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

**Date: 13.02.2024**
**To**
**The Commissioner (Appeals-II),**
**07th Floor, GST Bhavan, L.B. Stadium Road,**
**Basheer Bagh, Hyderabad – 500 004**

Dear Sir,

**Sub:** Filing of appeal against the Order-in-Original in Form APL-01.

**Ref:** Order-In-Original No. 33/2023-24-SEC-ADJN-ADC(GST) dated 01.11.2023 received through courier on 03.11.2023 and uploaded on GST common portal vide ZD361223007884G dated 05.12.2023 pertaining **to M/s. Villa Orchids LLP.**

1. We have been authorized by M/s. Villa Orchids LLP to submit an appeal against the above referred Order and represent it before your good office and to do necessary correspondence in the above referred matter. A copy of the authorization is attached to the appeal memorandum.
2. In this regard, we submit that we have already filed the appeal electronically over GST Common portal (Enclosed the provisional acknowledgement as Annexure), further we are herewith submitting the physical appeal memorandum against the Order passed by the Additional Commissioner of Central tax, Secunderabad GST Commissionerate in Form GST APL – 01 in duplicate along with authorization and annexures.
3. Further the impugned OIO was passed for the period July 2017 to March 2019. However, the period referred in the summary order uploaded on GST Common Portal in Form DRC-07 was July 2017-18 might be owing to technical error as it appears. Although the period was not correctly mentioned in the GST Common Portal, we are filing the appeal in consonance with the Order-in-Original for the period July 2017 to March 2019 as the demand amount is mentioned properly, humbly requesting your good office to kindly take this into record.
4. In addition, we would like to bring to your notice that the said appeal is being filed with a delay of 09 days. The reasons for the said delay are clearly mentioned

4th Floor, West Block, Srida Anushka Pride, R.No. 12, Banjara Hills, Hyderabad,
Telangana - 500 034, INDIA.
040 2331 8128, 3516 2881 | sudhir@hnaindia.com | www.hnallp.com
Bengaluru | Hyderabad | Visakhapatnam | Gurugram (NCR) | Mumbai | Pune | Chennai | Guwahati | Vijayawada | Kolkata | Raipur | Kochi | Indore | Ahmedabad

in the Application of condonation which is enclosed as Annexure 1 with this appeal memorandum.

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

Thanking You,

Yours faithfully,

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

R. Lakshman Kumar

**CA Lakshman Kumar K**
**Partner**

HNA & CO LLP Hyderabad Chartered Accountants

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सीमा शुल्क एवं सेवा कर प्रधान आयुक्त का कार्यालय O/o. Principal Commissioner of Customs & GST
13 FEB 2024
I.C. No:.....
Appeals-II Commissionerate, Hyderabad.
अपील्स-II आयुक्तालय, हैदराबाद.

13/02/2024

Annexure-1

**Villa Orchids LLP**

5-4-187/3&4, II floor, MG Road,
Secunderabad – 500 003.
Phone: +91-40-66335551

**Dated: 09.02.2024**

**To**
**The Commissioner (Appeals-II),**
**GST Bhavan,**
**07th Floor, L.B Stadium Road,**
**Basheer Bagh, Hyderabad- 500 004**

Dear Sir,

**Sub:** Application for Condonation of delay in filing Appeal

**Ref:** Appeal against Order No. 33/2023-24-Sec.Adjn-ADC (GST) dated 01.11.2023 pertaining to **M/s. Villa Orchids LLP**

1. We would like to bring to your notice that we have received the above referred order through post on 03.11.2023 and the due date for filing the appeal is on 02.02.2024 in accordance with Section 107(1) of CGST Act, 2017.

2. In this regard, we inform you that we are involved in the provision of construction services of residential villas. We were earlier in receipt of SCN in the subject regard and one of the allegations raised in such SCN is in relation to non-payment of GST on advance receipts. In concerning this, we have submitted our submissions in SCN reply, however, the Ld. Adjudicating authority has confirmed such demand in the above referred order and in this context the order held that *'Further, other submissions made by the taxpayer are confusing and ambiguous. The taxpayer has also not made documentary evidences in support of his claim.'*. In addition, the impugned order also held that *'However, in the present context, the reconciliation made by the taxpayer for the period from 2017-18 to 2020-21 is not relevant.'*

3. In this regard, we bring to your notice that we have received advances as instalments through different financial years and taxes on the flats have been discharged in different financial years. Therefore, if the overall receipts and tax payments are compared there is no short payment of tax subject to deductions and exemptions. However, the Ld. Adjudication authority has not considered our submissions stating that submissions shall be limited to FYs 2017-18 and 2018-19. Since the Ld. Adjudicating authority found our submissions to be ambiguous, we decided to provide clear turnover reconciliation of each and



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every receipt and corresponding exemption and tax payment details in respective returns pertaining to FYs 2017-18 and 18-19 before filing appeal.

