


<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद – उत्तर, कस्टम हाँउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		<p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
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निबन्धित पावती डाक द्वारा/By R.P.A.D
फा.सं./F.No. GST/15-61/OA/2022

DIN- 20231064WT000000A9E0
आदेश की तारीख/Date of Order: - 05.10.2023
जारी करने की तारीख/Date of Issue :- 05.10.2023

द्वारा पारित/Passed by:- लोकेश डामोर /Lokesh Damor
सयुक्त आयुक्त / Joint Commissioner

मूल आदेश संख्या / Order-In-Original No. 38/JC/ LD /GST/2023-24

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।
This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति में 90 दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद-380015 को प्रारूप GST-APL-01 में दाखिल कर सकता है। इस अपील पर रू. 5.00 (पांच रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form GST-APL-01 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within three months from the date of its communication. The appeal should bear a court fee stamp of Rs. 5.00 only.

इस आदेश के विरुद्ध अपील करने के लिए आयुक्त (अपील) के समक्ष नियमानुसार पूर्व जमा के धनराशी का प्रमाण देना आवश्यक है।

An appeal against this order shall lie before the Commissioner (Appeal) on giving proof of payment of pre deposit as per rules.

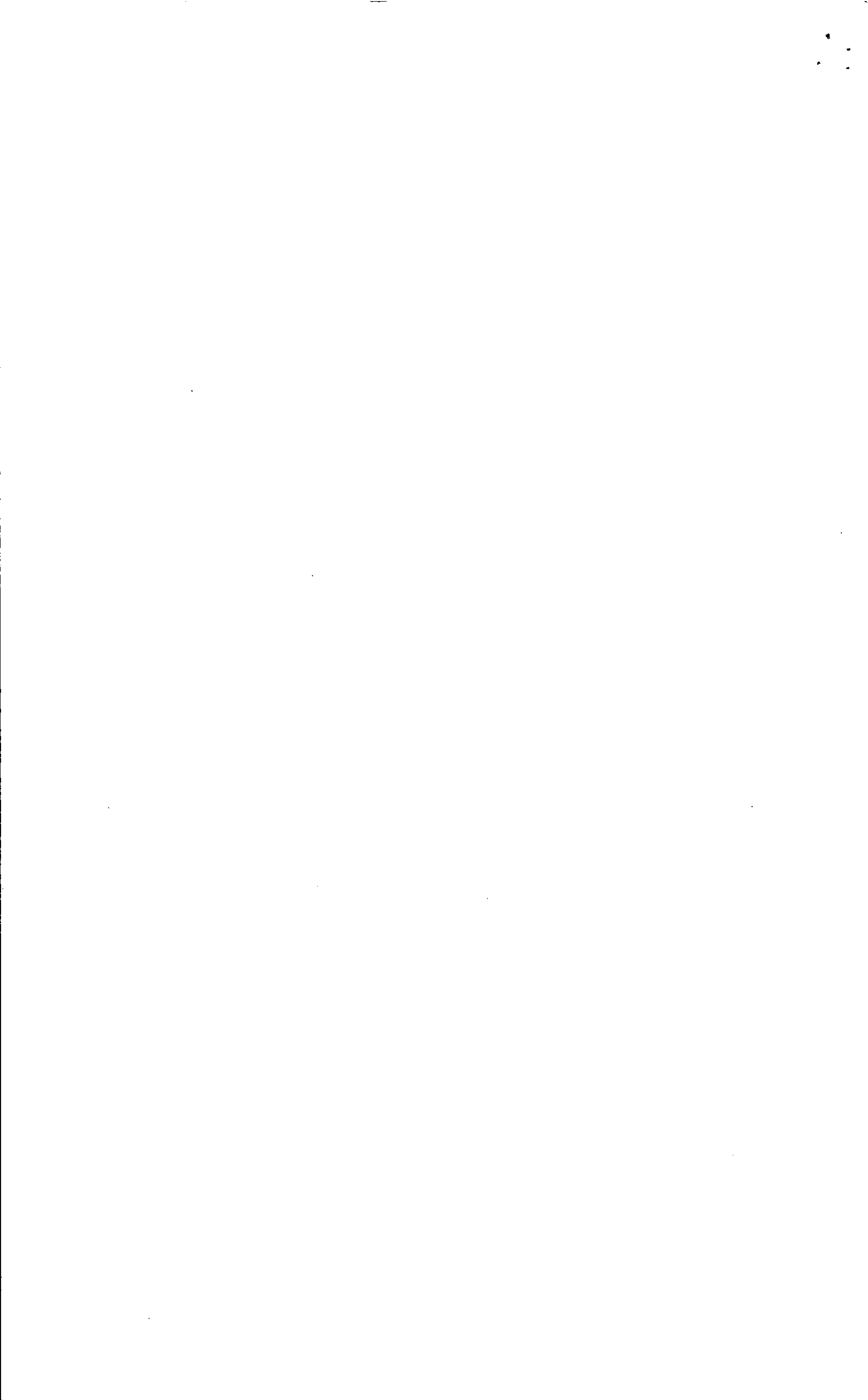
उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या GST-APL-01 में दो प्रतियों में दाखिल की जानी चाहिए। उम पर केंद्रीय जी. एस. टी. नियमावली, 2017 के नियम 108 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

