

Form GST DRC-06

[See rule 142(4)]

Reply to the Show Cause Notice

ARN: ZD360721000794J

Date: 08/07/2021

1. GSTIN	36ABCFM6774G2ZZ		
2. Name	MODI REALTY (MIRYALAGUDA) LLP		
3. Details of Show Cause Notice	Reference No. ZD360221006519P	Date of issue 13/02/2021	
4. Financial Year	2017-2018		
5. Reply	ZD360221006519P		
6. Documents uploaded	reply letter Modi Realty Miryalaguda LLP 10_04_21.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: Designated
Partner
Date: 08/07/2021

Date: 10-04-2021

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3.Details of Show Cause Notice	Ref. No. ZD360221006519P	Date of issue: 13/02/2021
4.Financial Year	2017-18	
5.Reply		
Submissions given as Annexure A		
6.Documents uploaded – Nil		
7.Option for personal hearing	Yes- Required	☐ No

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Signature of Authorised Signatory

ANNEXURE A:

Facts of the case:

- A. M/s. Modi Realty (Miryalaguda) LLP (Hereinafter referred to as “Noticee”) is a Limited Liability company located at Plot No. 5-4-187/3 and 4, Soham Mansion, 2nd Floor, M.G Road, Secunderabad, Ranga Reddy, Telangana, 500003 and is registered under The Central Goods and Services Act 2017 vide GSTN 36ABCFM6774G2ZZ.
- 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 for the period 2017-18 (July-March).
- C. Subsequently, Assistant Commissioner of State Tax Hyderabad Rural Division has issued a Notice vide letter dated 13.02.2021 proposing the demand of Rs.70,020/- towards CGST, Rs.70,020/- towards SGST and Rs.1,25,938/- towards IGST each payable on account of differences between the GSTR-09 and GSTR-3B.
- D. Noticee herein below makes the submission in response to the allegations and propositions made in the impugned SCN.

Submissions:

1. Noticee emphatically denies all the allegations made in the subject Notice as they are not factually/legal correct.
2. Noticee submits that the provisions (including Rules, Notifications & Circulars issued thereunder) of both the CGST Act, 2017 and the Telangana GST Act, 2017 are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act, 2017 would also mean a reference to the same provision under the Telangana GST Act, 2017.
3. 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
Denial of ITC due to non-reflection in GSTR-2A	99,474	99,474	125,938
Demand raised on account of increase in liability because of difference in liability on outward supplies between GSTR-1 and GSTR-09	2,07,215	2,07,125	-
Less: Demand on account of Excess payment made in GSTR- 3B.	- 2,36,669	-2,36,669	-
Total	70,020	70,020	125,938

Demand on account of excess payment of tax liability in GSTR-3B

4. With respect to the demand raised by the impugned notice for the difference amount between GSTR-3B and GSTR-9, Noticee submits that they have wrongly disclosed excess turnover in GSTR-01 and paid the same while filing GSTR-3B return. However, while filing annual return in GSTR-09 for the FY 2017-18, Noticee disclosed the correct taxable value and tax amounts. Since, there is an excess payment in GSTR-3B when compared with the GSTR-09, the impugned notice needs to be dropped. The details are as follows.

Particulars	CGST (with-out RCM)	SGST (with-out RCM)	Total
GSTR-1	8,82,827	8,82,827	17,65,654
GSTR-3B	8,82,827	8,82,827	17,65,654
GSTR-9	6,46,158	6,46,158	12,92,316
Difference (3B-09)	2,36,669	2,36,669	4,73,338

Noticee submits that the above disclosures had been properly made while filing GSTR-3B and GSTR-9 Return (Copy of GSTR-3B and GSTR-9 is enclosed as annexure.

5. Noticee submits that if the impugned notice has considered the turnovers and taxes declared in GSTR-3B and GSTR-9, then the notice would not have been issued. Hence, the Noticee requests the adjudicating authority to consider the turnover disclosed in GSTR- 09 wherein all the taxes are paid and there is no short payment of GST.

Demand raised on account of increase in liability because of difference in liability on outward supplies between GSTR-1 and GSTR-09

6. Noticee submits that the impugned notice has proposed to demand tax liability of Rs. 2,07,125/- towards CGST and Rs. 2,07,125/- towards SGST due to difference between GSTR-1 and GSTR-09. In this regard, Noticee submits that they are engaged in sale of flats under constructions which includes even the land value. During the initial stage of implementation of GST with effect from 01.07.2017, Noticee is not sure about the value on which tax rate to be applied. Therefore, Noticee has paid the tax amount on gross value received from the customers without deduction of land value and disclosed the said details in GSTR-3B for the FY 2017-18.
7. However, at the time of filing of the Annual return for the FY 2017-18, Noticee has corrected the mistake made while filing GSTR-01 and GSTR-3B and disclosed the correct taxable value in table 4A of GSTR-09 after deducting land value. Further, the details mentioned in GSTR-09 are final and the same shall be considered for the purpose of calculation of tax liability. Since the Noticee has paid excess GST when compared to actual GST payable, the impugned notice needs to be dropped.