4. In this regard, we submit that there has been continuous replacement in the coordination staff and accounts team handling GST returns and there are challenges in retrieving all the details, agreements and understanding the workings pertaining to FY 2017-18. Owing to these reasons, it is taking considerable time to exact precise turnover and advance receipt reconciliations and there has been delay in filing appeal. Even now we are in the process of preparing comprehensive reconciliations for two financial years i.e., 2017-18 and 2018-19. However, we are filing appeal with the legal submissions as we are already in condonation period. The extensive turnover reconciliations along with sufficient documentary evidence will be submitted in due course of time as additional submissions.

5. We submit that the 3 months' time limit for filing the appeal was on 02.02.2024, Due to the above referred reasons, there is a delay of 7 days in filing the appeal. In this regard, it is humbly submitted that the delay happened due to bonafide intention of alleviating the dispute and to provide more founded submissions along with supporting documents, it is requested before your good self to kindly consider the same and condone the delay in filing the appeal.

We sincerely regret the inconvenience caused to you in this regard. Kindly acknowledge receipt of the above and do the needful.

Thanking You,

Yours truly,
**For M/s. Villa Orchids LLP**

VILLA ORCHIDS LLP

**Authorized Signatory**

**Form GST APL – 01**

**Form of Appeal to Appellate Authority**

**[Under Section 107(1) of the Central Goods and Service Tax Act, 2017]**

**[See rule 108(1)]**

**BEFORE THE COMMISSIONER OF CUSTOMS AND INDIRECT TAXES HYDERABAD (APPEALS-II) COMMISSIONERATE, 7TH FLOOR, GST BHAVAN, HYDERABAD, TELANGANA – 500 004**

| | | | |
|---|---|---|---|
| (1) GSTIN/ Temporary ID/UIN- | | 36AANFG4817C1ZH | |
| (2) Legal Name of the Appellant | | M/s. Villa Orchids LLP | |
| (3) Trade name, if any- | | M/s. Villa Orchids LLP | |
| (4) Address | | 2nd Floor, 5-4-187/3 and 4, Soham Mansion, M.G. Road, Secunderabad, Hyderabad, Telangana – 500003. | |
| (5) Order No. | 33/2023-24-SEC-ADJN-ADC(GST) | Order Date | 01-11-2023 |
| (6) Designation and address of the officer passing the order appealed against | | Additional Commissioner of Central tax, Central Excise and Service tax, Secunderabad GST Commissionerate. | |
| (7) Date of communication of the order appealed against | | 01-11-2023 | |
| (8) Name of the authorized representative | | CA. Venkata Prasad. P<br>C/o: HNA & Co LLP, Chartered Accountants, 4th Floor, West Block, Srida Anushka Pride, Above Lawrence and Mayo, Road No. 12, Banjara Hills, Hyderabad-500034<br>Email: venkataprasad@hnaindia.com<br>Mob: +91 8978114341 | |
| (9) Details of the case under dispute | | | |
| i. Brief issue of the case under dispute | | a. Interest under section 50 and penalty under section 74 of CGST Act, 2017 on Non-payment of GST under RCM on brokerage/commission paid to unregistered person.<br>b. Non-payment of GST on advances received along with interest and penalty.<br>c. ITC availed on invoices not reflected in GSTR-2A during FY 2018-19. | |
| ii. Description and classification of goods/services in dispute | | NA | |

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| | |
|---|---|
| iii. Period of dispute | FY 2017-18 (July 2017 to March 2018) and FY 2018-19 |

iv. Amount under dispute

| **Description** | **Central tax** | **State/UT tax** | **Integrated tax** | **Cess** |
|---|---|---|---|---|
| a. Tax/Cess | 1,82,18,723 | 1,82,18,723 | NA | NA |
| b. Interest | U/s 50 | U/s 50 | NA | NA |
| c. Penalty | 1,82,20,253 | 1,82,20,253 | NA | NA |
| d. Fees | NA | NA | NA | NA |
| e. Other charges | NA | NA | NA | NA |

| | |
|---|---|
| v. Market value of seized goods | NA |
| (10) Whether the appellant wishes to be heard in person | Yes |
| (11) Statement of Facts | **Annexure – A** |
| (12) Grounds of Appeal | **Annexure-B** |
| (13) Prayer | To set aside the impugned order to the extent aggrieved and grant the relief sought |