- (1) उक्त अपील की प्रति।
- (2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू. 5) 00. पांच रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form GST-APL-01 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 108 of CGST Rules, 2017. It should be accompanied with the following:

- (1) Copy of accompanied Appeal.
- (2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.5.00.

विषय:- कारण बताओ सूचना/ Proceeding initiated against Show Cause Notice F.No. GADT/TECH/SCN/GST/170/2022 dated 30.12.2022 issued to M/s Emcure Pharmaceuticals Pvt. Ltd., (GSTIN: 24AAACE4574C1Z1), SM-14, SM-15 and SM-16/1, G.I.D.C Sanand-II Industrial Estate, Taluka Bol and Charal Sanand, Ahmedabad, Gujarat-382110.



BREIF FACTS OF THE CASE :-

M/s Emcure Pharmaceuticals Pvt. Ltd., SM-14, SM-15 and SM-16/1, G.I.D.C. Sanand-II Industrial Estate, Taluka Bol and Charal Sanand, Ahmedabad, Gujarat, 382110 (herein after referred to as 'said taxpayer') are engaged in manufacturing of Pharmaceutical Products i.e. injectible fluids and lyophilizer (Powder form) and is holding GSTIN No. 24AAACE4574C1Z1:

2. GST Audit of the said unit for the period July,2017 to March,2020 was conducted during August, 2022 & September, 2022 and pursuant to completion of Audit, Final Audit Report No:- GST 676 dated 21.09.2022 was issued to the said taxpayer. In the said Audit Report, the following GST Revenue Paras remained unsettled which are discussed in detail in subsequent paras. In this show cause notice all sections/ provisions of CGST Act, 2017 (hereinafter referred to as "the said Act") have been referred as 'pari materia' to the same parallel provisions under the Gujarat GST Act, 2017. Further, provisions of IGST Act, 2017 as made applicable vide Section 20 thereof in reference to applicability of provisions of CGST Act, 2017. The revenue paras detected are discussed in subsequent paras. The total 11 revenue paras detected and Revenue Para No.6 has been settled by the taxpayer after issuance of FAR, hence, only 10 Revenue Paras are unsettled which are detailed as follows:

REVENUE PARA 1: Wrong availment of Input tax Credit as per Section 16 of the CGST Act, 2017

3. Whereas, during the course of Audit while scrutinizing the purchase register of the taxpayer it is noticed that the taxpayer has availed ITC related to banquet charges, medical camp for employees, repair of amplifier, telephone bill for staff (personal use), distribution of silver coin to staff which is not in the course of furtherance of their business as per Section 16 of the CGST Act, 2017.

Section 16(1) reads as :

"(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."

