

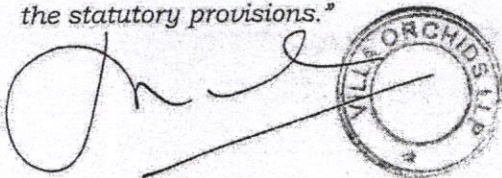
This decision states the when the government is prescribing a deemed value deviating from the actual value available, then it must have a good reason for doing so. If there is no reason, the deemed value shall become invalid. On-going through the GST Council Meeting Minutes, it is quite evident that no reason has been recorded while deeming the value of land as 1/3<sup>rd</sup> 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 notional values. The Supreme Court has made the following observations "*The scheme of the old Section 4 is indisputably 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 2/3<sup>rd</sup> of the value of the consideration received from their customers.

31. The valuation adopted by the Appellant 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 1/3<sup>rd</sup> 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."*



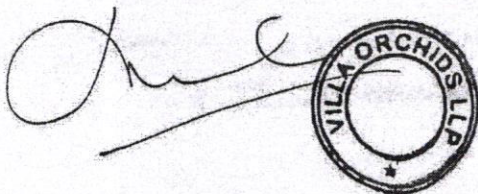


32. Appellant would like to submit that from the above referred decision, it is clear that wherever the actual land value is available, the same can be taken as deduction for the purpose of payment of GST and the deeming fiction of 1/3<sup>rd</sup> land value as deduction is ultra-vires the statutory provisions. Hence, Appellant would like to submit that the compliance made by the Appellant is in accordance with the law and there is no short payment of GST, therefore, the demand proposed by the impugned order need to be dropped.
33. In this regard, Appellant submits to reconsider the above-mentioned submissions in meantime Appellant would like to submit the additional documents to your good office with respect to short payment of tax for proof of evidence. Therefore, the demand imposed by impugned order to this extent needs to be dropped.

**In Re: No irregular availment of ITC:**

34. Appellant submits that the impugned order has confirmed that the Appellant 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 Appellant in GSTR-01.
35. Without prejudice to the above, Appellant 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, Appellant 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.
36. Appellant 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;"*

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

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

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

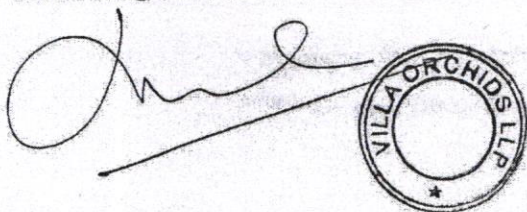
*(2) The credit referred to in sub-section (1) shall be utilized only for payment of self-assessed output tax as per the return referred to in the said sub-section"*

From the above-referred section, it is clear that every registered person is entitled to take credit of eligible ITC as self-assessed in his return and the same will be credited to the electronic credit ledger on a provisional basis.

38. 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.

39. 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.

40. 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)

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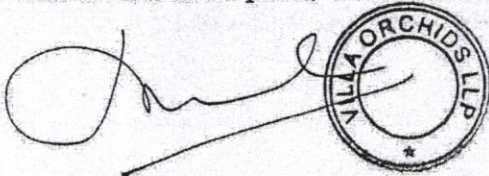


GSTR 3 for the months of July 2017 to June 2019 shall be notified subsequently.

41. 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.
42. 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.
43. 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 Appellant is rightly eligible. Hence, request you to drop the proceedings initiated.
44. 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.

45. Without prejudice to the above, Appellant submits that even if the matching mechanism is in place, the unmatched ITC amount will get directly added to

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the electronic liability ledger of the assessee under sub-section (5) of Section 42 and there is no requirement to reverse the ITC availed.

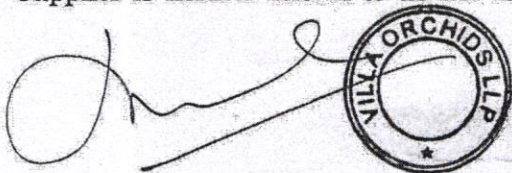
46. Appellant submits that only in exceptional cases like missing dealer etc. the recipient has to be called for to pay the amount which is coming out from Para 18.3 of the minutes of 28<sup>th</sup> GST Council meeting held on 21.07.2018 in New Delhi which is as under:

*"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.

