O/C

IN THE HIGH COURT OF JUDICATURE
FOR THE STATE OF TELANGANA AT HYDERABAD
(SPECIAL ORIGINAL JURISDICTION)

W.P.NO. 22193 OF 2020

BETWEEN:

Mehta & Modi Realty Kowkur LLP,
Rep., by Mr. Mangilipellli Jayaprakash
Registered Office at 5-4-187/3/4
Soham Mansion, IInd Floor,
MG Road, Secunderabad-500003 ....Petitioner

AND

1. **Union of India**
Ministry of Finance,
Department of Revenue,
Rep by its Secretary (Revenue)
Room No. 46, North Block
New Delhi110001

2. **The State of Telangana**,
Rep. by its Principal Secretary,
Revenue (CT) Department,
Telangana Secretariat,
Hyderabad.

3. **Goods and Services Tax Council**
Rep. by its Secretary
Office of the GST Council Secretariat
5th Floor, Tower II, Jeevan Bharti Building,
Janpath Road, Connaught Place,
New Delhi-110001

4. **Commissioner of Central Goods and Services Tax,**
Secunderabad GST Commissionerate,
Room No. 800, 7th Floor, GST Bhavan,
Hyderabad, Telangana State- 500004

5. **Chief Commissioner of GST Hyderabad**,
GST Hyderabad Zone,
Kendriya Shulk Bhavan,
L.B. Stadium Road, Basheer Bagh,
Hyderabad-500004, Telangana State

6. **Commissioner of State Tax**,
CT Complex, Nampally, Hyderabad-500001 ...Respondents

M. JP

AFFIDAVIT

I, Mangilipelli Jayaprakash, S/o.M. Venkataiah, aged forty five years, working as the Senior Manager of the Petitioner LLP having its office at 5-4-4187/3/4 Soham Mansion, IInd Floor, MG Road, Secunderabad-500003 , do hereby solemnly affirm and state on oath as follows:

1. I am working as the Senior Manager of the Petitioner LLP herein and as such I am well acquainted with the facts of the case and swear to the contents of this affidavit.

2. The present writ petition challenges two Notifications-- Notification 3/2019- Central Tax (Rate) amending No. 11/2017- Central Tax (Rate) dated 28th June 2017 *and* the equivalent State Notification ("**Impugned Notifications**") as being *ultra vires* the Central Goods and Services Tax Act, 2017 ("**CGST Act**") and the Telangana Goods and Services Tax Act, 2017 ("**TGST Act**") respectively since they deny input tax credit ("**ITC**") to the supplier while discharging their tax liability. The Impugned Notifications are violative of the foundational principle and the Parliamentary purpose of the GST regime which is to ensure seamless flow of ITC to the supplier and eliminate the cascading effect of taxes. This seamless flow of ITC promotes transparency and reduces tax evasion since every supplier in the product chain gets the benefit of ITC while discharging their tax liability. This entitlement of ITC has also been statutorily guaranteed under the CGST Act and the TGST Act which cannot be taken away by way of notifications. As such, the Impugned Notifications are unconstitutional, manifestly arbitrary, violates Article 14 and 19(1)(g) of the Constitution of India and also the provisions of the CGST Act. Copies of the Impugned Notifications are annexed as **Annexures P-1 and P-2.** The Petitioner submits that the

M. J.P

equivalent Impugned state Notification (Notification No.3/2019- State Tax (Rate), GOM No. 63, Dated 04 June 2019) is also *ultra vires* for the same reasons as stated above.

Background of the Petitioner

3. The Petitioner is a limited liability partnership incorporated in 2018 and is engaged in supplying construction services. The Petitioner is a registered dealer under the CGST Act and has been discharging its tax obligations in accordance with law. The Petitioner is an associate/group company of Modi Properties Pvt. Ltd., a company that is in the business of development of middle income housing for over two decades. The group has completed more than 4,000 flats & villas till date and is currently developing about three million square feet of residential and commercial space in over ten projects in this State.

