

Form GST DRC-06

[See rule 142(4)]

Reply to the Show Cause Notice

ARN: ZD361221025207W

Date: 08/12/2021

1. GSTIN	36ABCFM6774G2ZZ		
2. Name	MODI REALTY (MIRYALAGUDA) LLP		
3. Details of Show Cause Notice	Reference No. ZD361121025248S	Date of issue 14/11/2021	
4. Financial Year	2017-2018		
5. Reply			
Dear Sir, The reply in Form DRC-06 has been uploaded as an annexure. r equest you to consider the same and schedule the personal hearing at t he earliest			
6. Documents uploaded			
Miruyalaguda SCN Reply 2017-18_organized.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.

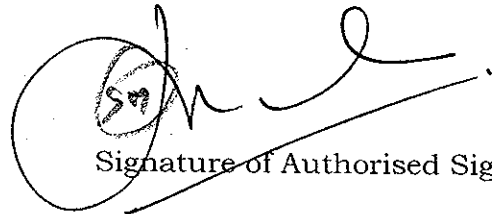
Signature of Authorized Signatory
Name : SOHAMMODI
Designation / Status: Designated
Partner
Date: 08/12/2021

FORM GST DRC - 06*[See rule 142(4)]***Reply to the Show Cause Notice**

1.GSTIN	36ABCFM6774G2ZZ	
2.Name	Modi Realty (Miryalaguda) LLP	
3.Details of Show Cause Notice	Ref. No. ZD361121025248S	Date of issue: 14.11.2021
4.Financial Year	2017-18	
5.Reply	Given as Annexure A	
6.Documents uploaded		
7.Option for personal hearing	Yes- Required	☐ No

8.Verification -

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



Signature of Authorised Signatory

ANNEXURE A:

FACTS OF THE CASE:

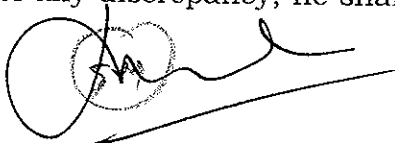
- A. M/s. Modi Realty (Miryalaguda) LLP (hereinafter referred as "Noticee") located at 5-4-187/3 and 4, Soham Mansion, 2nd Floor, M.G. Road, Secunderabad, Ranga Reddy, Telangana – 500003 is inter alia engaged in the provision of taxable services viz. Works Contract and are registered with Goods and Services Tax department vide GSTIN No: 36ABCFM6774G2ZZ.
- B. Noticee is availing Input Tax Credit (ITC) of taxes paid on inputs and input services and discharging taxes on output liability on timely basis by filing the monthly returns. Noticee has also filed the GSTR-09 for the period 2017-18 (July 2017 to March 2018).
- C. Subsequently, the Assistant Commissioner (ST), MG Road, Begumpet Division, has issued a Show Cause Notice vide ZD361121025248S dated 14.11.2021 proposing to demand an amount of Rs.6,46,661/-.
- D. In response to the above, Noticee herein makes the below submissions.

Submissions

1. Noticee submits that they deny all the allegations made in Show Cause Notice (SCN) as they are not factually/legally correct.
2. Noticee submits that the provisions (including Rules, Notifications & Circulars issued thereunder) of both the CGST Act, 2017 and the Telangana GST Act, 2017 are the same except for certain provisions. Therefore, unless a mention is specifically made to any dissimilar provisions, a reference to the CGST Act, 2017 would also mean a reference to the same provision under the TGST Act, 2017. Similarly, the provisions of CGST Act, 2017 are adopted by IGST Act, 2017 thereby the reference to CGST provisions be considered for IGST purpose also, wherever arises.

In Re: Impugned notice is not valid

3. Noticee submits that the impugned notice has been issued proposing to demand an amount of Rs. 6,46,661/- towards differences between the amounts declared in GSTR-01, GSTR-3B and GSTR-09 which shows that the issue is relating to discrepancy in returns filed by the Noticee.
4. In this regard, Noticee submits that Section 61 read with Rule 99 specifies that scrutiny of the returns shall be done based on the information available with the proper officer and in case of any discrepancy, he shall issue a notice to the



said person in FORM GST ASMT-10, under Rule 99(1), informing him of such discrepancy and seeking his explanation thereto. In case if the explanation provided by the Noticee is satisfactory, then no further action shall be taken in that regard. If the explanation provided is not satisfactory, then the proper officer can initiate appropriate action under Section 73 or Section 74.

