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

Date: 04.08.2023

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

Dear Sir,

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

Ref: SCN vide C. No. V/01/GST/78/2020-GR.12/CIR-I dated 05.01.2022 pertaining to

M/s. Villa Orchids LLP.

1. We have been authorized by M/s. Villa Orchids LLP to submit the reply to the above referred SCN vide C. No. V/01/GST/78/2020-GR.12/CIR-I dated 05.01.2022 and represent before your good office and to do necessary correspondence in the above referred matter. A copy of authorization is attached to the Reply.
2. In this regard, we are herewith submitting the SCN reply along with authorization letter and other annexures referred in the reply.

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

Thanking You,

Yours faithfully,

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

K. Lakshman Kumar

CA Lakshman Kumar K
Partner

H N A & CO LLP ★ Hyderabad ★ Chartered Accountants

केन्द्रीय कर एवं सीमा शुल्क आयुक्त का कार्यालय
Office of the Commissioner of Central Tax & Customs
04 AUG 2023
Secunderabad GST Commissionerate
सिकंदराबाद जी.एस.टी. आयुक्तालय

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FORM GST DRC – 06

[See rule 142(4)]

Reply to the Show Cause Notice

1.GSTIN	36AANFG4817C1ZH	
2.Name	Villa Orchids LLP	
3.Details of Show Cause Notice	Ref. No. C.No.V/01/GST/78/2020-GR.12/CIR-I	Date of issue: 05.01.2022
4.Financial Year	July 2017 to March 2019	
5.Reply Given as Annexure A		
6.Documents uploaded		
7.Option for personal hearing	Yes- Required	☐ No

8.Verification –

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

VILLA ORCHIDS LLP

Signature of Authorised Signatory

ANNEXURE A:

FACTS OF THE CASE:

A. M/s. Villa Orchids LLP (hereinafter referred as "Noticee") located at 2nd Floor, 5-4-187/3 and 4, Soham Mansion, M.G. Road, Secunderabad, Hyderabad, Telangana – 500003 is inter alia engaged in the provision of taxable services viz. Works Contract services, construction services in respect of residential villas and are registered with Goods and Services Tax department vide GSTIN No: 36AANFG4817C1ZH.

B. The total development consists of about 343 villas on about 21 acres of land. The entire project has been developed by M/s. Sri Venkataramana Construction (hereinafter referred as SVRC), Ram Reddy, Vikram Reddy, Aruna Reddy and others wherein the Noticee was appointed as a sole selling agent by SVRC under an agreement dated 13-11-2014. Under this agreement, the Noticee had sold 88 villas and received consultancy charges for the same. This was during the service tax regime (i.e, prior to 01.07.2017) and service tax was appropriately paid on the revenue.

C. Subsequently, SVRC agreed to enter into a co-development model wherein SVRC would sell the plot of land to prospective customers and Noticee would construct the villa thereon. SVRC was responsible for developing the entire layout including utilities, roads, parks, compound wall, clubhouse and other common amenities at its cost. Permits were also obtained by SVRC at its cost. Noticee was responsible only for construction of the villa on each plot at its cost.

D. Under the scheme of co-development and to help prospective purchasers to obtain housing loans, SVRC executed AGPAs in favour of Noticee for each plot, as and when Noticee identified a customer who was interested in purchasing the plot of land along with the villa constructed thereon. SVRC accepted payment of consideration for the plot in installments to enable Noticee collect the said amounts from prospective purchasers and thereafter pay SVRC.

E. In most of the cases AGPAs were executed post AOS and in some cases amounts were released by housing finance companies directly to SVRC. In each and every case, land was transferred to prospective customers by SVRC and Noticee represented SVRC as power of attorney. Not even a single plot has been registered by way of sale deed in favour of Noticee which shows that the Noticee is not the owner of the land.

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F. Noticee has developed 112 villas under a co-developer model. Thereafter, the understanding between SVRC and VOC was terminated on mutual agreement and amicably.

G. From the above referred arrangement, it is clear that Noticee was never owner of the land/plot. It was only a vehicle for transferring the plot from SVRC to prospective purchasers. At best Noticee was a glorified contractor. Accordingly, Noticee is only liable to pay GST @ 18% on the amounts received towards agreement of construction. Therefore, Noticee has not considered the valuation mechanism provided under Notification No.11/2017(CT)R dated 28.06.2017.