4. The Petitioner is developing a two-acre land under a joint development project where one hundred and nineteen flats are ultimately being constructed as per the necessary permissions and approvals. The Petitioner craves leave to produce and rely upon the necessary documents in relation to the above at the time of hearing. A copy of the joint development project is enclosed herewith as **Annexure P-3.**

Introduction of the GST regime in India

5. Unlike direct taxes, the cost of the indirect taxes is passed on to the next buyer in the product chain and eventually to the end consumer of the finished product. This led to taxes being levied on products, whose components have already suffered taxes, leading to levy of tax on tax already paid (i.e. the "cascading effect of taxes").

M. J.

6. Input tax credit, or ITC, was introduced in the Central and various State legislations to avoid this cascading effect of taxes. ITC is the process of offsetting the tax on inputs borne by an assessee against its tax liability on the output. In other words, tax is only levied on the value addition at each stage of the product chain. ITC was introduced in several indirect tax regimes including Central Excise, Service Tax, State Value Added Tax and Central Sales Tax.

7. However, the ability to avoid the cascading effect of taxes ITC under each of the above statutes was limited since they only allowed offsetting of tax liability under *that statute*. Thus, under the old regime, an assessee could not utilise ITC accumulated in relation to excise duty borne by it for offsetting its liability under the state VAT regime.

8. To overcome this problem, the Union of India created a "one tax system", i.e. the Goods and Services Tax system to enable an assessee to avail ITC for any supply of goods or services. The issues of unavailability of ITC and how the GST regime addresses the same are well documented in several reports prepared by Parliamentary Committees (such as the Standing Committee on Finance, the Select Committee). The relevant extracts from three such reports prepared by (a) the Parliamentary Standing Committee on Finance; (b) the Select Committee of the Rajya Sabha; and (c) the Empowered Committee of State Finance Ministers are enclosed as **Annexures P-4, P-5 and P-6**.

9. This GST regime was introduced by way of One hundred and First Constitutional Amendment, which was duly ratified by the state governments. Pursuant to Article 269A of the Constitution, the Central Government enacted the CGST Act and the State Government of Telangana introduced the Telangana Goods and Services Tax Act, 2017

(i.e. the TGST Act). Both under the CGST Act and the TGST Act, every supplier, subject to few conditions, was entitled to avail of Input tax Credit on goods or services supplied to him and which have suffered tax. Any tax paid at the earlier stage of the production distribution chain is set off at the final stage of supply of goods and services.

10. Under Section 16 (1) of the CGST Act, every registered person is ***entitled*** to take credit of the tax on his inputs, subject to prescribed restrictions, conditions and stated exclusions. These conditions and restrictions are provided under Sections 16(2) to 16 (4), Sections 18 to 21 and Section 49 The relevant extract of Section 16(1) is reproduced below-

> *"16. Eligibility and conditions for taking input tax credit- (1) Every registered person* ***shall,*** *subject to such conditions and restrictions* ***as may be prescribed*** *and in the manner specified in section 49, be* ***entitled to take credit of input tax*** *charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person."* [Emphasis supplied]

11. The only *prohibition* to taking ITC are in cases of specific supplies that have been expressly identified under Section 17 (5) of the CGST Act. The Petitioner submits that the present case does not fall under any of the prohibitions specified under Section 17(5).

12. Apart from the above statutory conditions, restrictions and prohibitions, the Respondent No.1 can "**prescribe**" further conditions and restrictions. The word "prescribed" has a specific connotation and has been

M. J.

expressly defined to mean Rules under the CGST Act on the recommendations of the Council. The relevant extract of Section 2(87) is reproduced below:

> "*'prescribed' means prescribed by **rules** made under this Act on the recommendations of the Council;*" [Emphasis added]

13. Thus, a registered person has been guaranteed a statutory entitlement to ITC so long as he fulfils the conditions prescribed under the CGST Act as well as those prescribed under any Rules notified by the Respondent No.1 *and* the supply does not fall under the prohibited list of supplies under Section 17(5). The CGST Act does not provide for any other manner of taking away a registered person's ITC entitlement.

