

Form GST DRC-06

[See rule 142(4)]

Reply to the Show Cause Notice

ARN: ZD360623038526A

Date: 28/06/2023

1. GSTIN	36AAHFB7046A1ZT		
2. Name	B & C ESTATES		
3. Details of Show Cause Notice	Reference No. ZD361121003679L	Date of issue 12/11/2021	
4. Financial Year	2017-2018		
5. Reply			
Dear Sir, Please Consider Additional Submissions for the FY 2017-18 against SCN Ref No.ZD361121003679L			
6. Documents uploaded			
Additional submissions_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: 28/06/2023

Date: 28.06.2023

To
The Deputy Commissioner (ST),
Begumpet Division,
6-3-789, 6th Floor,
Pavani Prestige, Ameerpet,
Hyderabad - 500016.

Sub: Additional Submissions to Show Cause Notice Reply dated 06.12.2021.

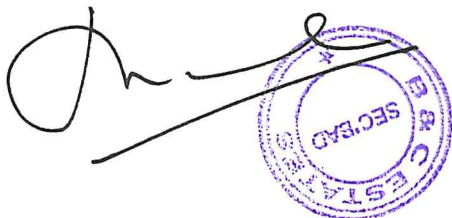
Ref:

- a. Reply to Show Cause Notice in DRC-06 dated 06.12.2021
- b. Show Cause Notice vide reference no. ZD361121003679L dated 12.11.2021 for the period 2017-18

1. We would like to submit that we have received the above referred Show Cause Notice requiring us to submit a reply. Accordingly, we have submitted a reply on 06.12.2021.
2. In continuation to submissions made in above referred reply, Noticee submits the following submissions. Noticee submits that the government vide Notification 11/2017 – Central tax (Rate) dated 28.06.2017 have notified that value of supply of construction services shall be equivalent to the total amount charged for such supply less 1/3rd of the total charged for such supply. For ease of reference, the relevant portion of the Notification is extracted below:

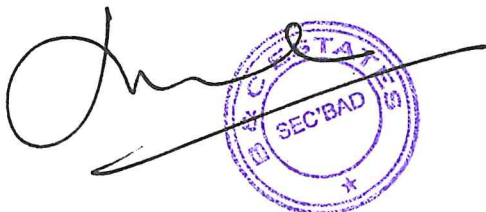
“2. In case of supply of service specified in column (3), in item (i); 88 [(i) (ia), (ib), (ic), (id), (ie) and (if)] against serial number 3 of the Table above, involving transfer of land or undivided share of land, as the case may be, the value of such supply shall be equivalent to the total amount charged for such supply less the value of transfer of land or undivided share of land, as the case may be, and the value of such transfer of land or undivided share of land, as the case may be, in such supply shall be deemed to be one third of the total amount charged for such supply.

Explanation. –For the purposes of this paragraph 89 [and paragraph 2A below], “total amount” means the sum total of,-



- (a) consideration charged for aforesaid service; and*
(b) amount charged for transfer of land or undivided share of land,
as the case may be including by way of lease or sublease.”

2. Noticee submits that the above referred SI No.02 in the Notification provides that the value of supply of construction services involving transfer of land or undivided share of land shall be equivalent to the following:
- Total amount charged for such supply less (-)
 - Value of transfer of land or undivided share of land and
 - The value of such transfer of land or undivided share of land in such supply shall be deemed to be 1/3rd of the total amount charged
3. Noticee submits that from the above referred paragraph, it is clear that the value of supply in case of construction services is only the 2/3rd of the total amount charged from the customer and the balance amount shall not be considered as value of supply. Once such value is not received towards any supply under CGST Act, 2017, the same goes out of the purview of GST and the same cannot be considered as exempt supply for the purpose of Rule 42 of CGST Act, 2017.
4. The 1/3rd land deduction is only an adjustment in valuation prescribed under Section 15 of the CGST Act, 2017. Therefore, the same shall not be considered as exempted turnover for the purpose of Rule 42 of CGST Act, 2017. In this regard, reliance is placed on
- Gateway Hotels Vs CCE, Cochin 2020 (37) GSTL 210 (Tri-Bang) wherein it was held that “6..... Further we find that as per Rule 2C of Service Tax (Determination of Value) Rules, 2006, value of service portion involved in supply of food or any other article of human consumption or any drink in a restaurant has been fixed as 40% of the total value on the condition that Cenvat credit on inputs classified under Chapters 1 to 22 of CETA, 1985 are not taken. Further we find that when the statute itself prescribes a percentage as total value as the value of service, the remaining portion of the value would neither be considered as an abatement nor as an



exemption and accordingly we hold that the restaurant service would not be covered under the definition of input service and hence the provisions of Rule 6 of CCR are not applicable.”