3.2 It appeared that the taxpayer has wrongfully availed ITC of Rs 24,340/- (Rs. 8,876/- [CGST], Rs. 8,876/-[SGST] and Rs. 6588/- [IGST])) and has contravened the provisions of Section 16(1) of CGST Act, 2017, by availing the ITC which is not used in the course of furtherance of business. It appears that the taxpayer would also be liable to pay interest on the wrongly availed ITC not reversed/paid within the prescribed due dates, under the provisions of Section 50(3) of the CGST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to wrongly avail the ITC, as stated above. Accordingly, they also appear to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having

paid/reversed the ITC of Rs.24,340/- from electronic cash ledger. Hence, the said amount appeared to be adjusted and appropriated towards the proposed demand.

REVENUE PARA 2: Wrong availment of ITC of Hotel Charges

4. Whereas, during the course of audit, on scrutiny of the documents and records it is observed that the taxpayer has wrongfully availed ITC of hotel expenses as the service providers have supplied the service to the inter-state located recipient.

5. The recipient of service cannot take the input tax credit related to hotel accommodation/stay for inter-state because the place of supply for these particular services is of the service provider and service provider always charges CGST and SGST.

The place of supply has been defined under Section 12(3) (b) of IGST Act, 2017 which reads as follows:

“the place of supply of services by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located.”

6. The place of supply shall be that of the service provider and the service provider which charge CGST and SGST for the above-said services even if the service recipient is located in inter-state. The place of supply cannot be treated as inter-state for these particular services. So, the taxpayer is not eligible to claim ITC for inter-state supply of these services.

7. It appeared that the taxpayer has contravened the provisions of Section 12(3) of IGST Act 2017 by availing wrong ITC amounting to Rs.62,876/- (Rs.30,403/- [CGST], Rs.30,403/- and Rs.2,070/- [IGST]). It appeared that the taxpayer would also be liable to pay interest on the wrongly availed ITC not reversed/paid within the prescribed due dates, under the provisions of Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to wrongly avail the ITC, as stated above. Accordingly, they also appear to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid/reversed the ITC of Rs.62,876/- from electronic cash ledger. Hence, the said amount appears to be adjusted and appropriated towards the proposed demand.

Revenue Para 3: Wrong availment of ITC of Blocked Credit

8. Whereas, during the course of audit, on scrutiny of the purchase register it is observed that the taxpayer has availed ITC on expenses related to Canteen expenses, food expenses related to stay in hotels and Purchase of Motor vehicle which is blocked under Section 17(5) of the CGST Act, 2017.

Section 17(5) of CGST Act reads as follows:

"(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

(a) [motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

(i) for making the following taxable supplies, namely:—

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause

(aa): Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where ;received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;]

(b) [the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(iii) membership of a club, health and fitness center; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession: Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force."

9. It appeared that the taxpayer has contravened the provisions of Section 17(5) of CGST Act 2017/Gujarat GST Act, 2017 by availing credit of expenses related to Canteen expenses, food and purchase of new motor vehicle which is blocked amounting to Rs.4,33,200/- (Rs.2,16,600/-[CGST]+Rs.2,16,600/-[SGST]). It appears that the taxpayer would also be liable to pay interest on the wrongly availed ITC not reversed/paid within the prescribed due dates, under the provisions of Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017. It appears that the taxpayer has suppressed the facts with an intent to wrongly avail the ITC, as stated above. Accordingly, they also appear to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid/reversed the ITC of Rs.4,33,200/- from electronic cash ledger. Hence, the said amount appears to be adjusted and appropriated towards the proposed demand.

Revenue Para 4:- ITC availed on GST paid on services provided for destruction of goods by Service Provider

10. Whereas, on scrutiny of the documents and records, it appeared that the taxpayer has cleared finished goods/expired samples to M/s E Coli Waste Management and M/s Saurashtra Enviro, for destruction, on payment of GST at appropriate rate.