5. However, in the instant case Noticee has not received any notice in FORM ASMT-10 requiring the Noticee to provide explanation for the discrepancy noticed in the returns. Instead, the proper officer has directly issued Form GST DRC-01 under Section 73 which shows that the impugned notice has been issued without following the procedure prescribed in Section 61 of CGST Act, 2017 and Rule 99 of CGST Rules, 2017.

Notice issued on assumptions and presumptions

6. Noticee submits that impugned SCN was issued with prejudged and premeditated conclusions on various issues raised in the notice. That being a case, issuance of SCN in that fashion is bad in law and requires to be dropped. In this regard, reliance is placed on *Oryx Fisheries Pvt. Ltd. v. Union of India* — 2011 (266) E.L.T. 422 (S.C.)
7. Noticee submits that the subject SCN is issued based on mere assumption and unwarranted inference, interpretation of the law without considering the intention of the law, documents on record, the scope of activities undertaken, and the nature of activity involved, the incorrect basis of computation, creating its own assumptions, presumptions. Further, they have arrived at the conclusion without actual examination of facts, provisions of the CGST Act, 2017. In this regard, Noticee relies on the decision of the Hon'ble Supreme Court in case **Oudh Sugar Mills Limited v. UOI, 1978 (2) ELT 172 (SC)**

Notice is vague and lack of details

8. Noticee submits that the impugned notice has not given clear reasons as to how the Noticee has availed the irregular credit, therefore, the same is lack of details and hence, becomes invalid. In this regard, reliance is placed on
 - a. *CCE v. Brindavan Beverages* (2007) 213 ELT 487(SC) the Hon'ble Supreme Court held that *"The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or*



unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice."

- b. Dayamay Enterprise Vs State of Tripura and 3 OR's. 2021 (4) TMI 1203 - Tripura High Court
- c. Mahavir Traders Vs Union of India (2020 (10) TMI 257 - Gujarat High Court)
- d. Teneron Limited Versus Sale Tax Officer Class II/Avato Goods and Service Tax & Anr. (2020 (1) TMI 1165 - Delhi High Court)
- e. Nissan Motor India Private Limited, Vs the State of Andhra Pradesh, The Assistant Commissioner (CT) (2021 (6) TMI 592 - Andhra Pradesh High Court)

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

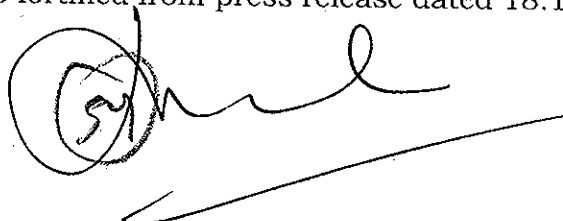
9. Noticee submits that the impugned notice has proposed to demand following amounts

SI No	Particulars	Amount
A	Excess ITC availed in GSTR-3B when compared to ITC reflected in GSTR-2A	1,98,947/-
B	Tax on outward supplies under declared in GSTR-09	4,14,430/-
C	ITC attributable to exempted and non-GST supply under Rule 42 of CGST Rules, 2017	33,283/-
	Total	6,46,661/-

In Re: No irregular availment of ITC

10. Noticee submits that the impugned notice has proposed to deny ITC of Rs. 1,98,947/- stating that the same is in excess of ITC reflected in GSTR-2A for the period 2017-18. In this regard, Noticee submits that the Noticee is rightly eligible for ITC for the following reasons

- a. 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.
- b. 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.
- c. Section 41 allows the provisional availment and utilization of ITC, there is no violation of section 16(2)(c) of CGST Act 2017
- d. The above view is also fortified from press release dated 18.10.2018