14. The Petitioner further submits that the above referred entitlement is also the case under the TGST Act. Section 16(1) of the TGST Act is identical to Section 16(1) of the CGST Act. Further, the prohibition under Section 17(5) under the CGST Act along with the limited scope for prescribing restrictions only by way of rules are also the same under the TGST Act.

<u>GST on Construction Services</u>

15. As stated above, the supply in question, i.e. construction of residential apartments in a "residential real estate project" ("**Construction Services**"), does not fall under the list of prohibited supplies under Section 17 (5).

16. The effective GST rate on Construction Services was originally notified at an effective rate of 18% under Notification 11/2017-Central Tax (Rate) dated 28 June 2017 (**"Notification 11/2017"**) (i.e. 9% under CGST and 9% under the state GST). Crucially, there was no prohibition on taking ITC. The Notification 11/2017 also provided for a deemed value of land-

- one-third of the total consideration, which was to be deducted from the total consideration making the effective GST rate 12%. A copy of Notification 11/2017 is annexed as **Annexure P-7.** The Respondent No.2 issued an equivalent Notification under the TGST Act. (**Annexure P-8**)

17. Thus, if the total consideration of a constructed residential flat was INR 1,00,000/-, an amount equivalent to one third of INR 1,00,000/- was allowed to be deducted before applying the GST rate of 18% (*or 12% on INR 1,00,000/-*). which was passed on to the buyer. However, the registered supplier of Construction Services was entitled to take and offset ITC available for GST borne by it on its inputs such as cement, bricks, iron, sand etc. The benefits to the real estate sector from GST and specifically from the availability of ITC was highlighted by the Respondent No.1 in its Press Release dated 15 June 2017. (**Annexure P-9**)

18. On 29 March 2019, the Respondent No.1 issued the Impugned Notification which reduced the effective GST rate from 12% to 5% but ***prohibited the supplier from taking ITC.*** This scheme was applicable for projects that commence on or after 1 April 2019. In relation to the effective rates, the Tax Research Unit, Department of Revenue functioning under Respondent No.1 has clarified the same by FAQ F.NO. 354/32/2019-TRU dated 7 May 2019, a copy of which is enclosed as **Annexure P-10.**

19. Notably, the Impugned Notification allows for the prior effective rate of 12% with ITC in cases of "ongoing projects" where the promoter has exercised a one time option in the specified form by 10 May 2019. A

number of conditions have been prescribed for determining whether the project is ongoing as on 31 March 2019. However, ***no such choice*** is provided to a developer where the project has commenced after 1 April 2019.

20. The Impugned Notification also requires the promoter to procure 80% of the value of input and input services used supplying the service from registered suppliers alone. In addition, where the value of input or input services received from registered suppliers falls short of the above threshold of 80%, tax shall be paid by the promoter on such shortfall at 18% on reverse charge basis and the provisions of CGST Act shall apply to the developer as if he is the person liable for paying tax in relation to supply of such inputs. The developer is required to maintain a project wise account of inward supplies from registered and unregistered suppliers and calculate tax payments on the shortfall by the end of the financial year and shall be submitted in the specified form in the timelines provided. The developer is also required to report ITC not availed as ineligible credit in the specified GSTR -3B.

21. Significantly, the Petitioner submits that the above threshold of 80% automatically means that 20% of goods and services can be purchased without bill/invoice. Dishonest promoters will more likely than not ensure that the 20% of the goods and services are availed without bill/invoice to reduce incidence of GST. Cost of works like excavation, fill back, rock cutting, etc., which are typically undertaken by unregistered contractors, at the start of the project result in exceeding the 20% threshold limit, as no construction activity can happen without ground clearance. Promoters are encouraged to pay these amounts by way of un-accounted cash to avoid 18% GST under RCM. Thus,

promoters are encouraged to manipulate accounts in financial years where the threshold of 20% is breached, by transferring amounts paid towards works done, to advances paid and billing is done in the next financial year.