10.1. As the said service provided by M/s E Coli Waste Management, M/s Saurashtra Enviro, M/s Detox India Pvt. Ltd. is provided after the supply of goods and not provided for furtherance of any business, it appeared that ITC of the same is not admissible as per provisions of Section 16 of CGST Act,2017/ Gujarat State GST Act,2017.

Section 16(1) reads as

(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."

10.2 It appeared that the taxpayer has contravened the provisions of Section 16(1) of CGST Act, 2017. The taxpayer is liable to pay Rs.66,236/- (Rs. 33,118/- [CGST]+ Rs. 33,118/- [SGST]). It appeared that the taxpayer would also be liable to pay interest on the wrongly availed ITC not reversed/paid within the prescribed due dates, under the provisions of Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to wrongly avail the ITC, as stated above. Accordingly, they also appear to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid/reversed the ITC of Rs.66,236/- from electronic cash ledger. Hence, the said amount appears to be adjusted and appropriated towards the proposed demand.

Revenue Para no. 5 Wrong availment of ITC of Cross head:

11. Whereas, on scrutiny of the purchase register, it is observed that the taxpayer has availed ITC of CGST and SGST in IGST and of IGST in CGST and SGST i.e. Cross Head availment of ITC. The details of the same is as under:

11.1. It appeared that the taxpayer has contravened the provisions of Section 16(1) of CGST Act, 2017. The taxpayer is liable to pay Rs.29,798/- (Rs.14,041/- [CGST]+ Rs.14,041/- [SGST] and Rs.1,716/- [IGST]). It appears that the taxpayer would also be liable to pay interest on the wrongly availed ITC not reversed/paid within the prescribed due dates, under the provisions of Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appears that the taxpayer has suppressed the facts with an intent to wrongly avail the ITC, as stated above. Accordingly, they also appeared to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid/reversed the ITC of Rs.29,798/- from electronic cash ledger. Hence, the said amount appeared to be adjusted and appropriated towards the proposed demand.

Revenue Para No. 7 Short Payment of tax for Credit Note not shown in GSTR1

12. Whereas, during scrutiny of the documents and records it is observed that the taxpayer has shown excess credit notes in GSTR9 in comparison to GSTR1 and hence made short payment of tax.

Section 34 of CGST Act reads as:

- (1) *"Where a tax invoice has been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services or both supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient a credit note containing such particulars as may be prescribed.*
- (2) *) Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than September following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier, and the tax liability shall be adjusted in such manner as may be prescribed:*

Provided that no reduction in output tax liability of the supplier shall be permitted, if the incidence of tax and interest on such supply has been passed on to any other person."

12.1. It appeared that the taxpayer has contravened the provisions of Section 34 of CGST Act, 2017/Gujarat GST Act, 2017. The taxpayer is liable to pay Rs.45,562/- (Rs.22,781/- [CGST]+ Rs.22,781/- [SGST]). It appeared that the taxpayer would also be liable to pay interest on the tax short paid within the prescribed due dates, under the provisions of

Section 50(1) of the CGST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to evade payment of correct tax as stated above. Accordingly, they also appeared to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017.

Revenue Para No.8 Short Payment of tax as per Sales register as per difference noticed in GSTR- 3B in 2018-19.

13. Whereas, during scrutiny of the documents it is observed that the taxpayer has short paid the tax as per their Sales register for the period 2018-19 vis-à-vis liability discharged under GSTR-3B. The details of the same is as follows:

13.1. It appeared that the taxpayer has short paid the tax. The taxpayer is liable to pay total GST amounting to Rs.1,17,835/- (CGST Rs.4,976/- + SGST Rs.4,976/- + IGST Rs.1,07,883). It appears that the taxpayer would also be liable to pay interest on the tax short paid within the prescribed due dates, under the provisions of Section 50(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to evade payment of correct tax, as stated above. Accordingly, they also appeared to be liable for penal action under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid the tax of Rs.9,952/- from electronic cash ledger along with interest of Rs.7,764/-. Hence, the said amount appeared to be adjusted and appropriated towards the proposed demand of tax and interest.

