

Form GST DRC-06

[See rule 142(4)]

Reply to the Show Cause Notice

ARN: ZD360221063196M

Date: 25/02/2021

1. GSTIN	36AAHFB7046A1ZT		
2. Name	B & C ESTATES		
3. Details of Show Cause Notice	Reference No. ZD360221001232C	Date of issue 10/02/2021	
4. Financial Year	2017-2018		
5. Reply			
To, The Deputy Commissioner (STU-2) Audit, Begumpet division			
GST DRC -01A Reply to the Communication for payment before issue of SCN			
6. Documents uploaded			
Reply of GST notice fy 2017-18.pdf			
7. Option for personal hearing	☐ Yes	☒ No	

8.Verification-

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

Signature of Authorized Signatory
Name : SOHAMMODI
Designation / Status: Managing Partner
Date: 25/02/2021

Form GST DRC-01A

Part B

Reply to the communication for payment before issue of SCN
[See Rule 142 (2A)]

Date: 11-01-2021

Place :Secunderabad

To
The Deputy Commissioner (STU-2) Audit,
Begumpet Division,
Hyderabad.

Sub.: Submissions in response to liability intimated under Section 73(5)/74(5) – reg.

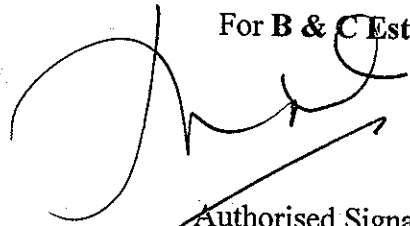
Please refer to your letter dated 22.12.2020 wherein the liability of tax payable as ascertained under section 73(5)/74(5) was intimated.

In this regard,

A. the said liability is not acceptable and the submissions in this regard are attached/
given below as Annexure-A

Yours faithfully,

For B & C Estates,



Authorized Signatory

GSTIN: 36AAHFB7046A:ZT

Enclosures:-

1. Annexure-A Statements of Facts
2. Annexure-B GST intimation Notice under Sec 73(5)/74(5)
3. Annexure-C DRC-03 ARN: AD3601200094000
4. Annexure-D GSTR-9C FY 2017-18.

ANNEXURE-A

STATEMENT OF FACTS

- A. M/s. B & C Estates (Hereinafter referred to as "Noticee") is a partnership firm *inter alia* engaged in the construction business and registered under GST vide 36AAHFB7046A1ZT.
- B. Noticee had been regularly discharging applicable GST and filing the periodical returns regularly. Noticee has also filed the Annual Return in Form GSTR-09 and reconciliation statement in GSTR-9C for the period 2017-18 (July-March).
- C. Subsequently, Deputy Commissioner of State Tax (STU), Audit, Begumpet Division has issued a Notice vide letter dated 22.12.2020 (Copy of notice is enclosed as **Annexure-B**) intimating that an amount of Rs.8,18,712/- towards CGST and SGST each is payable on account of GSTR-09.

SUBMISSIONS

1. Noticee submits that the impugned notice is ex-facie illegal and untenable in law since the same is contrary to facts and judicial decisions.
2. Noticee at the outset submits that the impugned notice has been issued based on the differences between amounts disclosed in GSTR-3B returns filed and GSTR-09 filed for the period July 2017 to March 2018. The bifurcation of demand proposed by the Noticee is as follows

Particulars	CGST	SGST	IGST
Differences in taxes payable	59,585	59,585	-
Denial of ITC due to non-reflection in GSTR-2A	7,59,126	7,59,126	-
Total	8,18,711	8,18,711	-

3. With respect to differences in taxes payable, Noticee submits that the differential amount between GSTR-3B and GSTR-09 has been paid while filing GSTR-09 vide DRC -03 dated 24.02.2020. Thereby, there is no short payment of GST to that extent. To evidence the same, Noticee is herewith submit the copy of Form DRC-03 dated 24.02.2020 as Annexure -C.
4. Noticee further submits that the audit under Section 35 has also been completed and Form GSTR-9C which is a reconciliation statement between books of accounts and GSTR-3B returns has also been filed wherein the Chartered Accountant has not pointed out any discrepancy in payment of taxes. A copy of the same is enclosed as Annexure -D
5. With respect to denial of ITC due to non-reflection in GSTR-2A, Noticee submits that ITC cannot be denied merely due to non-reflection of invoices in GSTR-2A as all the conditions specified under Section 16 of Telangana GST Act, 2017 has been satisfied.

Further, Noticee submits that GSTR-2A cannot be taken as a basis to deny the ITC in accordance with Section 41, Section 42, Rule 69 of Telangana GST Rules, 2017.