47. Without prejudice to above, Appellant submits that even if there is differential ITC availed by the Appellant, the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules based on which Appellant has availed ITC. Further, Appellant 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 Appellant hence the impugned notice needs to be dropped.

48. Appellant 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

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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.

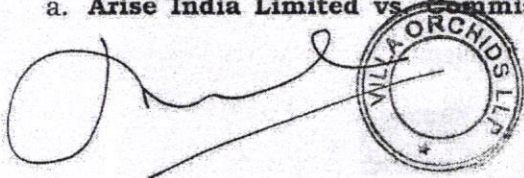
49. Appellant further submits that for the default of the supplier, the recipient shall not be penalized therefore the impugned notice shall be dropped. In this regard, reliance is placed on **On Quest Merchandising India Pvt Ltd Vs Government of NCT of Delhi and others 2017-TIOI-2251-HC-DEL-VAT** wherein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

*"54. The result of such reading down would be that the Department is precluded from invoking Section 9 (2) (g) of the DVAT to deny ITC to a purchasing dealer who has bona fide entered into a purchase transaction with a registered selling dealer who has issued a tax invoice reflecting the TIN number. In the event that the selling dealer has failed to deposit the tax collected by him from the purchasing dealer, the remedy for the Department would be to proceed against the defaulting selling dealer to recover such tax and not deny the purchasing dealer the ITC."*

50. Appellant 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"*

51. Appellant 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 -**

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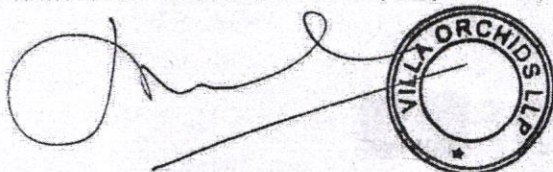


**2018-TIOL-11-SC-VAT** was rendered favorable to the assessee. This decision was rendered in the context of section 9(2) (g) of the Delhi Value Added Tax Act, 2004 which is a similar provision wherein the credit availment of the recipient is dependent on the action taken by the supplier.

- 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*

52. Appellant 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 reverse any credit in absence of the legal requirement during the subject period.
53. 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.
54. Appellant 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





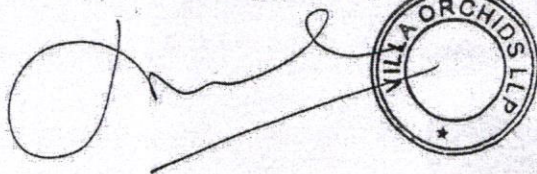
*goes beyond the rule making power conferred by the statute, the same has to be declared ultra vires. If a rule supplants any provision for which power has not been conferred, it becomes ultra vires. The basic test is to determine and consider the source of power which is relatable to the rule. Similarly, 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.

55. Appellant 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 seller / Charles and his wife Shanthi, on the present transactions. 13. The learned counsel for the petitioners draws my attention to the SCN, dated 27.10.2020, finalising the assessment of the seller by excluding the subject transactions alone. I am unable to appreciate the approach of the authorities. When it has come out that the seller has collected tax from the purchasing dealers, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against him. 14. That apart in the enquiry in question, the Charles and his Wife ought to have been examined. They should have been confronted."
- 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**

56. Appellant 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





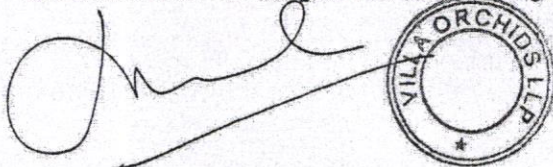
and therefore substantially diminishes ability to continue business. Therefore, it is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution.

57. Appellant 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.)]**
58. Appellant 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.
59. Appellant 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: Impugned order is not valid.**

**Demand was confirmed based on assumptions and presumptions**

60. Appellant submits that the order was issued based on mere assumptions and presumptions and without considering the intention of the law, documents on record, the scope of activities undertaken and 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 Finance Act, 1994. In this regard, Appellant relies on decision of the Hon'ble Supreme Court in case **Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC)** wherein it was held that "*we must hold that the finding that 11,606 maunds of sugar were not accounted for by the Appellant has been arrived at **without any tangible evidence and is based only on inferences involving unwarranted assumptions.** The finding is thus vitiated by an error of law.*"

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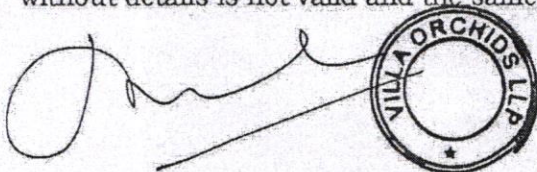


The Hon'ble SC categorically held that such order issued with assumptions and presumptions is not sustainable under the law. Therefore, on this count alone the entire proceedings in the order do not sustain and require to be set aside.