22. In addition, *there is no corresponding tax reduction* on the inputs for the supplier resulting in an unbalanced tax structure to the detriment of such supplier. Thus, under the Impugned Notification, if the total consideration was INR 1,00,000/-, the supplier is now required to collect 5% GST on the total consideration as opposed to 12% under Notification 11/2017. However, any benefit of reduced tax is instantly negated since the supplier continues to bear the burden of GST on inputs such as cement, steel, sand and iron passed on by the input goods suppliers and the construction service supplier is now prohibited from taking the ITC.

23. The Petitioner submits that at the hands of an honest developer, the loss of ITC completely negates and exceeds any benefit of the lowered GST rate. There is no reason as to why construction service suppliers such as itself have been singled out to bear this additional cost while all the others in the product chain (i.e. the input goods / service providers) continue to get the benefit of ITC.

24. The Petitioner submits that unlike the input suppliers, an attempt to pass on the cost of the lost ITC to the buyer is likely to be scrutinized as "profiteering" under Section 171 of the CGST Act.

25. Aggrieved and gravely prejudiced by the Impugned Notification, the Petitioner is challenging the same on the following grounds which are without prejudice to each other.

M-SG

GROUNDS

26. At the outset, the Impugned Central Notification is *ultra vires* Section 16 of the CGST Act since it takes away the statutory entitlement of ITC guaranteed thereunder.

27. Similarly, the Impugned State Notification is *ultra vires* Section 16 of the TGST Act because it takes away the statutory entitlement of ITC guaranteed thereunder.

28. The Impugned Notifications are violative of the well settled principle that a subordinate legislation are meant only for the purpose of carrying out the provisions of the statute and *not to take away what was conferred by the statute*. (*See CIT AP v. Taj Mahal Hotel*)1971) 3 SCC 550).

29. The Impugned Notifications are *ultra vires* Section 16(1) of both the CGST Act and SGST Act since they has been issued by Respondent Nos.1 and 2 in excess of their jurisdiction. Section 16(1) only empowers the Respondent Nos.1 and 2 to prescribe "conditions and restrictions" for availing ITC. The Respondent Nos.1 and 2 have not been conferred with power to take away the ITC entitlement by the Impugned Notifications.

30. The Impugned Notifications are *ultra vires* the CGST Act and SGST Act since they defeat the very purpose of the GST regime, i.e. the seamless flow of credit from the first to the final stage of supply. It is settled law that subordinate legislation cannot be contrary to the manifest objective of a statute.

M. J. [illegible]

31. The Impugned Notifications are also violative of the settled law that subordinate legislations such as notifications cannot tread and legislate on the field covered by the parent statute. *(See Agricultural Market Committee v. Shalimar Chemical Works Ltd.* (1997 5 SCC 576 at Para 26). The Petitioner submits that Section 16 is a self-contained code and the parent legislation with respect to ITC. Moreover, Section 17(5) of the CGST Act and the SGST Act provide for supplies where ITC is prohibited. The Respondent Nos.1 and 2 cannot create a parallel regime for ITC under the Impugned Notifications.

32. Without prejudice to any of the above, the Impugned Notifications are also *ultra vires* Section 16(1) of the CGST Act and SGST Act since any additional restrictions or conditions can only be introduced by bringing into effect Rules under the CGST Act and the SGST Act under Section 16(1) read with Section 2(87) under the respective enactments. Any condition or restriction, let alone a prohibition by way of a notification, is violative of Section 16(1).

33. It is well settled that taxing provisions are required to be interpreted strictly. Thus, when the governing statute on ITC, i.e. Section 16 (1) allows for restrictions only by way of Rules under the CGST Act and the SGST Act, the Respondent Nos.1 and 2 cannot prohibit ITC by way of the Impugned Notification.