Denial of ITC due to non-reflection in GSTR-2A

8. Noticee submits that the impugned notice has proposed to deny ITC of Rs. 99,474/- towards CGST, Rs. 99,474/- towards SGST and Rs. 1,25,938/- stating that invoices to that extent was not reflected GSTR-2A.
9. In this regard, Noticee submits that Table-8A of GSTR-9 was auto populated from the Form GSTR-2A as on 01st May, 2019 where as GSTR-2A which gets updated whenever supplier files the GSTR-1. Noticee submits that as seen from the report of the portal, Noticee has claimed less Input tax credit when compared with GSTR-2A (Screen shot of the same is enclosed below for your reference).

Tax liability and ITC statement (Summary) ?

Tax Period	Tax liability as per GSTR-1 and as per GSTR-3B [As per report no. 1 & 3]		ITC claimed in GSTR-3B and accrued as per GSTR-2A [As per report no. 4]	
	As per GSTR-1	As per GSTR-3B	As per GSTR-3B	As per GSTR-2A
Apr-17				
May-17				
Jun-17				
Jul-17	0.00	0.00	0.00	1,03,414.74
Aug-17	0.00	0.00	1,07,528.00	71,017.03
Sep-17	0.00	0.00	93,982.00	1,00,915.34
Oct-17	0.00	0.00	1,74,204.00	1,02,730.10
Nov-17	0.00	0.00	95,426.00	1,18,047.76
Dec-17	240.00	240.00	91,801.00	1,05,684.26
Jan-18	1,07,522.40	1,07,522.00	84,743.00	1,17,953.00
Feb-18	16,57,891.80	16,57,892.00	13,28,433.00	12,20,134.04
Mar-18	0.00	0.00	1,76,770.00	4,18,590.86
Total	17,65,654.20	17,65,654.00	21,52,887.00	23,58,487.13

[DOWNLOAD \(CSV\)](#)

10. Noticee submits that the reason for difference between the Table-8A of GSTR-09 and GSTR-2A as on date would be on account of filing of return by the supplies of Noticee after 01.05.2019. From the above referred table, it is clear that Noticee has not availed any ITC in excess of what was reflected in GSTR-2A. Hence, the impugned notice to that extent needs to be dropped.
11. 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 bought 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;”

12. 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.

13. 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.
14. 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.

15. 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.
16. 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.
17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.”

25. 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”*

26. 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*

27. Noticee further submits that the fact that there is no requirement to reconcile the invoices reflected in GSTR-2A vs GSTR-3B is also evident from the proposed amendment in Section 16 of GST Act, 2017 in Budget 2021-22. Hence, there is no requirement to reverse any credit.

28. Noticee further submit that the fact that there is no requirement to reconcile the invoices reflected in GSTR-2A vs GSTR-3B is also evident from the 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.
29. 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
30. Without prejudice to anything above, Noticee submits that No notice can be issued for mere difference in the Coloumn 8D of the GSTR-9 as the same was only for settlement purpose. The same was even clarified by the CBIC vide press release dated 03rd July 2019
- “Premise of Table 8D of Annual Return: There appears to be some confusion regarding declaration of input tax credit in Table 8 of the annual return. The input tax credit which is declared / computed in Table 8D is basically credit that was available to a taxpayer in his FORM GSTR-2A but was not availed by him between July 2017 to March 2019. The deadline has already passed, and the taxpayer cannot avail such*

credit now. There is no question of lapsing of any such credit, since this credit never entered the electronic credit ledger of any taxpayer. Therefore, taxpayers need not be concerned about the values reflected in this table. This is merely an information that the Government needs for settlement purposes. Figures in Table 8A of FORM GSTR-9 are auto-populated only for those FORM GSTR-1 which were furnished by the corresponding suppliers by the due date. Thus, ITC on supplies made during the financial year 2017-18, if reported beyond the said date by the corresponding supplier, will not get auto populated in said Table 8A. It may also be noted that FORM GSTR-2A continues to be auto-populated on the basis of the corresponding FORM GSTR-1 furnished by suppliers even after the due date. In such cases there would be a mismatch between the updated FORM GSTR-2A and the auto-populated information in Table 8A. It is important to note that Table 8A of the annual returns is auto populated from FORM GSTR-2A as on 1st May, 2019”.

Therefore, when there is a clear clarification issued by the Board stating that it is only for settlement purpose, issuing of the notice is not valid

31. Noticee craves leave to alter, add to and/or amend the aforesaid grounds

32. Noticee wishes to be heard in person before passing any order in this regard.

For, M/s. Modi Reality (Miryalaguda) LLP

Authorised Signatory