- e. 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
- f. Even if there is differential ITC availed, the same is accompanied by a valid tax invoice containing all the particulars specified in Rule 36 of CGST Rules and the payment was also made to the suppliers. Hence, the Noticee is rightly eligible for ITC.
- g. Noticee submit that under the earlier VAT laws there were provisions similar to Section 16(2) ibid which have been held by the Courts as unconstitutional. Relied on Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11-SC-VAT AND M/s Tarapore and Company Jamshedpur v. State of Jharkhand - 2020-TIOL-93-HC-JHARKHAND-VAT.
- h. **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 amendment in Section 16 of CGST Act, 2017 vide Section 100 of Finance Act, 2021. Hence, there is no requirement to reverse any credit in absence of the legal requirement during the subject period.**
- i. **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.**
- j. **Noticee further submits that the ITC proposed to be denied by the impugned notice is in the permissible limits of Rule 36(4), therefore, there is no irregular availment of ITC. Hence, the impugned notice needs to be dropped.**
- k. Noticee wish to rely on recent Madras High Court decision in case of M/s. D.Y. Beathel Enterprises Vs State Tax officer (Data Cell), (Investigation Wing), Tirunelveli 2021(3) TMI 1020-Madras High Court and Jurisdictional High Court decision in case of Bhagyanagar Copper Pvt Ltd Vs CBIC and Others 2021-TIOL-2143-HC-Telangana-GST

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In Re: No short payment of tax

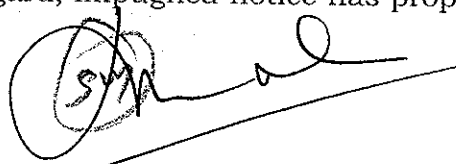
11. Noticee submits that the impugned notice has proposed to demand an amount of Rs. 4,14,430/- alleging that there is a difference between the taxes paid as disclosed in GSTR-09 returns and taxes paid as disclosed in GSTR-01 for the period 2017-18 (July 2017 to March 2018).
12. In this regard, Noticee submits that out of the total liability declared in GSTR-09 of Rs. 6,75,612/-, an amount of Rs. 58,908/- is relating to the amount paid under reverse charge mechanism. Therefore, the amount considered in SGTR-09 is the consolidated figure taken from GSTR-3B including reverse charge liabilities.
13. Further, Noticee submits that the amount of Rs. 8,82,827/- is pertaining to the outward supplies declared in GSTR-01. Notice submits that though the Notice is liable to pay only an amount of Rs. 6,46,158/- each of SGST and CGST, Noticee has paid an amount of Rs. 8,82,827/- each of SGST and CGST while filing the GSTR-3B returns for the disputed period. This has resulted in excess payment of GST of Rs. 2,36,669/- each of SGST and CGST. The workings of the same are as follows:

	CGST	SGST
As per GSTR-01	8,82,827	8,82,827
As per GSTR-09	6,46,158	6,46,158
Excess amount paid	2,36,669	2,36,669

14. Noticee submits that though the Noticee has declared the liability only of Rs. 6,46,158/- each of SGST and CGST, Noticee has paid an amount of Rs.8,8,2827/- which has resulted in excess payment of GST. The fact that the Noticee has paid the excess GST is also evident from Table 10 of the GSTR-09. Therefore, there is no under declaration of tax to the extent stated above. Hence, the demand to that extent needs to be dropped.

In Re: Reversal under Rule 42 is not required for the exempted and non-GST supply declared by the Noticee in the GSTR-09

15. Noticee submits that the impugned notice has stated that the Noticee has declared an amount of Rs.97,516/- as exempted turnover, however, not reversed any ITC attributable to exempted turnover under Rule 42 and 43 of the CGST Act, 2017. In this regard, impugned notice has proposed to deny ITC



of Rs. 33,283/- attributable to exempted and non-GST turnover under Rule 42 and 43 of the CGST Act, 2017.

16. In this regard, Noticee submits that the impugned notice is erroneous for the following reasons, thereby, the same needs to be dropped outrightly

- a. Impugned notice has not examined whether the turnover declared in table 5C, 5D, 5E and 5F of GSTR-09 is required to be considered for the purpose of reversal under Rule 42 and 43 of CGST Rules, 2017
- b. Impugned notice has considered the entire ITC availed during the period as the common credit whereas the reversal under Rule 42 and 43 is required to be made only on common ITC used for provision of both taxable and exempted turnover.