(14) Amount of Demand Created, admitted, and disputed

| | Particulars | | CGST | SGST | IGST | Cess | Total amount |
|---|---|---|---|---|---|---|---|
| Particulars of demand / Refund | Amount of demand created (A) | a) Tax/Cess | 1,82,18,723 | 1,82,18,723 | NA | NA | 3,64,37,446 |
| | | b) Interest | U/s 50 | U/s 50 | NA | NA | U/s 50 |
| | | c)Penalty | 1,82,20,253 | 1,82,20,253 | NA | NA | 3,64,40,506 |
| | | d)Fees | NA | NA | NA | NA | NA |
| | | e) other charges | NA | NA | NA | NA | NA |
| | Amount of demand admitted (B) | a) Tax/Cess | NA | NA | NA | NA | NA |
| | | b) Interest | NA | NA | NA | NA | NA |
| | | c)Penalty | NIL | NA | NA | NA | NA |
| | | d)Fees | NA | NA | NA | NA | NA |
| | | e) other charges | NA | NA | NA | NA | NA |
| | Amount of demanddis | a) Tax/Cess | 1,82,18,723 | 1,82,18,723 | NA | NA | 3,64,37,446 |
| | | b) Interest | U/s 50 | U/s 50 | NA | NA | U/s 50 |

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| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | puted (C) | c)Penalty | 1,82,20,253 | 1,82,20,253 | NA | NA | 3,64,40,506 |
| | | | d)Fees | NA | NA | NA | NA | NA |
| | | | e) other charges | NA | NA | NA | NA | NA |

(15) Details of payment of admitted amount and pre-deposit: -

a) Details of payment required.

| Particulars | | | Central tax | State/ UT tax | Integrated tax | Cess | Total |
|---|---|---|---|---|---|---|---|
| | a) Admitted amount | Tax/Cess | NA | NA | NA | NA | NA |
| | | Interest | NA | NA | NA | NA | NA |
| | | Penalty | NA | NA | NA | NA | NA |
| | | Fees | NA | NA | NA | NA | NA |
| | | Other charges | NA | NA | NA | NA | NA |
| | b) Pre-Deposit (10% of disputed tax or 25Cr. Whichever is lower) | Tax/Cess | 36,43,745 | | | | |

b) Details of payment of admitted amount and pre-deposit (pre-deposit 10% of the disputed tax and cess)

| Sr. No. | Description | Tax payable | Paid through cash/credit ledger | Debit entry No. | Amount of tax paid | | | |
|---|---|---|---|---|---|---|---|---|
| | | | | | CGST | SGST | IGST | TOTAL |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| 1 | Integrated tax | NA | Cash Ledger | NA | NA | | | |
| | | NA | Credit Ledger | NA | NA | NA | NA | NA |
| 2 | Central tax | NA | Cash Ledger | NA | NA | NA | NA | NA |
| | | NA | Credit Ledger | NA | NA | NA | NA | NA |
| 3 | State/UT tax | NA | Cash Ledger | NA | NA | NA | NA | NA |
| | | NA | Credit Ledger | NA | NA | NA | NA | NA |
| 4 | Cess | NA | Cash Ledger | NA | NA | NA | NA | NA |
| | | NA | Credit Ledger | NA | NA | NA | NA | NA |

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c) Interest, Penalty, Late fee, and any other amount payable and paid

| S.No. | Description | Amount Payable | | | | Debit Entry No. | Amount paid | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 2 | 3 CGST | 4 SGST | 5 IGST | 6 TOTAL | 7 | 8 CGST | 9 SGST | 10 IGST | 11 TOTAL |
| 1 | Interest | U/s 50 | U/s 50 | NA | U/s 50 | NA | NA | NA | NA | NA |
| 2 | Penalty | 3,64,40,506 | | | | NA | NA | | | |
| 3 | Late Fee | NA | NA | NA | NA | NA | NA | NA | NA | NA |
| 4 | Others | NA | NA | NA | NA | NA | NA | NA | NA | NA |

(16) Whether appeal is filed after the prescribed period – Yes

(17) If 'Yes' in item 16 –

a. Period of delay – 9 days

b. Reasons for delay – Enclosed as Annexure 1

(18) Place of supply wise details of the integrated tax paid (admitted amount only) mentioned in the Table in sub-clause (a) of clause 15 (item (a)), if any

| Place of Supply (Name of State/UT) | Demand | Tax | Interest | Penalty | Other | Total |
|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 |
| NA | Admitted amount [in the Table in sub-clause (a) of clause 15 (Item (a))] | NA | NA | NA | NA | NA |

Appellant

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## STATEMENT OF FACTS

A. M/s. Villa Orchids LLP (hereinafter referred as "Appellant") 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. Appellant 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. Appellant has also filed the GSTR-09 for the period 2017-18 (July 2017 to March 2018) and 2018-19.