Revenue Para No.9 Wrong availment of ITC after due date

14. Whereas, during scrutiny of the purchase register, it is observed that the taxpayer has availed ITC after due date.

Section 16(4) of CGST Act reads as :

"A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier."

14.1. It appeared that the taxpayer has contravened the provisions of Section 16(4) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The taxpayer is liable to pay Rs.42,050/- (Rs.6,394/- [CGST]+ Rs.6,394/- [SGST] and Rs.29,262/- [IGST]). It appeared that the taxpayer would also be liable to pay interest on the wrongly availed ITC not reversed/paid within the prescribed due dates, under the provisions of Section 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appears that the taxpayer has suppressed the facts with an intent to wrongly avail the ITC, as stated above. Accordingly, they also appeared to be liable for penal action under the provisions of

Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid/reversed the ITC of Rs.42,050/- from electronic cash ledger. Hence, the said amount appeared to be adjusted and appropriated towards the proposed demand.

Revenue Para no. 10 Excess availment of ITC in comparison to GSTR-2A.

15. Whereas, during scrutiny of the documents it is observed that the taxpayer has availed excess ITC in GSTR3B return in comparison to GSTR2A in table 8 of GSTR9 for the period 2018-19 and 2019-20. The details of the same are as follows:

Table 10 Amount in Rs.

Year	CGST	SGST	IGST	Total
2018-19	0	0	5052439	5052439
2019-20	5072940	5072940	6664595	16810475
Total	5072940	5072940	11717034	21862914

15.1. The eligibility of ITC is provided under Section 16(1) of the Central Goods and Services Act, 2017, ('CGST Act') and Section 16(1) of CGST Act, 2017. The relevant text is reproduced below:

"16(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."

16. Further, as per Section 16(2)(a) of the Act, that **the Supplier would not be entitled to ITC if he is not in possession of a tax invoice or debit note or any tax paying document issued by a supplier.** Further, the taxpayer has not produced any tax paying document evidencing proof that they were entitled to avail excess ITC as stated above.

17. Whereas, it appeared that the taxpayer has contravened the following provisions of CGST Act 2017:

- Sections 16(1) & 16(2)(a) of the said Act as they have wrongly availed and utilised the irregular ITC in excess to what was available to them, as per books;
- Sections 39(7) of the Act read with the provisions of Rule 85(3) of the Central Goods and Services Rules, 2017 and Rule 85(3) of the Gujarat State Goods and Services Rules, 2017 (collectively '**the Rules**') as they have failed to reverse/pay the ITC wrongly availed and utilized by them within the prescribed due dates.

18. Further, it appeared that the taxpayer had wrongly availed and utilised the ITC in excess without having proper tax paying documents, as required under the provisions of

Section 16(2)(a) of the said Act. It appeared that they had not reversed the inadmissible ITC irregularly availed by them in excess during the period from 2018-19 and 2019-20 within the prescribed time limit. Therefore, it appeared that there is a case of suppression of facts with an intent to wrongly availed ITC irregularly in excess available and admissible to them. It appeared that the total ineligible ITC amounting to Rs.2,18,62,914 /- (Rs. 50,72,940/- [CGST]+ Rs. 50,72,940/- [SGST]+ Rs.1,17,17,034 /- [IGST]) is to be disallowed to the taxpayer and recovered from them under the provisions of Sections 74(1) of the CGST Act 2017. It appeared that the taxpayer would also be liable to pay applicable interest on the non-reversal of ITC, under the provisions of Sections 50(3) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to wrongly availed irregular ITC, as stated above. Accordingly, they also appeared to be liable for penal action under the provisions of Sections 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017.

Revenue Para no. 11 Excess availment of ITC in 2018-19 in GSTR-3B as per purchase register.