6. Noticee submits that the condition for availment of credit is provided under section 16(2) of the Central Goods and Service Tax Act, 2017 and Section 16(2) of the Telangana 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 brought out as to which provision under the Central Goods and Service Tax, 2017/Telangana Goods and Service Tax Act, 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, needs to be dropped. 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;"

7. 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 electronic credit ledger on a provisional basis.

8. 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.
9. 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 claim of the input tax credit shall also be extended accordingly.
10. The Central Government vide Notification No.19/2017-CT dated 08.08.2017, 20/2017-CT dated 08.08.2017, 29/2017-CT dated 05.09.2017, 58/2017- has extended the time limit for filing GSTR-2 and GSTR-3. Further, vide Notification No.11/2019-CT dated 07.03.2019 stated that the time limit for furnishing the details or returns under Section 38(2) (GSTR-2) and Section 39(1) GSTR 3 for the months of July 2017 to June 2019 shall be notified subsequently.
11. 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.
12. 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.

13. As Section 41 allows the provisional availment and utilization of ITC, there is no violation of section 16(2)(c) of GST Act 2017, therefore, the ITC availed by Noticee is rightly eligible. Hence, request you to drop the proceedings initiated.

14. The above view is also fortified from 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 the Form GSTR 2A and hence the notice issued is contrary to the same.

15. Without prejudice to above, Noticee submits that even if the matching mechanism is in place, the unmatched ITC amount will get directly added to the electronic liability ledger of the assessee under sub-section (5) of Section 42 and there is no requirement to reverse the ITC availed.

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

"18.3---- He highlighted that a major change proposed was that no input tax credit can be availed by the recipient where goods or services have not been received before filing of a return by the supplier. This would reduce the number of pending invoices for which input tax credit is to be taken. There would be no automatic reversal of input tax credit at the recipient's end where tax had not been paid by the supplier. Revenue administration shall first try to recover the tax from the seller and only in some exceptional circumstances like missing dealer, shell companies, closure of business by the supplier, input tax credit shall be recovered from the recipient by following the due process of serving of notice and personal hearing. He stated that though this would be part of IT architecture, in the law there would continue to be a provision making the seller and the buyer jointly and severally responsible for recovery of tax, which was not paid by the supplier but credit of which had been taken by the recipient. This would ensure that the security of credit was not diluted completely."

Thereby issuing the notice without checking with our vendors the reason for non-filing of the returns etc. issuing a notice to us, runs against the recommendations of the GST council.

17. Without prejudice to above, Noticee submits that even if there is differential ITC availed by the Noticee, the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules based on which Noticee has availed ITC. Further, Noticee submits that the value of such supplies including taxes has been paid to

such vendors thereby satisfying all the other conditions specified in Section 16(2) of the CGST Act, 2017. As all the conditions of Section 16(2) are satisfied, the ITC on the same is eligible to the Noticee hence the impugned notice needs to be dropped.

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

- *Indian Seamless Steel & Alloys Ltd Vs UOI, 2003 (156) ELT 945 (Bom.)*
- *Hico Enterprises Vs CC, 2005 (189) ELT 135 (T-LB). Affirmed by SC in 2008 (228) ELT 161 (SC)*

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

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

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

20. Noticee further submits that in case of Hon'ble Karnataka High Court in a writ petition filed by M/s ONXY Designs Versus The Assistant Commissioner of Commercial Tax Bangalore 2019(6) TMI 941 relating to Karnataka VAT has held that *"It is clear that the benefit of input tax cannot be deprived to the purchaser dealer, if the purchaser dealer satisfactorily demonstrates that while purchasing goods, he has paid the amount of tax to the selling dealer. If the selling dealer has not deposited the amount in full or a part thereof, it would be for the revenue to proceed against the selling dealer"*

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

- a. **Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11-SC-VAT** was rendered favorable to the assessee. This decision was rendered in the context of section 9(2) (g) of the Delhi Value Added Tax Act, 2004 which is a similar provision wherein the credit availment of the recipient is dependent on the action taken by the supplier.
- b. **M/s Tarapore and Company Jamshedpur v. 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*.

22. Noticee submits that several grounds are urged in SCN reply, in this regard, Noticee wishes to communicate that all grounds are without prejudice to one another.

Reliance is placed on the decision in case of *Bombay Chemicals Pvt Ltd Vs Union of India 1982 (10) E.L.T 171 (Bom)*

23. Noticee craves leave to alter, add to and/or amend the aforesaid submissions.
24. Noticee submits that wish to be heard in personal before passing any order in this regard.