in GSTR-09 when compared to financials and proposed to demand Rs.39,50,922/-in CGST and Rs.39,50,922/-in SGST

9. Noticee submits that Noticee is engaged in the provision of construction services where GST liability arises upon the receipt of advance payments. However, as per the accounting standards prescribed by the Institute of Chartered Accountants of India ICAI revenue from construction contracts is recognized in the financial statements based on the percentage of completion method. This method is mandated by ICAI which results in revenue being recognized progressively over the life of the project reflecting the actual work completed rather than at the point of receiving advances,

10. Consequently, there will be differences between the turnover reported in the GSTR-9 and the revenue recognized in the financial statements. The present difference is a natural outcome of complying with both GST regulations and ICAI accounting standards. Therefore, the proposal to

levy GST again such amounts recognized in the financial statements but not aligned with the GSTR-9 is incorrect and the same needs to be dropped

11. Noticee submits that the Noticee has already paid the GST on all advances revived during the disputed period and disclosed the same in the GSTR-3B returns. The same can be evidenced from the GSTR-3B and GSTR-09 which was enclosed as Annexure IV & V.

In Re: Interest under section 50 is not applicable:

12. Noticee submits that when tax is not applicable, the question of interest & also penalties does not arise it is a natural corollary that when the principal is payable there can be no question of paying any interest as held by the Supreme Court in *Prathiba Processors Vs UOI*, 1996 (88) ELT 12 (SC)

13. Noticee submits that the impugned notice confirmed 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 there under, but failed to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council'

(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.

14. Noticee submits that the impugned notice has demanded that interest rate prescribed under Section 50 is applicable. In this regard, Noticee submits that the proposal in impugned notice is not at all tenable. Hence, the demand of interest does not sustain.

In Re: Penalty under section 73 is not imposable:

15. Noticee submits that the impugned notice has imposed the penalty of 10% of the tax due or Rs. 10,000/- whichever is higher. 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).

16. 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, 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".

17. Noticee submits that the impugned notice has imposed the penalty u/s 73 of the COST Act, 2017. The relevant extract is reproduced below :-

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

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

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

(3).....

.....

.....

(8).....

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

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

18. From the above-referred sub-section, it is clear that the penalty is applicable only when any amount of self-assessed tax or any amount collected as tax has not been paid within a period of 30 days from the due date of payment of such tax. However, in the instant case, the Noticee has not availed any excess ITC in GSTR-03B. Hence, the penalty under Section 73(11) is not applicable in the instant case.

19. 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.

20. 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.

21. 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.

22. 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.

23. Noticee would like to submit further that 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 judgment 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 notices 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."

24. Noticee further submits that the Supreme Court in case of Hindustan Steel Ltd. v. State of Orissa -1978 [AIR 1970 SC 253] while dealing with the similar facts wherein a mandatory penalty is prescribed without the concept of mens rea held that "Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An notice imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation, Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out."

25. 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.

26. 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.

27. 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.

28. 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 assessee. Therefore, the imposition of 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:

1. *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 (Tars Exports Union of India)* (2019 (20) G.STL 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"

2. *The Tyre Plaza Vs UOI* 2019 (30) GSTL 22 (Del)

3. *Kusum Enterprises Pvt Ltd Vs UOI* 2019-TIOL-1509-HC-Del. GST

29. The Noticee submits that, as submitted supra, there was confusion that existed at such point in time and the issue involved interpretation of provisions and law is at nascent stages Therefore, the penalties cannot be imposed. Relied on *CCE Vs Gujarat Narmada Fertilizers Co. Ltd* 2009 (240) E.LT 661 (S.C).

In Re: Impugned notice is not valid. Notice issued on assumptions and presumptions:

30. Noticee submits that impugned SCN was 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) ELT 422 (S.C.).

31. 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, and provisions of the CGST Act, 2017. In this regard, Noticee relies on the decision of the Hon'ble Supreme Court in the case *Oudh Sugar Mills Limited v. UOI*, 1978 (2) ELT 172 (SC) Therefore, the impugned Noticee is invalid and needs to be dropped.

Impugned notice is time barred and Notification No. 56/2023-CT dated 28.12.2023. in bad in law for the FY 2019-20,

32. Notice submits that the show cause notice for the FY2019-20 needs to be issued at least three months prior to the time limit specified in section 73(10) for issuance of order as per section 73(2) of the CGST Act, 2017 and accordingly the time limit as per the section 73(10) of the CGST Act 2017 read with Notification 56/2023 dated 28.12.2023 for passing the order for FY2019- 20 is 31 August 2024. Consequently, the show cause notice for FY2019-20 should have been issued by 31 May 2024. However, in the instant case, the ERRATA show cause notice had been served to the Noticee on 22.06.2024 which is beyond the time limit specified under the Act. Therefore, the issuance of show cause notice is void-ab-initio and the proceedings to this extent need to be dropped.

33. Noticee submits that the impugned SCN was issued under section 73 of CGST Act, 2017 which provides for adjudication of demand within 3 years from the due date of the annual return of the corresponding FY. For FY 2019-20, the annual return due date falls on 31.03.2021 and the 3-year time limit expires by 31.03.2024 however citing the difficulties caused due to Covid-19, the Government has extended the time limit from 31.03.2024 to 30.06.2024 by exercising the powers u/s. 168A by the Notification No. 09/2023 dated 31.03.2023. However, again exercising the powers u/s. 168A, *ibid* the time limit was further extended to 31.08.2024 by the Notification No. 09/2023-C.T dated 31.03.2023.