19. Whereas, during the scrutiny of records, it is observed that the taxpayer has availed excess input tax credit in GSTR3B return in 2018-19 in comparison to their purchase register. The details of excess ITC availed is as follows:

20. The eligibility of ITC is provided under Section 16(1) of CGST Act, 2017. The relevant text is reproduced below:

"16(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"

21. Further, as per Section 16(2)(a) of the Act, that **the Supplier would not be entitled to ITC if he is not in possession of a tax invoice or debit note or any tax paying document issued by a supplier.** Further, the taxpayer has not produced any tax paying document evidencing proof that they were entitled to avail excess ITC.

21.1. Whereas, it appears that the taxpayer has contravened the following provisions of CGST Act 2017:

- Sections 16(1) & 16(2)(a) of the said Act as they have wrongly availed and utilised the irregular ITC in excess to what was available to them, as per books;
- Sections 39(7) of the Act read with the provisions of Rule 85(3) of the Central Goods and Services Rules, 2017 and Rule 85(3) of the Gujarat State Goods and

Services Rules, 2017 (collectively 'the Rules') as they have failed to reverse/pay the ITC wrongly availed and utilized by them within the prescribed due dates.

21.2. . Further, it appeared that the taxpayer had wrongly availed and utilised the ITC in excess without having proper tax paying documents, as required under the provisions of Section 16(2)(a) of the said CGST Act, 2017. It appeared that they had not reversed the inadmissible ITC irregularly availed by them in excess during the period from 2018-19 within the prescribed time limit. Therefore, it appears that there is a case of suppression of facts with an intent to wrongly availed ITC irregularly in excess available and admissible to them. It appeared that the total ineligible ITC amounting to **Rs.5,105/- (Rs. 1296/- [CGST]+ Rs. 1296/- [SGST]+ Rs.2513/- [IGST])** is to be disallowed and recovered from the taxpayer under the provisions of Sections 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appeared that the taxpayer would also be liable to pay applicable interest on the excess availment of ITC, under the provisions of Section 50(3) of the said CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. It appeared that the taxpayer has suppressed the facts with an intent to wrongly availed irregular ITC, as stated above. Accordingly, they also appeared to be liable for penal action under the provisions of Sections 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. The taxpayer vide their letter dated 10.10.2022 has informed about having paid/reversed the ITC of Rs.5,105/- from electronic cash ledger. Hence, the said amount appeared to be adjusted and appropriated towards the proposed demand.

CONTRAVENTIONS

22. In light of the facts discussed hereinabove in Para 3 to 37 and the material evidences available on records, it appears that M/s. Emcure Pharmaceuticals Pvt. Ltd. have contravened the following provisions of the CGST Act 2017:

- (i) Section 16(1) of CGST Act, 2017 in as much as they have availed the wrong ITC which was not in the course of furtherance of their business.
- (ii) Section 12(3)(b) of IGST Act, 2017 in as much as the place of supply was interstate and they have availed the ITC in wrong head which is not permissible.
- (iii) Section 17(5) of CGST Act, 2017 in as much as they have availed the blocked credit and not reversed the same.
- (iv) Section 34(2) of CGST Act, 2017 in as much as they have short paid the tax by showing more credit notes in GSTR9 in comparison to GSTR1M.
- (v) Section 16(4)(a) the said Act, in as much as they have availed the ITC after due date;
- (vi) Section 50(1) of the said Act, in as much as they failed to pay interest on late payment of tax deposit in Government Account;

23. **QUANTIFICATION OF GST EVASION, IRREGULAR/INADMISSIBLE ITC WRONGLY AVAILED AND UTILIZED BY THE SAID TAX PAYER**

As discussed herein above, with respect to Revenue Para 1 to 11 of ADT-02 (F.A.R), it appeared that M/s. Emcure Pharmaceuticals Pvt. Ltd. has contravened Section 16,17,34 and 50 of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017. Detailed calculation is shown in the following table :-