This shows that the impugned notice has been issued on incorrect basis and the same needs to be dropped.

17. Noticee submits that the details of the turnover declared in table 5C, 5D, 5E and 5F of GSTR-09 are as follows

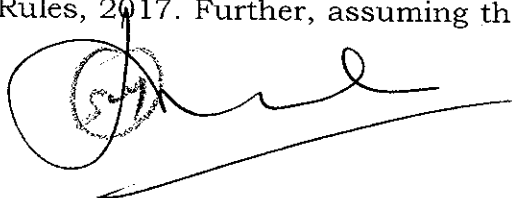
SI No in GSTR-09	Nature of supply	Amount
5C	Supplies on which tax is to be paid by the recipient on reverse charge	0
5D	Exempted	97,516
5E	Nil Rated	0
5F	Non-GST supply (includes 'no supply')	0
Total		97,516

18. With respect to amount declared in Table 5D as exempted supply, Noticee submits that the bifurcation of the same is as follows

S.No	Description of Service	Amount
A	Creditors written off	39,939
B	Interest from Fixed Deposits	57,577
	Total	97,516

Creditors written off

19. In this regard, Noticee submits that the amounts in respect of the creditors written off is neither supply of goods and nor supply of services. Therefore, the same shall not be considered as a supply at all. Once it is not a supply, then the same cannot be treated as an exempted supply for the purpose of reversal of ITC under Rule 42 of CGST Rules, 2017. Further, assuming that the ITC is



required to be reversed, no inputs or input services are used for writing off the creditors. Hence, the demand proposed to that extent needs to be dropped.

20. With respect to interest income, Noticee submits that Explanation 1 to Rule 43 reads as follows

Explanation 1: -For the purposes of rule 42 and this rule, it is hereby clarified that the aggregate value of exempt supplies shall exclude: -

a.

b. *the value of services by way of accepting deposits, extending loans or advances in so far as the consideration is represented by way of interest or discount, except in case of a banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances; and*

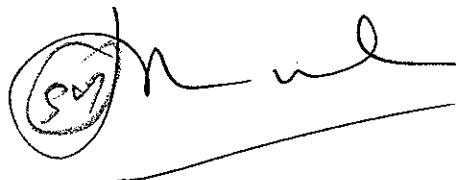
c.

Noticee submits that from the above referred explanation, it is clear that the value of services for which the consideration is represented by way of interest or discount shall be excluded from the aggregate value of exempt supplies for the purposes of reversal under Rule 42 and 43 of the CGST Act, 2017. Therefore, there is no requirement to reverse any ITC with respect to interest income received by the Noticee. Hence, the impugned notice to that extent needs to be dropped.

In Re: Interest and Penalties are not payable/impossible:

21. Noticee submits that Noticee is of vehement belief that the input availed by Noticee is not required to reverse, therefore, the question of interest and penalty does not arise. Further, it is a natural corollary that when the principal is not payable there can be no question of paying any Penalty as held by the Supreme Court in Prathiba Processors Vs UOI, 1996 (88) ELT 12 (SC).

22. Further, Noticee submits that the impugned show cause notice had not discharged the burden of proof regarding the imposition of the penalty under CGST Act, 2017. In this regard, wishes to rely on the judgment in the case of Indian Coffee Workers' Co-Op. Society Ltd Vs C.C.E. & S.T., Allahabad 2014 (34) S.T.R 546 (All) it was held that "It is unjustified in absence of discussion on fundamental conditions for the imposition of penalty under Section 78 of Finance Act, 1994".

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23. Noticee submits that Section 73(11) of the CGST Act, 2017 which provides for penalty in case of non-payment of self-assessed tax reads as follows

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax

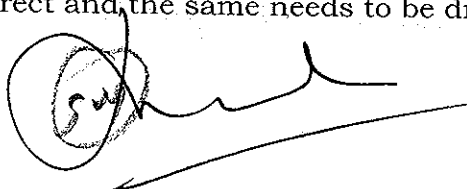
From the above referred sub-section, it is clear that the penalty is applicable only when any amount of self-assessed tax or any amount collected as tax has not been paid within a period of 30 days from the due date of payment of such tax. However, in the instant case the Noticee has paid the self-assessed tax and there is no delay in payment of tax. Hence, the penalty under Section 73(11) is not applicable in the instant case.