- b. Sundaram Finance Ltd Vs CCE, Chennai 2018-TIOL-3288-CESTAT-MAD
 - c. Gautam Sahakari Bank Ltd Vs CCE 2019 (20) GSTL 584 (Tr-Bom)
 - d. Popular Caterers Vs CCE 2019 (27) GSTL 545 (Tri-Bom)
 - e. Order-in-Original No. MUM/CGST/MW/COMMR/AK/44-46/2020-21 dated 26.02.2021
5. Noticee further submits that Section 16 of the CGST Act, 2017 provides the eligibility and conditions for availing the credit whereas Section 17 of the CGST Act, 2017 provides for Apportionment of credits and blocked credits. Section 17(1), 17(2) and 17(3) which provides for apportionment of credit reads as follows:

17. Apportionment of credit and blocked credits: —

(1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed, and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

Explanation— For the purposes of this sub-section, the expression value of exempt supply“ shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said



Schedule;

6. Section 17(1) provides that ITC on inputs and input services which are partly used for business purposes and partly used for non-business purposes shall be restricted to so much of ITC attributable to business purpose.
7. Further, Section 17(2) provides that ITC on inputs and input services which are partly used for taxable supplies and partly used for exempted supplies shall be restricted to ITC attributable to taxable supplies. What is meant by exempt supply is defined in Section 2(47)

2(47) –exempt supply means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11, or under section 6 of the Integrated Goods and Services Tax Act, and includes nontaxable supply;

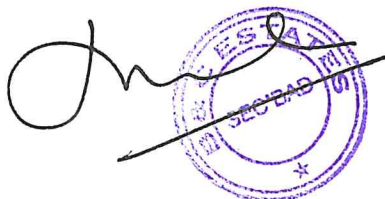
8. The above referred definition contains 3 limbs as follows:

Exempt supply means

- a. Supply of goods or services which attracts Nil rate of tax or
- b. Supply of goods or services which may be wholly exempt from tax under Section 11 or under Section 6 of IGST Act and
- c. Includes non-taxable supply

9. In this regard, it is important to understand the following aspects:

- a. With respect to 1st limb, it is pertinent to understand that the construction and sale of residential apartment or commercial area attracts GST, therefore, the same cannot be considered as attracting Nil rate of tax.
- b. With respect to 2nd limb, it is pertinent to understand that 1/3rd value has been given as deduction from the value of supply under Section 15 of CGST Act, 2017 and was not exempted from payment of GST under Section 11 of CGST Act, 2017. Further, even assuming it as exemption, the service of construction of residential complex and commercial area were not wholly exempted from



payment of GST. Therefore, the same does not get covered under 2nd limb.

10. With respect to 3rd limb i.e., non-taxable supply was defined in Section 2(78) as follows

(78) –non-taxable supply means a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act;

This shows that the activities which are not at all leviable to GST are covered under Non-taxable supply definition. However, in the instant case the services of construction of residential complex and commercial area are leviable to GST. Hence, this limb is not applicable in the instant case.

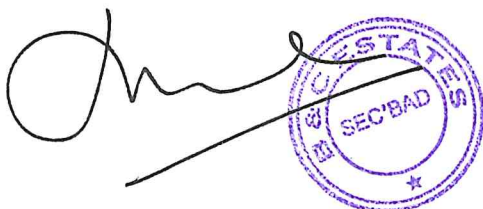
11. From the above referred explanation, it is clear that the instant transaction is not covered under the definition of exempt supply, thereby, the value of land deduction shall not be considered as exempt supply for the purpose of reversal of ITC under Rule 42 of CGST Act, 2017.

12. Further, Noticee submits that definition of taxable supply as per section 2(108) of the CGST Act, 2017 as follows

“taxable supply” means supply of goods or services or both which is leviable to tax under this Act.

13. Noticee further submits that adjustment in valuation will not change the transaction from taxable supply to exempt supply. The taxable supply definition covers goods or services which are leviable to tax i.e., goods or services on which tax is levied or which attracts tax. The question of how much tax is to be paid is to be determined as per Section 15 of the CGST Act, 2017 and the valuation rules.

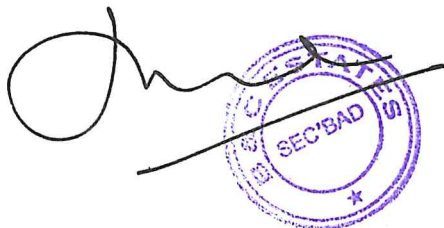
14. In this regard, Noticee submits that the supply of construction services are leviable to tax and are to be treated as taxable supply. The 1/3rd portion of the land is only given by way of adjustment in the valuation. It cannot be treated as exempt supply. Noticee submits that taxability and valuation are two different



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aspects and cannot be mixed together. Once it is taxable, there is no question of considering the same as exempt unless it is exempted by way of notification or nil rate of tax.