H. Noticee is availing Input Tax Credit (ITC) of taxes paid on inputs and input services and discharging taxes on output liability on timely basis by filing the monthly returns. Noticee has also filed the GSTR-09 for the period 2017-18 (July 2017 to March 2018) and 2018-19.

I. Subsequently, the department has conducted audit for the period July 2017 to March 2019 and on verification of the records the following points were observed and the same was communicated to the Noticee vide Final Audit Report No. 815/2020-21-GST dated 11.06.2021 (Copy of Final Audit Report is enclosed as Annexure ___)

   i. *Non-payment of GST under RCM on Brokerage/Commission paid to unregistered persons (Rs. 3,060/-)*

   ii. *Interest to be paid on delayed filing of GSTR-3B returns for the months July 2017, August 2017 and October 2017*

   iii. *Non-payment of GST on advances received in FY 2017-18 and 2018-19*

J. In response to the above final audit report, Noticee has filed the detailed reply along with appropriate annexures stating the reasons as to why there is no short payment of GST on the part of the Noticee (Copy of reply is enclosed as Annexure ___).

K. Subsequently, Noticee is in receipt of the present Show Cause Notice vide Ref No. C.No. V/01/GST/78/2020-GR.12/CIR-I dated 05.01.2022 to show cause as to why (Copy of SCN is enclosed as Annexure ___):

   i. An amount of total GST of Rs.3,060/- [COST Rs.1,530/- (+) SGST Rs.1,530/-] (Rupees Three Thousand and Sixty only] for the year 2017-18 should not be demanded from the taxpayer under Section 74 (1) of the CGST Act, 2017;

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ii. Interest as applicable should not be demanded from the taxpayer in terms of Section 50 (3) of the CGST Act, 2017 on the proposed demand of Rs.3,060/- as mentioned at Sl.No.(i) above;

iii. Penalty equal to the demand at Sl. No. (i) should not be imposed on the taxpayer in terms of Section 74 (1) of the CGST Act, 2017;

iv. Interest of Rs.827/- [Rupees Eight Hundred and Twenty Seven Only] [CGST:Rs.413.50 (+) SGST: Rs.413.50] should not be demanded from the taxpayer in terms of Section 50 of the CGST Act, 2017;

v. Penalty as applicable under Section 125 (5) of the CGST Act. 2017 should not be imposed on them;

vi. An amount of Rs.3,19,85,690/- (CGST Rs.1,59,92,845/- @9% and SGST Rs.1,59,92,845/-) during the year 2017-18 & 2018-19 should not be demanded by/from the taxpayer Section 74 (1) of the CGST Act, 2017;

vii. Interest as applicable should not be demanded from the taxpayer in terms of Section 50 of the CGST Act, 2017 on the proposed demand of Rs.3,19,85,690/- as mentioned at Sl. No. (vi) above;

viii. Penalty equal to the demand at Sl. No. (vi) should not be imposed on the taxpayer in terms of Section 74 (1) of the CGST Act, 2017;

ix. An amount of Rs.44,51,756/- [CGST Rs.22,25,878/- (+) SGST Rs.22,25,878/-] (Rupees Forty Four Lakhs Fifty One Thousand Seven Hundred and Fifty Six Only) should not be demanded from the taxpayer in terms of Section 74 (1) of the CGST Act, 2017;

x. Interest as applicable should not be demanded from the taxpayer in terms of Section 50 of the CGST Act, 2017 on the proposed demand as mentioned at Sl.No.(ix) above;

xi. Penalty equal to the demand at Sl. No. (ix) should not be imposed on the taxpayer in terms of Section 74 (1) of the CGST Act, 2017;

L. In response to the above, Noticee herein makes the below submissions which are alternative pleas without prejudice to one another.