61. Appellant submits that the entire order seems to have been issued with revenue bias without appreciating the statutory provisions, the intention of the same and the objective of the transaction/activity and nature of the business. Appellant submits that the impugned order has been issued without examining the activities carried out by the Appellant. In case the department had examined all these aspects, the department would not have passed the impugned order. Appellant submits that it is the duty of the authority to consider the facts of the case properly before passing the order. Therefore, impugned order issued without considering the facts of the case is not valid and the same needs to be set aside.

Order is vague and lack of details

62. Appellant submits that the impugned order has not given clear reasons as to how the Appellant has not paid the tax under RCM, Ineligible ITC availed, Non-payment of tax on advance received 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 notice 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)
63. From the invariable decisions of various High Courts, it is clear that the order without details is not valid and the same needs to be set aside.



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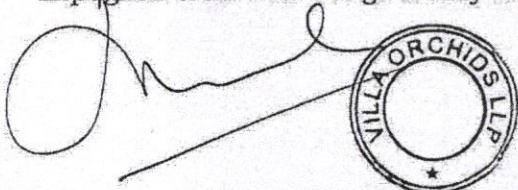
Violation of principles of natural justice

64. Appellant submits that the impugned order has confirmed the demand without considering the various meritorious submissions made by the Appellant as referred above which shows that the same has been passed in violation of principles of natural justice, therefore, the same is not valid and needs to be set aside on this count alone. In this regard, Appellant submits that the Hon'ble Supreme Court in case of Dharampal Satyapal Limited Vs DC of Gauhati 2015 (320) ELT 3 (SC) held that

*"18. Natural justice is an expression of English Common Law. Natural justice is not a single theory - it is a family of views. In one sense administering justice itself is treated as natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism.' Moral naturalism captures the essence of common-sense morality - that good and evil, right, and wrong, are the real features of the natural world that human reason can comprehend. In this sense, it may comprehend virtue ethics and virtue jurisprudence in relation to justice as all these are attributes of natural justice. We are not addressing ourselves with this connotation of natural justice here.*

*19. In Common Law, the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi-judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must be given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice.' The principles of natural justice developed over a period of time, and which is still in vogue and valid even today were: (i) rule against bias, i.e., nemo iudex in causa sua; and (ii) opportunity of being heard to the concerned party, i.e., audi alteram partem. These are known as principles of natural justice. To these principles a third principle is added, which is of recent origin. It is duty to give reasons in support of decision, namely, passing of a 'reasoned order.'*

Appellant submits that from the above referred decision of the Hon'ble Supreme Court, it is quite clear that every quasi-judicial authority is required to give reasons while confirming the demands. However, in the instant case the impugned order has not given any reasons as to why the submissions made by

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the Appellant are not correct. Hence, the impugned order is not correct and the same needs to be set aside.

65. Appellant submits that Section 75(6) of CGST Act, 2017 requires the adjudicating authority to set out all the relevant facts and the basis of his decision while passing any order. For easy reference, the same is extracted as follows.

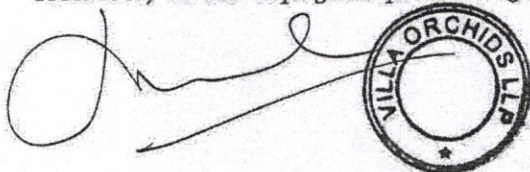
*(6) The proper officer, in his order, shall set out the relevant facts and the basis of his decision.*

This shows that the adjudicating authority is obligated to set out the relevant facts and the basis on which the demand has been confirmed. However, in the instant case the impugned order has been passed without giving any reasons as to why the submissions made by the Appellant are not correct. This shows that the impugned order is violative of Section 75(6) of CGST Act, 2017 and the same needs to be set aside.