34. In this regard, it is submitted that an extension of the time period prescribed for issuance of show cause notice under Section 73 (10) of the Goods and Service Tax Act, 2017 is not sustainable in law, in as much as COVID restrictions were uplifted long back in the year 2022 and the revenue had sufficient time to complete the scrutiny and audit process. Further, the force majeure is as defined u/s. 1684, *ibid* was never occurred from 2022 till the expiry of the extended due date of 30.06.2024. Hence, the second extension of time runs beyond the mandate of Section 168A and is not sustained in the law. Accordingly, the demand for FY 2019-20 deserves to be dropped as the Show under Section 73 of CGST Act, 2017.

35. *It is settled law that any delegated legislation travelling beyond the Statutory provisions be ultra vires' and do not sustain in law. In view of the above, it is requested that a lenient view may be adopted, and the penalty be waived.*

Sri. Shiva Mohan, C.A. of H NA & Co. LLP, authorized signatory of the company appeared for Personal Hearing on dated. 17-08-2024 and explained their submissions and requested for 3 days of time to provide additional submissions required, but they have failed to provide additional submissions within the stipulated time as requested by them.

The Reply filed by the Tax Payer has been verified and considered as under:

1) **Excess claim of Input Tax compared with Table 8A of GSTR 9 and GSTR 3B / GSTR 9 Rs. 7,18,974/-:**

Tax Payer claimed that as per the GSTR2A they are having sufficient Input Tax for the Input Tax claimed by them in the GSTR-3B and GSTR-09 returns filed by them.

The Reply filed by the Tax Payer has been verified along with documents filed and GSTR-2A and found in order, hence the **Tax of Rs.7,18,974/- (CGST of Rs.3,59,487/- and SGST of Rs.3,59,487/-) proposed in the notice is hereby withdrawn.**

2) **Short Reported Output Tax compared with Financial Statements (Profit and Loss Account) and GSTR 3B / GSTR 9 Rs.79,01,844/-**

The Tax Payer claimed that, they are engaged in construction services, where GST liability arises upon the receipt of advance payments, and as per the accounting standards revenue from construction contracts is recognized in the financial statements based on the percentage of completion method, revenue being recognized progressively over the life of the project reflecting the actual work completed rather than at the point of receiving advances, consequently, there will be differences between the turnover reported in the GSTR-9 and the revenue recognized in the financial statements.

The Reply filed by the Tax Payer has been verified along with documents filed i.e. GSTR-3B, GSTR-09 returns & Financial Statements. The Tax Payer failed to furnish documentary evidences such as Party Ledgers, Copies of Agreements, Copies of Occupancy Certificates and also break up lists for earlier receipts (advances) shown during this year financial statements and present year receipts (advances) which were not shown during this year financial statements, Advances Schedule of Financial Statements, detailed lists of advances as on dated 01-04-2019 and as on dated 31-03-2020. Thus the under signed couldn't come to conclusion with the information available to arrive actual taxable turnover for the year financial year 2019-20.

Hence the claim of the Tax payer is hereby rejected and the **Tax of Rs. 79,01,844/- (CGST of Rs.39,50,922/- and CGST of Rs.39,50,922/-) as proposed in the notice (Errata) is hereby confirmed.**

3) **Interest and Penalties :**

The case laws referred by the Tax Payer clearly mentioned that “when the principle is not payable” the question of any Interest / Penalty arise. But whereas the present Tax Payer is liable for Tax, which is payable during the financial year 2019-20 itself. Hence Interest / Penalty are applicable on the Tax payable amount. Thus, the Interest / Penalty proposed as per the provisions of the GST Act are here by confirmed.

Thus the Tax, Penalty and Interest proposed in the notice issued in ARN: AD3604240088518 with DRC 01 in Ref. No. ZD360524058370H dt. 29-05-2024 are hereby confirmed and Passed Orders accordingly for the year 2019-20. The details of confirmed Tax, Penalty and Interest are as follows.

S. No	Issue	SGST	CGST	Total
1	Shortly Reported Output Tax proposed compared with Financial Statements (Profit and Loss Account) and GSTR 3B / GSTR 9	3950922	3950922	7901844
	Net Tax liability	3950922	3950922	7901844
	Interest (Under Section 50 of TGST & CGST Act 2017)	2844664	2844664	5689328
	Penalty (Under Section 73(9) of TGST & CGST Act 2017)	395092	395092	790184

Therefore Tax Payer is here by requested to Pay the Tax along with interest under Section 50 of GST Act, 2017 and Penalty under Section 73 read with Rule 122 of GST Act, 2017 in DRC-03 within (30) days from the date of receipt of this order.

NOTE : An appeal against this order lies before the Appellate Joint Commissioner (ST), Punjagutta Division, Hyderabad within (90) days from the date of receipt of this Order.



STATE TAX OFFICER-II,
M.G. ROAD - S.D. ROAD CIRCLE.

State Tax Officer-II
M.G. Road-S.D. Road Circle,
Begumpet Division, Hyderabad

To,
M/s. MODI REALTY (MIRYALAGUDA) LLP,
SOHAM MANSION, 2ND FLOOR, 5-4-187/3 AND 4,
M.G ROAD, SECUNDERABAD, 500003