Sr.No.	Revenue Para No.	CGST		SGST		IGST		Total	
		Demand	Paid	Demand	Paid	Demand	Paid	Demand	Paid
1	R.P.1	8,876	8,876	8,876	8,876	6,588	6,588	24,340	24,340
2	R.P.2	30,403	30,403	30,403	30,403	2,070	2,070	62,876	62,876
3	R.P.3	2,16,600	2,16,600	2,16,600	2,16,600	0	0	4,33,200	4,33,200
4	R.P.4	33,118	33,118	33,118	33,118	0	0	66,236	66,236
5	R.P.5	14,041	14,041	14,041	14,041	1,716	1,716	29,798	29,798
6	R.P.7	22,781	22,781	22,781	22,781	0	0	45,562	45,562
7	R.P.8	4,976	4,976	4,976	4,976	1,07,883	1,07,883	1,17,835	1,17,835
8	R.P.9	6,394	6,394	6,394	6,394	29,262	29,262	42,050	42,050
9	R.P.10	50,72,940	0	50,72,940	0	1,17,17,034	0	2,18,62,914	0
10	R.P.11	1,296	1,296	1,296	1,296	2,513	2,513	5,105	5,105
	Total	54,11,425	3,38,485	54,11,425	3,38,485	1,18,67,066	1,50,032	2,26,89,916	8,27,002

24. RELEVANT LEGAL PROVISIONS UNDER CGST ACT, 2017 :-

Section 16. Eligibility and conditions for taking input tax credit.—

“(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b)

(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 utilisation of input tax credit admissible in respect of the said supply;”

Section 39. Furnishing of returns.—

“(1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed:

Provided that the Government may, on the recommendations of the Council, notify certain class of registered persons who shall furnish a return for every quarter or part thereof, subject to such conditions and restrictions as may be specified therein.”

Section 50 of CGST Act 2017: Interest on Delayed Payment of Tax (CHAPTER X – PAYMENT OF TAX)

- “(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council. Interest on delayed payment of tax.
- (2) The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.
- (3) A taxable person who makes an undue or excess claim of input tax credit under sub-section (10) of section 42 or undue or excess reduction in output tax liability under sub-section (10) of section 43, shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, at such rate not exceeding twenty-four per cent., as may be notified by the Government on the recommendations of the Council.”

24.1. In view of the aforesaid discussion relating to all the Revenue Paras, it appeared that the said taxpayer had contravened the provisions of Sections 9,16,39 and 50 of the CGST Act, 2017 read with parallel provisions of Gujarat GST Act, 2017 on non payment of tax, interest on wrongly availed and utilized irregular ITC and late paid tax for the period from July, 2017 to March, 2020.

25. INVOCATION OF SECTION 74 OF THE CGST ACT, 2017

Section 74 of the CGST Act, 2017 :

“74. (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) to (6).....

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty-five percent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty percent of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded."

26. The Government has from the very beginning placed full trust on the taxpayer and accordingly measures like self-assessments, etc., based on mutual trust and confidence are in place. All these operate on the basis of honesty of taxpayer; therefore, the governing statutory provisions create a liability on taxpayer when any provision is contravened or there is a breach of trust placed on the taxpayer.

27. It is pertinent to mention here that the system of self-assessment is specifically incorporated in respect of GST under the provisions of Section 59 of CGST Act' 2017 /Gujarat GST Act'2017 which reads as "59. Every registered person shall self-assess the taxes payable under this Act and furnish a return for the tax period as specified under section 39." It appears that the said taxpayer suppressed the wrong availment and utilization of irregular ITC on various counts; non-payment of applicable interest and thereby it appears has knowingly failed to correctly self assess tax payable with an intent to evade payment of proper tax. In the scheme of self-assessment, the Central Audit Department Ahmedabad comes to know about the supplies made and ITC wrongly availed and utilised only during the scrutiny of the financial records and statutory returns filed by the taxpayers under the statute. Therefore, it places greater onus on the taxpayer to comply with standards of disclosure of information in the statutory returns.