Submissions

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

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

In Re: Impugned notice is not valid

Notice issued on assumptions and presumptions

3. Noticee submits that impugned SCN was issued with prejudged and premeditated conclusions on various issues raised in the notice. That being a case, issuance of SCN in that fashion is bad in law and requires to be dropped. In this regard, reliance is placed on **Oryx Fisheries Pvt. Ltd. v. Union of India — 2011 (266) E.L.T. 422 (S.C.)** wherein it was held that *"It is obvious that at that stage the authority issuing the charge-sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony."*

4. Noticee submits that the subject SCN is issued based on mere assumption and unwarranted inference, interpretation of the law without considering the intention of the law, documents on record, the scope of activities undertaken, and the nature of activity involved, the incorrect basis of computation, creating its own assumptions, presumptions. Further, they have arrived at the conclusion without actual examination of facts, provisions of the CGST Act, 2017. In this regard, Noticee relies on the decision of the Hon'ble Supreme Court in case **Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC)**

Notice is vague and lack of details

5. Noticee submits that the impugned notice has not given clear reasons as to how the Noticee has availed the irregular credit and why there is short payment of

tax, therefore, the same is lack of details and hence, becomes invalid. In this regard, reliance is placed on

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

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

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

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

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

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

6. Noticee submits that Noticee has not received any summary of the proposed demand in Form DRC-01 electronically till date which is mandated as per Rule 142(1) of CGST Rules, 2020 when a demand notice is issued under Section 74 of CGST Act, 2017. In this regard, Noticee submits that Rule 142(1) of CGST Rules, 2017 reads as follows:

"Rule 142. Notice and order for demand of amounts payable under the Act

(1) The proper officer shall serve, along with the

(a) Notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof electronically in FORM GST DRC-01 ,

(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof electronically in FORM GST DRC-02 , *specifying therein the details of the amount payable."*

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7. Noticee submits that summary of notice in Form DRC – 01 was neither uploaded online nor served along with Show Cause Notice. Further, no statement containing details of amount payable was issued to the Noticee. Thus, the notice is not issued in consonance with the Rules framed under this act and on this ground alone the entire notice is liable to be quashed and dropped.

8. In this regard, Noticee wishes to rely on the Judgement of Hon'ble Madhya Pradesh High Court in the case of **Mr. Akash Garg vs. The State of MP** [2020-TIOL-2013-HC-MP-GST] wherein the Hon'ble High Court has held that

"6.1 A bare perusal of the aforesaid provision reveals that the only mode prescribed for communicating the show-cause notice/order is by way of uploading the same on website of the revenue.

7. The State in its reply has provided no material to show that show-cause notice/orders No.11 and 11a dated 10.06.2020 were uploaded on website of revenue. In fact, learned AAG, Shri Mody, fairly concedes that the show-cause notice/orders were communicated to petitioner by E-mail and were not uploaded on website of the revenue.

8. It is trite principle of law that when a particular procedure is prescribed to perform a particular act then all other procedures/modes except the one prescribed are excluded. This principle becomes all the more stringent when statutarily prescribed as is the case herein.

9. In view of above discussion, this Court has no manner of doubt that statutory procedure prescribed for communicating show-cause notice/order under Rule 142(1) of CGST Act having not been followed by the revenue, the impugned demand dated 18.09.2020 vide Annexure P/1 and P/2 pertaining to financial year 2018-2019 and 2019-2020 and tax period September, 2018 to March, 2019 and April, 2019 to May, 2019 respectively, deserves to be and is struck down."

9. Noticee submits that in the case of Pazhayidom Food Ventures (P) Ltd. Versus Superintendent Commercial Taxes, Addl. R2. Superintendent CGST, Pala., 2020-TIOL-1053-HC-Kerala-GST the Hon'ble Kerala High Court held that *"Learned counsel appearing on behalf of the petitioner submits that the show cause notice in Form GST REG 17 did not mention about the date, month and year as well as the time for appearance of the petitioner. The contents of the same are vague and do not commensurate with the format prescribed in Central Goods and Service Tax Rules, 2017 where a column of day, month and year has been*

prescribed. It is on that account this Court had issued notice and sought the comments thus impelling to invoke, the extraordinary jurisdiction of this Court as the order under challenge is without jurisdiction."

10. Noticee submits that in the above-referred decision, the Hon'ble High Court has set aside the order because the contents in the form prescribed in rules are not filled properly. In the instant case, the Form DRC-01 which was prescribed in rules itself has not been given to Noticee thereby there is no question of validating the present notice which was issued without issuing the summary of demand in Form DRC-01. Hence, the impugned notice needs to be dropped.