66. Appellant wish to reply on the following decisions under GST wherein it was held that non-speaking order are invalid.

a. The Hon'ble High Court of Madras in the case of **TVS Motors Company Ltd V. Assistant Commissioner (2018 (16) G.S.T.L. 17 (Mad.))** while examining whether the adjudicating authority has followed the principles of natural justice or not held that *"5. This Court finds that though such a reply has been given, the same has not yet been considered nor adjudicated upon. On a reading of the impugned order, it clearly shows that it is not in the nature of a show cause notice, but a demand by itself whereby the petitioner's claim for transitional credit has been rejected and that they have been directed to reverse the credit along with interest within 15 days from the date of receipt of a copy of the impugned order, failing which, penal action would be initiated for recovery of arrears under Section 79 of the said Act.*

*6. The respondent states that the impugned order is only a show cause notice. This Court is unable to agree with the said stand taken by the Learned Senior Panel Counsel appearing for the Revenue, as a show cause notice cannot pre-judge the issue. Had the first respondent issued a notice calling upon the petitioner to state as to why the transitional credit claimed by them cannot be granted or should be directed to be reversed, then it would be a different matter? However, in the impugned proceedings, the first respondent denied the credit*

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*and all that has been granted is 15 days' time to reverse the credit, which, according to the first respondent, is inadmissible. These are sufficient grounds to hold that the impugned order is in violation of the principles of natural justice. On this ground alone, the petitioner is entitled to succeed."*

- b. Bright Load Logistics Vs Joint Commissioner of Commercial Taxes (Appeals), Davanagere 2021 (48) GSTL 151 (Kar)
- c. Swastik Traders Vs State of UP 2019 (29) GSTL 389 (All)
- d. Kalebudde Logistics Vs Commercial Tax Officer, Hubballi 2021 (48) GSTL 238 (Kar)

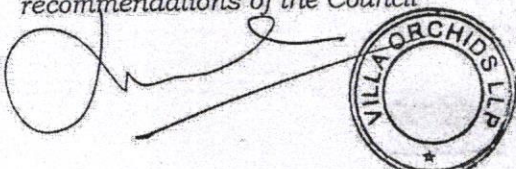
67. Appellant submits that the entire order seems to have been issued with revenue bias without appreciating the statutory provisions, the intention of the same and the objective of the transaction/activity and nature of the business. Appellant submits that the impugned order has been issued without examining the activities carried out by the Appellant. In case the department had examined all these aspects, the department would not have passed the impugned order. Appellant submits that it is the duty of the authority to consider the facts of the case properly before passing the order. Therefore, impugned order issued without considering the facts of the case is not valid and the same needs to be set aside.

**In Re: Interest under Section 50 is not applicable.**

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

69. Appellant submits in this regard that the impugned order has stated that the Appellant is liable to interest under Section 50 of CGST Act, 2017. It is pertinent to examine Section 50 of CGST Act, 2017 which is extracted below for ready reference.

*"(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the Rules made thereunder, but failed to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council"*





*(2) the interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid*

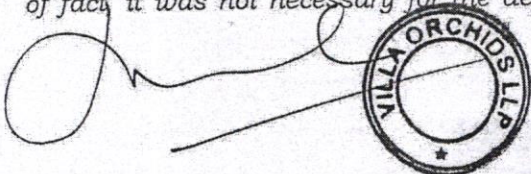
*(3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.*

70. In this regard, Appellant submits that Notification No.13/2017-CT dated 28.06.2017 has prescribed the interest rate at 18% in case of failure in payment of GST under Section 50(1) of CGST Act, 2017 and 24% in case of undue or excess claim of ITC under sub-section (3) of Section 50 of CGST Act, 2017.

71. Appellant submits that there is no reference in Section 50 as to how to compute the interest payable. Furthermore, Section 50(2) though envisages the period from which the tax computation has to begin, it empowers the Central Government to prescribe the methodology of computation of interest. However, as on date there is no such prescription in the Rules, thereby the interest is not at all applicable. In this regard, Appellant submits that it is settled position of law that when the mechanism to measure fails, the levy also fails as laid down by Hon'ble Supreme Court in the case of B.C. Srinivasa Shetty 1981 (2) SCC 460. Accordingly, the mechanism to compute interest is not set out therefore the levy of interest also fails.