24. Noticee submits that the Supreme Court in case of CIT Vs Reliance Petro Products Pvt Ltd (SC) 2010 (11) SCC (762) while examining the imposition of penalties under Section 271(1)(c) of Income Tax Act, 1961 held that penalties are not applicable in similar circumstances.

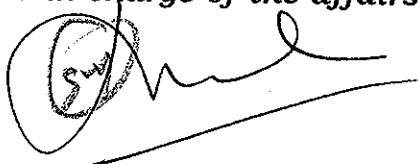
25. Noticee submits that from the above referred decision of the Supreme Court, penalties cannot be imposed merely because the assessee has claimed certain ITC which was not accepted or was not acceptable to the revenue when the assessee has acted on bonafide belief that the ITC is eligible. In the instant case also, Noticee has availed the ITC on bonafide belief that the same is eligible which was not accepted by the department. Therefore, in these circumstances the imposition of penalties is not warranted and the same needs to be dropped.

26. Noticee submits that it is pertinent to understand that the Supreme Court in the above referred case has held that the penalties shall not be imposed even though the mens rea is not applicable for imposition of penalties.

27. Noticee submits that GST being a new law, the imposition of penalties during the initial years of implementation is not warranted. Further, Noticee submits that they are under bonafide belief that ITC availed by them are eligible, thus, penalties shall not be imposed. Further, the government has been extending the due dates & waiving the late fees for delayed filing etc., to encourage compliance and in these circumstances imposition of penalties for claiming ITC on bonafide belief is not at all correct and the same needs to be dropped.

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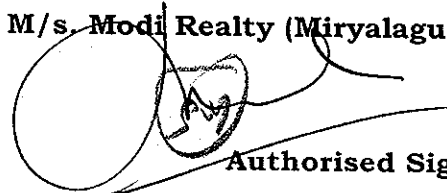
28. In addition to above, Noticee submits that where an authority is vested with discretionary powers, discretion has to be exercised by application of mind and by recording reasons to promote fairness, transparency and equity. In this regard the reliance is placed on the judgement of hon'ble Supreme Court in the case of *Maya Devi v. Raj Kumari Batra* dated 08.09.2010 [Civil Appeal No.10249 of 2003] wherein it was held that "14. *It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi-judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.*"
29. Noticee submits that the Supreme Court in case of **Hindustan Steel Ltd. v. State of Orissa —1978 [AIR 1970 SC 253]** while dealing with the similar facts wherein a mandatory penalty is prescribed without the concept of mens rea held that "*Under the Act penalty may be imposed for failure to register as a dealer: Section 9(1) read with Section 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. **Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that The offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company***



in failing to register the Company as a dealer acted in the honest and genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out

30. Noticee further submits that it was held in the case of Collector of Customs v. Unitech Exports Ltd. 1999 (108) E.L.T. 462 (Tribunal) that- ***"It is settled position that penalty should not be imposed for the sake of levy. The 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 a deliberate violation of the provisions of the particular statute."*** Hence, Penalty cannot be imposed in the absence of deliberate defiance of law even if the statute provides for a penalty
31. Noticee submits that the Supreme Court in case of Price Waterhouse Coopers Pvt. Ltd Vs Commissioner of Income Tax, Kolkata S.L.P.(C) No.10700 of 2009 held as follows
- "20. We are of the opinion, given the peculiar facts of this case, that the imposition of penalty on the assessee is not justified. We are satisfied that the assessee had committed an inadvertent and bona fide error and had not intended to or attempted to either conceal its income or furnish inaccurate particulars."*
32. Notice submits that from all the above submissions, it is clear that imposition of penalties is not warranted therefore the impugned notice needs to be dropped.
33. Noticee craves leave to alter, add to and/or amend the above reply.
34. Noticee would also like to be heard in personal, before any Notice being passed in this regard.

For M/s. Modi Realty (Miryalaguda) LLP



Authorised Signatory