11. Noticee further submits that in the case of NKAS Services Pvt Ltd Vs State of Jharkhand, 2022 (58) G.S.T.L.257 (Jhar) the Hon'ble Jharkhand High Court held that *"SCN issued in a format without even striking out any irrelevant portions and without stating contraventions committed by petitioner - Summary of SCN as issued in Form GST DRC-01 in terms of Rule 142(1) of Jharkhand Goods and Services Tax Rules, 2017 cannot substitute requirement of proper show cause notice - Summary of SCN not discloses information as received from headquarter/Government treasury as to against which works contract service completed or partly completed, petitioner had not disclosed its liability in returns filed under GSTR-3B - Impugned show cause notice did not fulfil ingredients of proper show cause notice and there was violation of principles of natural justice - Accordingly, impugned notice and summary of show cause notice in Form GST DRC-01 quashed."*

Separate SCN to be issued for CGST & SGST

12. Noticee further submits that three types of ITC and outward supplies are proposed to be denied and demanded in the present SCN i.e. ITC of IGST, CGST and SGST availed under the corresponding enactments which are separately enacted. The section 6(2) of CGST Act, 2017 also specifies that separate notice and orders are required to be issued. That being a case, the separate notice is required to be issued raising the demands under that corresponding law. For instance, the demand raised under IGST law requires separate notice and CGST demand requires separate notice whereas the present case, all three demands are raised in a single notice and no bifurcation for the same has provided for. Hence, the notice is issued in violation of Section 6(2), ibid.

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In Re: No GST under RCM on Brokerage/Commission paid to an un-registered person:

13. Noticee submits that the impugned notice vide Para 2(i) have stated that the Noticee is liable to pay an amount of Rs. 3,060/- on payment to un-registered persons under RCM for the period 01.07.20217 to 12.10.2017.

14. In this regard, Noticee submits that the reverse charge liability under section 9(4) of CGST Act, 2017 was exempted vide Notification No. 8/2017 – Central Tax (Rate) dated 28.06.2017 with a condition that the payments to unregistered persons shall not exceed Rs.5,000/- in a day.

15. However, the Notification No. 38/2017 – Central Tax (Rate) dated 13.10.2017 was issued removing the condition of Rs.5,000/- per day with retrospective effect in absence of any savings clause therein and the objective of the amendment. Hence, there is no liability to be paid against the demand proposed in the Show Cause Notice.

16. Noticee submit that the omission of the proviso vide notification No. 38/2017-CT(R) dated 13.10.2017 ibid would mean deletion of such provision completely from the statute book as if it had never been passed, and the statute must be considered as a law that never existed. Further, if there is no saving clause in favor of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceeding shall not continue but a fresh proceeding for the same purpose may be initiated under the new provision. Therefore, Noticee submit that the proviso which was omitted by the Notification No. 38/2017-CT(R) dated 13.10.2017 ibid, which resulted in all the URPs becoming exempt, is deemed to have effect from 01.07.2017, Therefore, Noticee is of the belief that the GST is not required to be discharged on the supplies received from URP's.

17. However, not to litigate the matter and the amount being nominal, the same is paid by executing a DRC-03. The payment was made through DRC-03 ARN no. AD361222007137K dated 19.12.2022 (Copy of DRC-03 is enclosed as annexure III).

In Re: Interest already discharged on delayed filing of GSTR-3B Returns

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18. With respect to the above, the show cause notice has proposed to demand an amount of Rs. 827/- towards interest liability for delayed filing of GSTR-3B returns.

19. In this regard, we would like to submit that we have paid an amount of Rs. of Rs. 827/- towards interest vide DRC – 03 ARN AD361222007154O dated 19.12.2022 (Copy of DRC-03 are enclosed as Annexure- IV).

In Re: No short payment of GST

20. Noticee submits that as stated in the background facts, the total development consists of about 343 villas on about 21 acres of land. The entire project has been developed by M/s. Sri Venkataramana Construction (hereinafter referred as SVRC), Ram Reddy, Vikram Reddy, Aruna Reddy and others wherein the Noticee was appointed as a sole selling agent by SVRC under an agreement dated 13-11-2014. Under this agreement, the Noticee had sold 88 villas and received consultancy charges for the same. This was during the service tax regime (i.e, prior to 01.07.2017) and service tax was appropriately paid on the revenue.