15. Further, in case of joint development agreements, the landowner would be owning the land and having the title over the land. As per the development agreement, the landowner shall transfer the title of undivided share of land to the customer at the time of entering into sale deed wherein the land owner shall transfer the title to undivided share of land. The developer would be merely transferring the land to the customer without having title to the land. Therefore, the transfer of land by the developer shall not be considered as outright sale of land as the developer is not having any title to the land.
16. The explanation to Section 17(3) includes the sale of land per se but does not include the transfer of land by the developer as both are completely different. Sale of land involves the transfer of title to land whereas the transfer of land does not include transfer of title to land. Therefore, mere transfer of land is not covered under explanation to Section 17(3) as the same is not a sale of land. In case of construction of residential complex, the developer would be transferring the Undivided Share of Land, the title of which cannot be transferred to any individual flat owner. Since the title cannot be transferred to anyone, the same would not be considered as sale of land for the purpose of Rule 42 reversal.
17. Considering the fact that the developer would not be having the title to the land, the Notification has also used the words “transfer of land or undivided share of land” everywhere in SI No.02 to Notification No. 11/2017-CT (R) dated 28.06.2017. Therefore, mere transfer of land or undivided share of land by the developer should not be considered as outright sale of land to bring within the purview of inclusions of Section 17(3) of CGST Act, 2017. Once it is not covered in Section 17(3), there is no requirement to reverse ITC as per Rule 42 of CGST Rules, 2017.
18. Further, Noticee submits that section 17(3) extends the meaning of 'exempt supplies' for the purpose of section 17(2). The said Section 17(3) includes 4 specific transactions in the ambit of 'exempt supplies' [of course over and above

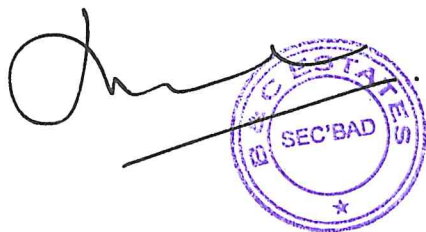
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the supplies covered by Section 2(47)]. Although 'sale of land' is included, the legislature has not included 'undivided share of land' within the ambit of exempt supplies. **There is a difference between 'land' and 'undivided share of land'.** The GST Law also recognizes such difference. It is because the law recognizes such difference, Rate Notification explicitly mentions both 'land' and 'undivided share of land' separately. When 'undivided share of land' is not mentioned in Section 17(3), interpretation can be made that exempt supply for the purpose of Section 17(2) read with Rule 42 doesn't include the 'undivided share of land' and therefore the same cannot be considered as exempt supply for the purpose of Rule 42 of CGST Act, 2017.

19. Noticee submits that the impugned notice is self-contradictory in as much as the impugned order on one side has considered the supplies made by the Noticee are covered under Entry 5(b) of Schedule-II of CGST Act, 2017 and on the other hand it has stated that the amount disclosed under non-GST category is covered under Schedule -III of CGST Act, 2017.
20. Noticee submits that the activity carried out by the Appellant is covered under Entry 5(b) of Schedule-II which reads as follows *“construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier”*
21. Noticee submits that the impugned order has not disputed the fact that the Noticee is engaged in construction of building service and had collected the GST under the category “construction of complex, building” whereas when it comes to input tax credit, the impugned order had considered the 1/3rd value declared under the category “non-GST supply” as a separate transaction of sale of land.
22. Noticee submits that when the classification of the output is not disputed there is no question of changing the classification for the purpose of reversal of ITC under Rule 42 of CGST Rules, 2017 read with Section 17(3) of CGST Act, 2017. This shows that the impugned notice is not correct and the same needs to be dropped.