34. The Impugned Notifications are also contrary to the settled principle that machinery provisions in tax cannot be provided by way of notifications or circulars and can only be done so either by the statute or the _rules_ framed under the statute. Taxation by any other way is unreasonable and contrary to

M-

Article 265 of the Constitution of India. *(See Larsen and Toubro v. State of Orissa* (2008) 12 VST 31 (Orissa) upheld by the Hon'ble Supreme Court in *CCE v. Larsen and Toubro* (2016) 1 SCC 270 at Para 37).

35. Here, the machinery for ITC in Construction Services is provided by way of the Impugned Notification and not by the CGST Act or any Rules framed thereunder. Therefore, the Impugned Notifications prohibiting ITC is *unltra vires* the CGST Act and the SGST Act and are liable to be set aside.

36. The Petitioner submits that the Impugned Notifications prohibiting ITC contrary to the letter and spirit of GST which is to provide a continuous chain of set-off from the original producer's point and service provider's point upto the retailer's level eliminating the burden of cascading effects of all several indirect taxes.

37. The Impugned Notifications denying ITC also encourage black economy encouraging unscrupulous builders to find and exploit loopholes or to procure inputs without bills / invoices. On the other hand, honest suppliers such as the Petitioner are penalized by bearing the burden of input tax. The Petitioner submits that the original GST regime under 2017 led to supplies without bills/invoices coming to a stop since there was no incentive for developers to buy material without bill/invoices. However, pursuant to the Impugned Notifications, suppliers have once again slowly started providing material without bill/ invoices.

38. Without prejudice to any of the above submissions, the Petitioner submits that the Impugned Notifications fail to provide an option to builders to pay the higher rate of tax while taking ITC. Providing the option to the builder

to adopt a lower rate without ITC or a higher rate with ITC is consistent with the objective of the Respondent No.1 to boost the real estate sector.

39. The Petitioner submits that all the above reasons are equally applicable for the equivalent State Notification as well and should be set aside.

40. The Petitioner has no other alternative remedy, except to approach this Hon'ble Court under Article 226 of the Constitution of India for the redressal of its grievances.

41. The Petitioner has not filed any writ petition, suit or any other proceeding for the relief or reliefs sought in this writ petition either before the Supreme Court or this High Court or any other High Court in India.

42. The Petitioner reserves its rights to file a better or additional affidavit, if any, if the circumstances so warrant.

43. For the sake of brevity and convenience, the annexures filed herein, and the material contents therein may be read as part and parcel of this affidavit.

44. The Petitioner states that the illegal and arbitrary denial of ITC has resulted in grave prejudice being caused not just to the Petitioner in its ongoing projects but also to the buyers. Further, the Petitioner also has a number of upcoming construction projects where the Impugned Notification will once again grave prejudice the Petitioner and the buyers. The Petitioner submits that it has made out a prima facie case above. Further, the balance of convenience is also in its favor and therefore, this Hon'ble Court ought to grant interim stay of the operation of the Impugned Notification pending the disposal of the present Writ Petition.

PRAYER

For the reasons aforesaid, it is humbly prayed that this Hon'ble Court may be pleased to issue an appropriate Writ, Direction or Order, particularly one in the nature of Mandamus and Certiorari

a. Declaring that item (ia) of Serial No.3 as inserted by the Impugned Notification No. 3/2019-Central Tax (Rate) dated 29 March 2019 in Notification No. 11/2017- Central Tax (Rate) dated 28th June 2017 to the extent the Respondent No.1 has prohibited the taking of input tax credit as unconstitutional, arbitrary and *ultra vires* the Central Goods and Services Tax, 2017;