21. Subsequently, SVRC agreed to enter into a co-development model wherein SVRC would sell the plot of land to prospective customers and Noticee would construct the villa thereon. SVRC was responsible for developing the entire layout including utilities, roads, parks, compound wall, clubhouse and other common amenities at its cost. Permits were also obtained by SVRC at its cost. Noticee was responsible only for construction of the villa on each plot at its cost.

22. Under the scheme of co-development and to help prospective purchasers to obtain housing loans, SVRC executed AGPAs in favour of Noticee for each plot, as and when Noticee identified a customer who was interested in purchasing the plot of land along with the villa constructed thereon. SVRC accepted payment of consideration for the plot in installments to enable Noticee collect the said amounts from prospective purchasers and thereafter pay SVRC.

23. In most of the cases AGPAs were executed post AOS and in some cases amounts were released by housing finance companies directly to SVRC. In each and every case, land was transferred to prospective customers by SVRC and Noticee represented SVRC as power of attorney. Not even a single plot has

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been registered by way of sale deed in favour of Noticee which shows that the Noticee is not the owner of the land.

24. Noticee has developed 112 villas under a co-developer model. Thereafter, the understanding between SVRC and VOC was terminated on mutual agreement and amicably.

25. From the above referred arrangement, it is clear that Noticee was never owner of the land/plot. It was only a vehicle for transferring the plot from SVRC to prospective purchasers. At best Noticee was a glorified contractor. Accordingly, Noticee is only liable to pay GST @ 18% on the amounts received towards agreement of construction. Therefore, Noticee has not considered the valuation mechanism provided under Notification No.11/2017(CT)R dated 28.06.2017.

26. Noticee submits that since the Noticee is not the owner of the land and is only providing pure construction services, Noticee has paid GST @18% on the amount received towards construction agreements. Therefore, Noticee has not followed the SI No.02 to Notification No.11/2017-CT® dated 28.06.2017.

27. In this regard, Noticee submit that the project undertaken by us got completed & possession was handed over to the customers. The customers also have paid all the amounts towards the sale of Villas. Noticee have remitted the applicable GST also (including the advances received in FY 2017-18 & 2018-19) as shown below:

S.No	Particulars	July 2017 to March 2021
A	Total receipts	70,67,62,816
B	Less: Land (exempt sales)	32,04,85,000
C	Less: Non-taxable receipts (Stamp duty, registration charges, GST etc.,)	7,09,77,246
D	Net taxable value	31,53,00,570
E	Declared in GST returns	31,07,73,154
F	Difference to be declared	45,27,417
G	**GST paid on the above (F)**	**8,14,935**

The Year wise reconciliation is enclosed as annexure V Further, it is submitted the major portion of the liability was paid through ITC in which case there is no interest liability on the belated remittance of the GST, if any to that extent.

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28. Noticee submits that the impugned notice vide Para 4 alleged that the the Noticee has given reconciliation for the period from 2017-18 to 2020-21 however, the disputed period is only July 2017 to March 2019 and requested us to give explanation only for the disputed period.

29. In this regard, Noticee submits that during the initial stages of implementation of GST, Noticee is completely unaware of the procedure to be followed for making payment of GST. Further, all the accountants in the entity are new to the real estate industry, therefore, the monthly returns were not filed properly.

30. Subsequently, Noticee has identified the mistake in calculation of GST liability and the payment of GST, Noticee has re-calculated the liability and discharged the same in subsequent years. Since the taxes were paid in subsequent years, Noticee has given recalculation for the entire project. Hence, Noticee request to consider the same and drop further proceedings in this regard.

31. Noticee submits that the summary of the GST liability for the period July 2017 to March 2018 and April 2018 to March 2019 is as follows

SI No	Particulars	2017-18	2018-19	Total
A	Total receipts as per Noticee	11,55,29,926	29,57,75,294	41,13,05,220
B	**Less:** Received towards sale of land	11,20,38,682	19,07,87,289	30,28,25,971
C	Received towards construction services (A-B)	34,91,244	10,10,37,526	10,45,28,770
D	**Add:** Other taxable services	-	57,043	57,043
E	Total taxable receipts	34,91,244	10,10,94,569	10,45,85,813
F	Tax at 18%	6,28,424	1,81,97,022	1,88,25,446
G	Taxes already paid in GSTR-3B	14,83,268	1,25,42,424	1,40,25,692
	Short paid/(Excess paid)	(8,54,844)	56,54,598	47,99,754

From the above referred table, it is clear that there is no short payment of GST for the period July 2017 to March 2018. In fact, there is an excess payment of GST. For the period, April 2018 to March 2019, there is a short payment of GST which was paid in subsequent years. The detailed

calculation of liability and the details of payment are enclosed as Annexure __.