**In Re: Demand under Section 74 is not applicable:**

72. Without prejudice to the above, Appellant 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*

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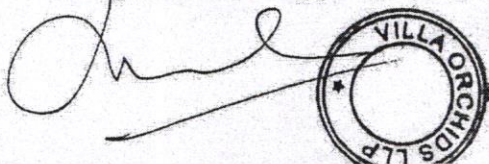


73(1) *ibid* for demanding service tax from the assessee for the aforesaid period, which is within the normal period of limitation prescribed under Section 73(1). In this scenario, the penalty imposed by the Commissioner under Section 78 of the Finance Act, 1994 on the assessee on the ground of suppression 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."

73. With respect to non-payment of GST under reverse charge mechanism on unregistered procurements, Appellant would like to submit that there exists a confusion relating to payment of GST on unregistered procurements and the industry has not paid GST on the same as the same is very complex. Understanding the difficulties involved in implementation of RCM on unregistered procurements, the government has removed the same from reverse charge mechanism. This shows that there was a genuine difficulty faced by the trade which was also understood by the Government and removed the same. In these circumstances, it cannot be said that there is a suppression and intention to evade payment of tax. Hence, the question of invocation of Section 74 does not arise.

74. With respect to difference between ITC availed in GSTR-3B and GSTR-2A, Appellant 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.

75. Appellant would like to submit that the Appellant 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

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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.

76. 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.

77. Appellant 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"*

78. Appellant would like to submit that the impugned order has confirmed the penalty under Section 74 merely on the ground that the Appellant had paid certain taxes on pointing out by the audit officers. In this regard, Appellant 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 Appellant. In this regard relied, on LANDIS + GYR LTD Vs CCE 2013 (290) E.L.T. 447 (Tri. - Kolkata).

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79. Appellant 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.

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

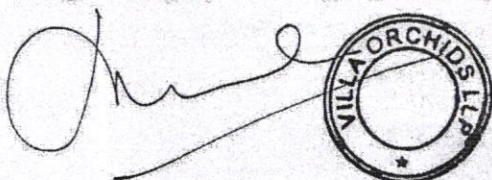
*“74. (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any willful-misstatement or suppression of facts to evade tax, he shall serve notice on the person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

However, in the instant case, Appellant 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.

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

82. Further, Appellant 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.*

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83. Appellant 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, Appellant 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.

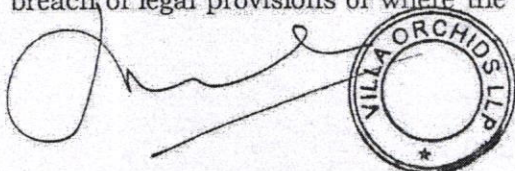
84. Appellant further submits that suppression means not providing information that the person is legally required to state but is intentionally or deliberately not stated. Whereas in the instant case full facts of present SCN were well disclosed before authorities as and when requested by way of clear & specific letters. Further, there is no willful misstatement by Appellant in view of the fact that what is believed to be correct as backed by legal provisions was put forth before the authorities.

85. 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 Bonafide 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)

86. Appellant submits that mere non-payment/short payment of tax per se does not mean that Appellant 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.).

87. Appellant 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

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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.).

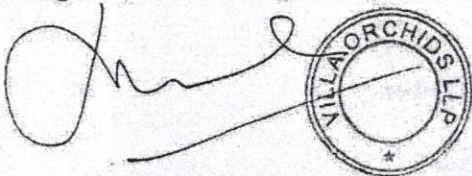
88. Appellant further submits that it was held in the case of Collector of Customs v. Unitech Exports Ltd. 1999 (108) E.L.T. 462 (Tribunal) that- *"It is settled position that penalty should not be imposed for the sake of levy. Penalty is not a source of Revenue. The penalty can be imposed depending 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.

89. Appellant submits that from the above-referred case laws, it is clear that Appellant has not willfully misstated any facts, therefore, the imposition of penalties is not warranted.

90. Appellant 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)]

91. Appellant 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).

92. Appellant 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.

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93. Appellant 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 Appellant hence the same shall be avoided.

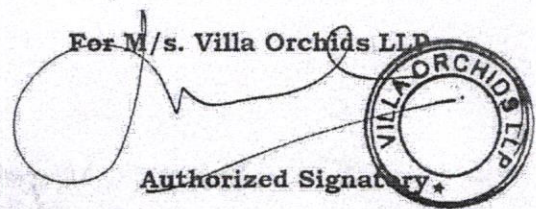
94. Appellant submits that the GST is still under trial-and-error phase and the assesseees are facing genuine difficulties and the same was also held by various courts by deciding in favour of the assessee. Therefore, the imposition of the penalty during the initial trial and error phase is not warranted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

- i. **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
- ii. **The Tyre Plaza Vs UOI 2019 (30) GSTL 22 (Del)**
- iii. **Kusum Enterprises Pvt Ltd Vs UOI 2019-TIOL-1509-HC-Del-GST**

95. From the above referred submissions, it is clear that the finding of the impugned order is not correct and the penalties need to be set aside.