C. 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 Appellant was appointed as a sole selling agent by SVRC under an agreement dated 13-11-2014. Under this agreement, the Appellant 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.

D. Subsequently, SVRC agreed to enter into a co-development model wherein SVRC would sell the plot of land to prospective customers and Appellant 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. Appellant was responsible only for construction of the villa on each plot at its cost.

E. Under the scheme of co-development and to help prospective purchasers to obtain housing loans, SVRC executed AGPAs in favour of Appellant for each plot, as and when Appellant 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 instalments to enable Appellant collect the said amounts from prospective purchasers and thereafter pay SVRC.

F. 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 Appellant represented SVRC as power of attorney. Not even a single plot has been registered

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

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

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

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

J. In response to the above final audit report, Appellant 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 Appellant

K. Thereafter, Appellant was in receipt of the Show Cause Notice vide Ref No. C.No. V/01/GST/78/2020-GR.12/CIR-I dated 05.01.2022 (Copy of SCN is enclosed as **Annexure** III ). The said SCN was duly replied on 04.08.2023.

L. Subsequently, Appellant is in receipt of present Order-in-original No. 33/2023-24-SEC-ADJN-ADC(GST) dated 01.11.2023 (Copy of Order-in-original is enclosed as **Annexure** I) confirming a demand of Rs. 3,64,37,446/-(Rs. 1,82,18,723 of CGST & SGST each).

To the extent aggrieved by the above impugned order, which is contrary to facts, law, and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the Appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.

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## GROUNDS OF APPEAL

1. Appellant submits that the impugned order is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.

2. Appellant 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: No short payment of GST on Advances received**

3. Appellant submits that there have been numerous meritorious submissions provided in the SCN reply supported with various decisions. However, the Ld. Adjudicating authority has not appreciated such submissions and confirmed the instant demand solely on emphasizing that *'the period of show cause notice undertaken is from July, 2017 to March, 2019 and proposed demand is limited to this period only----------. However in the present context the reconciliation made by the taxpayer for the period from 2017-18 to 2020-21 is not relevant. The taxpayer's contention should be limited to the involved liability----.'*

4. In this regard, Appellant submits that the Appellant has discharged for certain receipts the tax has been discharged in subsequent financial years as Appellant adheres to payment of taxes under milestone basis. Thereby, Appellant has provided submissions integrating receipts and tax payments for all financial years from July 2017 to March 2021. Since the submissions provided in SCN reply were not considered by Ld. Adjudicating authority in their true sense Appellant would like to re-iterate the same submissions below.

5. Appellant 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 Appellant was appointed as a sole selling agent by SVRC under an agreement dated 13-11-2014. Under this agreement, the Appellant had sold 88 villas and

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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.

6. Subsequently, SVRC agreed to enter into a co-development model wherein SVRC would sell the plot of land to prospective customers and Appellant 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. Appellant was responsible only for construction of the villa on each plot at its cost.

7. Under the scheme of co-development and to help prospective purchasers to obtain housing loans, SVRC executed AGPAs in favour of Appellant for each plot, as and when Appellant 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 Appellant collect the said amounts from prospective purchasers and thereafter pay SVRC.

8. 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 Appellant represented SVRC as power of attorney. Not even a single plot has been registered by way of sale deed in favour of Appellant which shows that the Appellant is not the owner of the land.

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

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

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

12. Appellant further submits that during the initial stages of implementation of GST, Appellant 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.

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

14. Appellant 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. Appellant 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.

15. Therefore, Appellant 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.

16. Appellant 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 Appellant is not the owner of the land. As stated in

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the previous paragraphs, SVRC is the owner of the land and transferring the land directly to the customers, Therefore, SI No 2 of Notification No. 11/2017-Central Tax (Rate) dated 28.06.2017 is not applicable in the instant case. Hence, the Appellant has paid GST at full rate on amounts received towards construction services.

17. Without prejudice to above, Appellant 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.**

18. 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.

19. 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

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word 'prescribed' has been defined under Section 2(87) which means prescribed by rules made under this act on the recommendations of the council.

20. 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.

21. 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."*

22. 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*

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*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.*

23. 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.

24. 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.

25. 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.

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*

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*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.*

26. 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.

27. 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.

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

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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.

29. 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.

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

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

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

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

b. **The Supreme Court in case of Indian Acrylics Vs UOI 1999 (113) ELT 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.***

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