32. Noticee submits that the impugned notice has considered only an amount of Rs. 14,64,43,000/- towards sale deed, however, the actual amount received towards sale deed is Rs. 30,28,25,971/- for the period July 2017 to march 2019. Once the actual sale deed value is considered for the purpose of calculating the GST liability, the GST liability proposed by the impugned notice would get reduced.

33. Noticee submits that as explained in the preceding paragraphs, the sale of land is not liable to GST as the same is covered under Entry 5 to Schedule -III of CGST Act, 2017. Therefore, the same need to be excluded while arriving the GST liability. Further, the deemed deduction of 1/3rd land value is not correct when the actual land value is available. Noticee submits that it is a settled law that the Government cannot re-write the terms of contract entered into between people. Reliance is placed on the Supreme Court judgement in the case of **Mangalore Ganesh Beedi Works Vs CIT [(2015) 378 ITR 640 (SC)]** wherein it was held that the Act does not clothe the taxing authorities with any power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them.

34. Therefore, Noticee submits that a view is possible that deeming 1/3rd of contract value as land value for the purpose of taxation could amount to re-writing of the agreement which is not consistent with the facts involved and what the commercials agreed between the parties.

35. Noticee submits that the valuation adopted by the department as per the Notification No. 11/2017- Central Tax (Rate) dated 28.06.2017 is not sustainable in law when the Noticee is not the owner of the land. As stated in the previous paragraphs, SVRC is the owner of the land and transferring the land directly to the customers, Therefore, Sl No 2 of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 is not applicable in the instant case. Hence, the Noticee has paid GST at full rate on amounts received towards construction services.

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36. Without prejudice to above, Noticee submits that under GST, the valuation mechanism has been prescribed in Section 15 of CGST Act, 2017. Section 15(1) states that the **value of supply of goods or services** or both shall be the ***transaction value*** which is the price actually paid or payable for the said supply of goods or services subject to the following conditions:

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

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

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

The sub-section would not be applicable in case of a transaction involving the composite supply of goods, services **and immovable property.**

37. Sub-section (4) states that where the value of supply cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed i.e., the valuation mechanism as prescribed (in the Rules). On perusal of rules 27 to 35 of CGST Rules 2017, it is quite clear that none of the prescribe rules provides for valuation mechanism for transactions involving the supply of goods, service and immovable property. Therefore, even the valuation rules are not applicable in the instant case.

38. Further, sub-section (5) of Section 15 is the only sub-section that is left unexamined. This sub-section starts with a non-obstante clause and states *'Notwithstanding anything contained in sub-section (1) or sub-section (4), the value of such supplies as may be notified by the Government shall be determined in such manner as may be prescribed'*. From this subsection it states that the Central Government would be notifying certain services and the value of such notified supplies shall be determined in the manner as may be prescribed. The word 'prescribed' has been defined under Section 2(87) which means prescribed by rules made under this act on the recommendations of the council.

39. On a strict interpretation of Section 15(5) read with Section 2(87), it is evident that the Central Government can notify the supplies by way of a notification, but the value of such supplies shall be determined as prescribed in rules. Thus, it means the valuation mechanism cannot be notified in a notification

itself. Unless the valuation mechanism is prescribed in rules, the same is not valid and the valuation mechanism prescribed by way of Notification is not valid.

40. To support the argument that the word 'prescribe' should be given limited meaning, reliance is placed on the Andhra Pradesh High Court decision in case of **GMR Aerospace Engineering [2019 (31) G.S.T.L. 596 -A.P.]** held that *"The word "prescribe" is verb. Generally, no enactment defines the word "prescribe". But the SEZ Act 2005 defines the word "prescribe" under Section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of Rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under Rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in Rule 22 with the terms and conditions prescribed in the notifications issued under any one of five enactments listed in Section 26(1) to find out whether there was any inconsistency."*

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

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

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

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

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

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

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

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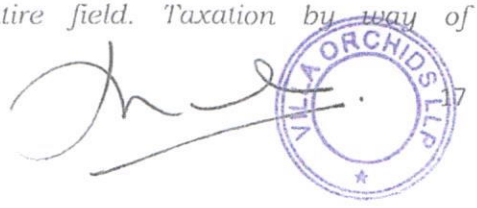
b) **The Supreme Court in case of Govind Saran Ganga Saran v. CST, AIR 1985 SC [2002-TIOL-589-SC-CT]** held that *"6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the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

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

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



administrative instructions which are not backed by any authority of law is unreasonable and is contrary to Article 265 of the Constitution of India.