96. Appellant craves leave to alter, add to and/or amend the aforesaid grounds.

97. Appellant wishes to be heard in person before passing any order in this regard.

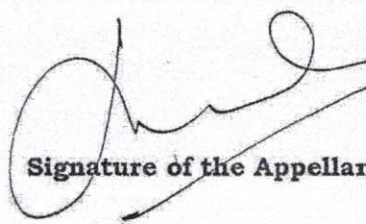
For M/s. Villa Orchids LLP  
  
Authorized Signatory ★



### PRAYER

**Therefore, it is prayed that**

- a. To set aside the impugned order to the extent aggrieved;
- b. To hold that the proceedings are not initiated by the proper officer;
- c. To hold that the violation of principals of natural justice;
- d. To hold that there is no short payment of tax.
- e. To hold that there is no ineligible availment of input tax credit.
- f. To hold that interest and penalties are not imposable.
- g. Any other consequential relief be granted.

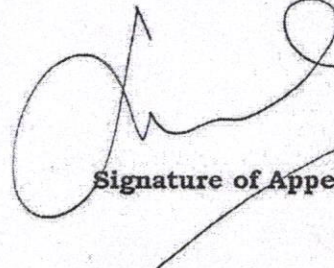
  
Signature of the Appellant

### VERIFICATION

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

Place: Hyderabad

Date: 08.02.2024

  
Signature of Appellant



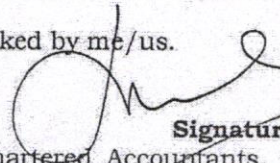
**BEFORE THE COMMISSIONER OF CUSTOMS AND INDIRECT TAXES**  
**HYDERABAD (APPEALS-II) COMMISSIONERATE, 7<sup>TH</sup> FLOOR, GST BHAVAN,**  
**HYDERABAD, TELANGANA - 500 004**

**Sub: Proceedings under Order-In-Original No. 33/2023-24-SEC-ADJN-ADC(GST) dated 01.11.2023 issued to M/s. Villa Orchids LLP**

I Sollammopi, partner of M/s. Villa Orchids LLP, hereby authorizes and appoint HNA & CO LLP (formerly, Hiregange & Associates LLP), Chartered Accountants, Hyderabad 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/Appellant 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 08<sup>th</sup> February 2024 at Hyderabad

  
Signature 

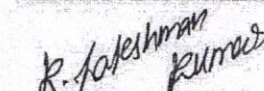
I the undersigned partner of M/s HNA & Co LLP, Chartered Accountants, do hereby declare that the said M/s HNA & Co LLP is a registered firm of Chartered Accountants, and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 116 of the CGST Act, 2017. I accept the above said appointment on behalf of M/s HNA & Co LLP. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

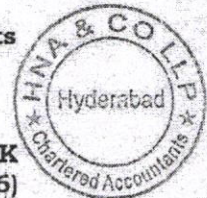
Dated: 08.02.2024

**Address for service:**

**HNA & Co LLP,  
Chartered Accountants,  
4th Floor, West Block, Anushka Pride,  
above Lawrence & Mayo,  
Road Number 12, Banjara Hills,  
Hyderabad, Telangana 500034**

**For HNA & Co LLP  
Chartered Accountants**

  
**CA Lakshman Kumar K  
Partner (M.No. 241726)**



I Partner/employee/associate of M/s HNA & Co LLP duly qualified to represent in above proceedings in terms of the relevant law, also accept the above said authorization and appointment.

| Sl No. | Name             | Qualification | Mem. /Roll No. | Signature |
|--------|------------------|---------------|----------------|-----------|
| 1      | Sudhir V S       | CA            | 219109         |           |
| 2      | Venkat Prasad P  | CA            | 236558         |           |
| 3      | Srimannarayana S | CA            | 261612         |           |
| 4      | Revanth Krishna  | CA            | 262586         |           |
| 5      | Akash Heda       | CA            | 269711         |           |