b. Declaring that item (ia) of Serial No.3 as inserted by the Impugned Notification No. 3/2019-State Tax (Rate), GOM No. 63 dated 04 June 2019 in Notification No. 11/2017- State Tax (Rate) dated 28th June 2017 to the extent the Respondent No.2 has prohibited the taking of input tax credit as unconstitutional, arbitrary and *ultra vires* the Telangana Goods and Services Tax, 2017;

c. Set aside and quash (ia) of Serial No.3 as inserted by the Impugned Notification No. 3/2019-Central Tax (Rate) dated 29 March 2019 in Notification No. 11/2017- Central Tax (Rate) dated 28th June 2017 to the extent the Respondent No.1 has prohibited the taking of input tax credit; and

d. Set aside and quash (ia) of Serial No.3 as inserted by the Impugned Notification No. 3/2019-State Tax (Rate), GOM No. 63 dated 04 June 2019 in Notification No. 11/2017- State Tax (Rate) dated 28th June 2017 to the extent the Respondent No.1 has prohibited the taking of input tax credit;

e. pass such other order(s) as this Hon'ble Court deems fit and proper in the extraordinary circumstances of the case in the interests of justice.

INTERIM PRAYER

In view of the above, it is prayed that this Hon'ble Court may be pleased to

a) stay the operation of (ia) of Serial No.3 inserted by Impugned Notification No. 3/2019- Central Tax (Rate) dated 29 March 2019 in Notification No. 11/2017-Central Tax (Rate) dated 28 June 2017 prohibiting the taking input tax credit for supply of construction services issued by Respondent No. 1 pending disposal of the writ petition;

b) stay the operation of (ia) of Serial No.3 inserted by Impugned Notification No. 3/2019-State Tax (Rate), GOM No. 63 dated 04 June 2019 in Notification No. 11/2017- State Tax (Rate) dated 28th June 2017 prohibiting the taking input tax credit for supply of construction services issued by Respondent No. 1 pending disposal of the writ petition;

c) dispense with the requirement of filing the certified copy of the Impugned Notification and pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case;

d) dispense with the requirement of filing the certified copy of the equivalent state notification and pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case: and

e) pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

Solemnly affirmed and signed
before me on this the day of
November, 2020 at Secunderabad

M. [signature]
DEPONENT

ADVOCATE: HYDERABAD

VERIFICATION

I, Mangilipelli Jayaprakash, deponent herein, do hereby declare that the above contents mentioned in paras 1 to 25 and 39 to 43 are true and correct to the best of my knowledge and belief, and paras 26 to 38 are correct on the advice of counsel, hence verified on this the 28th day of November, 2020 at Secunderabad.

SECUNDERABAD

DATE: .11.2020 Counsel for the Petitioner

IN THE HIGH COURT OF TELANGANA AT:HYDERABAD

W.P.No. 22193 of 2020

Between:

Mehta & Modi Realty Kowkur LLP

..Petitioner

AND

Union of India & 2 Others

..Respondents

I/We Mehta & Modi Realty Kowkur LLP, Rep., by Mr. Mangilipelli Jayaprakash Registered Office at 5-4-187/3/4 Soham Mansion, IInd Floor, MG Road, Secunderabad-500003

In the above Appeal / Petition do hereby appoint and retain

MANOJ REDDY (19541)
CUDDAPAH NANDA GOPAL
Advocate

Advocate/s of the High Court to appear for ME/US in the above APPEAL/PETITION and to conduct and prosecute or defend the same and all proceedings that may be taken in respect of any application connected with the same including compromise or any decree or order passed therein, including all applications for return of documents or the receipt of any money that may be payable to ME/US in the said APPEAL/PETITION and also to appear in all appeals and applications under Clause XV of the Letters Patent and in application for review and for leave to appeal The Supreme Court of India, and in all application for review of Judgment.

I certify that the contents of this Vakalat were read out and explained in ____________ in my presence to the executant or executants who appeared perfectly to understand the same and made his /her or their signature/s or mark /s in my presence.

Executed before me this day of December of 2020.

Advocate, Hyderabad.