45. From the above-referred decisions, it is clear that the valuation mechanism shall be prescribed in the Act or Rules and cannot be prescribed by way of a notification. Further, it is important to note that Section 15 of CGST Act prescribes the valuation mechanism only for supply of goods or services or both and does not prescribe valuation mechanism for transactions involving immovable property.

46. When the law provides specific powers to prescribe certain things by issue of notifications, the same would be valid, few of such examples may be notification of rate of tax under section 9 and exemptions under section 11. Further, section 15(5) does not authorize the Government to prescribe the valuation mechanism in Notification. Even section 164 of CGST Act, 2017 states that the Government may on the recommendations of the council, by notification, make rules for carrying out the provisions of this act'. Therefore, the Notifications cannot go beyond the act to prescribe a deemed valuation which is not prescribed in the Act itself.

47. Further, even assuming the deemed valuation adopted by the department as per Notification No. 11/2017-CT(Rate) is correct, the Noticee submits that the same is not justified and is unsustainable in law. It is a known fact that the land value may not be the same across the country as the same depends on the location of the land. In metros, the cost of land would be high and in towns and rural areas, it would be low. The cost of construction may not vary much when compared to the land value, whether in metros or in rural areas. Deeming 1/3rd of the total amount charged as land value would lead to levy of GST on the land value in metros, whereas in the non-metros the construction service would not get completely taxed. Thus, levy of GST on land value, indirectly not allowed under Article 246A of the Constitution of India is being levied due to the deeming fiction. We should also understand there would be cases where the land value is less than 1/3rd value and in such cases the Government is collecting less taxes.

48. During the 15th GST Council meeting, where GST rates on several goods and services were discussed, the Maharashtra and Gujarat State Finance Ministers opposed the 1/3rd land deduction proposed by the Fitment

Committee. Maharashtra State Finance Minister was of the view that the flat cost consists of at least 50% of land cost in Maharashtra. Giving 30% land deduction will lead to litigation and Courts may give adverse judgements on this. He suggested giving the land value according to the ready reckoner or stamp duty value. The discussion in this meeting and consequently issue of notification No.11/2017-CT(R) dated 28.06.2017 deeming the value of land as 1/3rd of the total amount charged itself shows that the Government has acted arbitrarily and without any scientific reason to arrive at the basis of 1/3rd.

49. The Supreme Court in a catena of decisions held that any action undertaken by the Central Government or State Government arbitrarily would amount to a violation of Article 14 of the Constitution of India and becomes invalid. Further, it was also held that when the actual value is available the statutes or rules cannot prescribe a deemed value ignoring the actual value. Few of the decisions which had discussed this issue are as follows:

a. **Supreme Court in case of Wipro Limited Vs UOI 2015 (319) ELT 177 (SC)** while examining the validity of deemed value of loading and unloading as 1% of the FOB value for the purpose of determining the assessable value for calculating the customs duty it was held that "*31. In contrast, however, the impugned amendment dated 5-7-1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned.* ***The proviso now stipulates 1% of the free on-board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultra vires this provision. We are also of the opinion that when the actual charges paid are***

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available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on-board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.

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

b. **The Supreme Court in case of Indian Acrylics Vs UOI 1999 (113) ELT 373 (SC) it was held that "***7. The exchange rate fixed by the Reserve Bank of India is the accepted and determinative rate of exchange for foreign exchange transactions.* ***If it is to be deviated from to the extent that the notification dated 27th March 1992 does, it must be shown that the Central Government had good reasons for doing so.*** *The Reserve Bank of India's rate, as we have pointed out, was Rs. 25.95, the rate fixed by the notification dated 27th March 1992 was Rs. 31.44, so that there was difference of as much as Rs. 5.51.* ***In the absence of any material placed on record by the respondents and in the absence of so much as a reason stated on affidavit in this behalf, the rate fixed by the notification dated 27th March, 1992 must be held to be arbitrary.***

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

c. The Supreme Court in case of **Hindustan Polymers case Vs Collector of CE 1989 (43) ELT 165 (SC)** held that the Excise Duty cannot be levied on

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

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

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

"Thus, mandatory application of deeming fiction of 1/3 of total agreement value towards land even though the actual value of land is ascertainable is clearly contrary to the provisions and scheme of the CGST Act and therefore ultra-vires the statutory provisions."