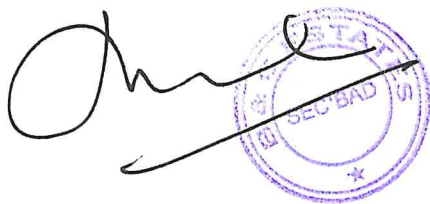


23. Noticee submits that with respect to Section 17(3) which provides that value of sale of land shall be included for the purpose of reversal under Rule 42, it should be noted that the same includes only the outright sale of land and do not include the transfer of land in the composite transaction of construction services.
24. Noticee submits that 'sale of land' is specifically included as 'exempt supply' under section 17(5) but with reference of Schedule III of the CGST Act, 2017 which does not cover the cases of 'transfer of land' or 'undivided share of land' along with constructed flat/house thereby the reference of Schedule III in Section 17(3) shall be limited to the pure cases of land sales and not the present cases of transfer of land along with construction which is specifically excluded from the Schedule III.
25. It is also to be noted that the agreement between the transacting parties is to sell flat. Neither the seller intentionally attempts to sell, nor the buyer intentionally attempts to buy the undivided share of land. When the intent of the transacting parties is never to deal in undivided share of land, transfer of right over the same can only be considered as incidental and unavoidable. Therefore, in such circumstances, the 1/3rd portion cannot be considered as sale of land and cannot be treated as exempt supply in terms of Section 17(3) and hence reversal requirement doesn't arise.
26. Further, Noticee submits press releases issued at various instances asserts that builders eligible for full ITC unlike pre-GST regime while stressing that effective rate is 12%. The 5% scheme rate was also given calculating the full ITC available with effective rate of 12%
27. In this regard, Noticee submits the relevant extracts of the agenda for the 34th GST Council Meeting
- "25.33. The Hon'ble Chairperson explained that apart from NBCC and CPWD, he obtained the information from certain reputed builders of Delhi and Mumbai who were operating in a structured transparent manner. They had also submitted that their Input Tax Credit came to 7% - 8% and therefore, tax rate of 5% and 3% were verified by them which seemed to*



corroborate the figures except the fact that the 3% on 'Affordable Housing' segment seemed to be higher. It was confirmed by not only the Fitment Committee but by the Hon'ble Minister from Chhattisgarh and other independent enquiries from the persons involved in the sector. Thus, the tax rate of 5% and 1% without ITC would be revenue neutral in the current situation. The Hon'ble Minister from Tamil Nadu stated that their State agreed to the resolution of the Council on the taxation of Affordable and non-Affordable houses."

28. Noticee further submits that even the amendment to Rule 42 of CGST Rules, 2017 requiring the reversal of ITC has not considered anything about the reversal of ITC with respect to 1/3rd land deduction. The amended Rule provides that ITC shall be reversed proportionate to SFT which was unsold as on the date of receipt of Completion Certificate. Even this shows that the government is not having any intention or objective to consider the 1/3rd land deduction for the purpose of ITC reversal. Hence, the impugned order needs to be set aside on this count also.
29. Noticee submits that the Reversal under Section 17(3) read with Rule 42 of CGST Rules, 2017 provides that the ITC is required to be reversed only on common input tax credit but not on the entire credit availed by the Noticee.
30. In this regard, it is pertinent to examine Rule 42 of CGST Rules, 2017 wherein it requires for proportionate reversal of input tax credit availed on inputs and input services used for providing both taxable and exempted supplies. For arriving at the common input tax credit, Rule 42 requires the registered person need to exclude the ITC availed on input and input services which are exclusively used for exempted supplies, ITC availed on inputs and inputs services exclusively used for taxable supplies. The balance ITC after above referred exclusions is the common credit i.e, ITC availed on inputs and input services which are commonly used for both taxable and exempted supplies.



31. Noticee submits that the impugned notice while proposing the demand had considered the entire ITC availed by the Noticee as common credit which is factually not correct. Noticee submits that all the inputs and inputs services are used for the purpose of construction services on which Noticee has discharged the GST appropriately. There are no common inputs and input services except the head-office expenditure such as auditor services, consultancy services etc which would be very minor. Therefore, the reversal if any shall be restricted to the common inputs and inputs services and not on the entire ITC availed by the Noticee.
32. Noticee submits that the impugned notice has wrongly assumed that the entire ITC as common ITC more so when the department is having all the details of inputs and input services received by the Noticee. The inward supplies include the construction materials such as steel, cement, consultancy services, electrical goods etc. All these inward supplies are used for the purpose of constructions and no way related to the land. When the department is having all the details of inward supplies, the assumption of considering the entire ITC as common is not at all correct and the same needs to be set aside.
33. Based on the above referred submissions, it is clear that there is no requirement to reverse the ITC with respect to 1/3rd deduction claimed in accordance with Notification 11/2017 – Central tax (Rate) dated 28.06.2017. Hence, the impugned notice to this extent needs to be dropped.
34. Noticee request your good self to consider the same before passing of any order in this regard.

We shall be glad to furnish any further information/clarification required in this regard. Kindly acknowledge the receipt of the above and do the needful.

Thanking you,

Yours Truly

For M/s. B & C Estates

Authorized signatory