51. Noticee would like to submit that from the above referred decision, it is clear that wherever the actual land value is available, the same can be taken as deduction for the purpose of payment of GST and the deeming fiction of 1/3rd land value as deduction is ultra-vires the statutory provisions. Hence, Noticee would like to submit that the compliance made by the Noticee is in accordance with the law and there is no short payment of GST, therefore, the demand proposed by the impugned notice needs to be dropped.

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In Re: No irregular availment of ITC:

52. Noticee submits that the impugned notice has alleged that the Noticee has excess claimed ITC of Rs. 44,51,756/- (CGST Rs. 22,25,878/- SGST Rs. 22,25,878/-) in GSTR-3B as compared to the tax declared by the suppliers of Noticee in GSTR-01.

53. 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.

54. 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;"*

55. 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"*

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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.

56. 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.

57. 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.

58. 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, 58/2017- 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.

59. 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. 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.

60. 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.

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61. 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.

62. 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.

63. 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.

64. 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.

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

66. 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:**

- *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.

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

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

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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."***

68. 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"*

69. 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*

70. **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 bill, 2021 as introduced in Parliament. Hence, there is no requirement to**

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reverse any credit in absence of the legal requirement during the subject period.

71. **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.**

72. 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.

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

a. **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 as under: "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

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seller / Charles and his wife Shanthi, on the present transactions. 1 3.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."

b. **Jurisdictional High Court decision in case of Bhagyanagar Copper Pvt Ltd Vs CBIC and Others 2021-TIOL-2143-HC-Telangana-GST**

c. **M/s. LGW Industries limited Vs UOI 2021 (12) TMI 834-Calcutta High Court**

d. **M/s. Bharat Aluminium Company Limited Vs UOI & Others 2021 (6) TMI**

e. **M/s.Sanchita Kundu & Anr. Vs Assistant Commissioner of State Tax 2022 (5) TMI 786 - Calcutta High Court**

74. 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.

75. 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.)]**

76. 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.

77. 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: Interest under Section 50 is not applicable

78. 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 UOI0 1996 (88) E.L.T. 12 (S.C.).

In Re: Demand under Section 74 is not applicable:

79. 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."*

80. 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

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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.

81. 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.

82. 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.

83. 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.

84. 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"*

85. 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).

86. 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 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.

87. 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

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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.

88. 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.

89. 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.

90. Noticee submits that from the above-referred Explanation-2 to Section 74 of CGST Act, 2017, the expression 'suppression' means not declaring the information required to be declared in the return or failure to furnish any information on being asked for, in writing by the proper officer. In the present case, Noticee has 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.

91. 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.

92. 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)

93. 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.).

94. 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.).

95. 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.

96. 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.

97. 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)

98. 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).

99. 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.

100. 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.

101. Noticee submits that the GST is still under trial-and-error phase and the assessees 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

a. **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

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

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

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

103. Noticee would also like to be heard in personal, before any Notice being passed in this regard.

For M/s. Villa Orchids LLP

VILLA ORCHIDS LLP

Authorised Signatory

BEFORE THE ADDITIONAL/JOINT COMMISSIONER OF CNTRAL TAX, SECUNDERABAD GST COMMISSIONERATE, 7TH FLOOR, GST BHAVAN, HYDERABAD, TELANGANA – 500004

Sub: Proceedings under Show Cause Notice vide C.No. V/01/GST/78/2020-GR.12/CIR-I dated 05.01.2022 issued to M/s. Villa Orchids LLP.

I, SOHAM MODI, PARTNER of M/s Villa Orchids 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 31st July 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: 31.07.2023

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	Srimannarayana S	CA	261612	
4	Mohammed Shabaz	Advocate	TS/2223/16	
5	Akash Heda	CA	269711	