28. The scrutiny of information/data/record of the taxpayer verified during the course of audit, it appears that the taxpayer have short paid GST; wrongly availed irregular ITC; not discharged its interest liability and it appears that the taxpayer's liabilities are not properly discharged in GST returns. The above said wrong availment of ITC; non-payment of interest is unearthed after audit was conducted by officers of Central Tax Audit, Ahmedabad and therefore they had the wrong availment and utilization of ITC; then non-payment of interest had not been detected during audit, it would have remained unnoticed. All the above facts of contravention on the part of the Taxpayer have been

committed with an intention to evade the payment of GST by suppressing the facts. Therefore, the same is required to be demanded from them under Section 74(1) of the CGST Act, 2017 read with Section 74(1) of Gujarat GST Act, 2017 by invoking extended period of five years.

29. Since the said taxpayer was liable to self-assess the liability to pay tax under CGST Act, 2017, they had an obligation to furnish the true, correct and complete information to the department.

30. Further, it appeared that the taxpayer had not paid/reversed the wrongly availed and utilized ITC in the prescribed due dates. Also, they had not paid applicable interest on the wrongly availed irregular ITC. Hence, it appeared that they had wrongly availed ITC of CGST/SGST/IGST. These supplies; wrongly availed ITC were not shown in their GSTR 2A returns. It, therefore, appears that there is a case of suppression of facts with intent to evade the payment of tax; payment of interest; wrong availment and utilization of ITC. It appears that short paid CGST/SGST and wrongly availed CGST/SGST is to be demanded/ recovered from the said taxpayer under the provisions of Section 74(1) of the CGST Act 2017. Similarly, wrongly availed and utilized irregular ITC of CGST/SGST; non-payment of applicable interest appears liable to be demanded/ recovered from them under the provisions of Section 74(1) and Section 50(3) of the CGST Act, 2017 /Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as and where applicable.

31. By their various acts discussed above, the said taxpayer appeared to have rendered themselves liable for penal action under Section 74(1) of the CGST Act' 2017 for failure to file proper statutory GST returns duly discharging the proper tax liability, failure to pay tax, failure to self assess the tax liability, wrong availment and utilization of irregular/inadmissible ITC and suppression of facts and contravention of various provisions of the CGST Act'2017 and rules made there under with intent to evade payment of Goods and Services Tax; thereby it appears penalty under Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 is to be invoked.

32. In terms of the provisions of Rule 142(1A) of the CGST Rules, 2017, DRC-01 A was issued to the said taxpayer on 16.12.2022 intimating their liability under Section 74(5) of the CGST Act, 2017 or to file any submissions against the above ascertainment in Part-B of DRC-01A on or before 26.12.2022.

33. The said taxpayer vide their reply dt.28.12.2022 has raised contentions on merit. However, it appeared that these contentions did not merit acceptance at this stage. The submissions made by the said taxpayer during the course of audit proceedings have also been considered. Hence, the contentions raised by them did not appear to have any merit so as to drop the proposal of issuing the show cause notice. Therefore, to protect government revenue, the SCN was required to be issued under Section 74(1) of CGST Act, 2017.

34. Therefore, M/s. Emcure Pharmaceuticals Pvt. Ltd. vide SCN bearing F. No. GADT/TECH/SCN/GST/170/2022 dated 30.12.2022, were called upon to show cause to

the Additional/Joint Commissioner, CGST, Ahmedabad North Commissionerate, having their office at 1st floor, Custom House, Navrangpura, Ahmedabad – 380 009 as to why:

- i. ITC amounting to **Rs. 24,340/- (CGST Rs. 8,876/-+ SGST Rs. 8,876/-+ IGST Rs. 6,588/-)** should not be disallowed and recovered from them under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 1; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- ii. ITC amounting to **Rs. 62,876/- (CGST Rs. 30,403/-+ SGST Rs.30,403/- + IGST Rs. 2070/-)** should not be disallowed and recovered from them, under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 2; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- iii. ITC amounting to **Rs. 4,33,200/- (CGST Rs. 2,16,600/-+ SGST Rs.2,16,600/-)** should not be disallowed and recovered from them under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 as per Revenue Para 3; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- iv. ITC amounting to **Rs. 66,236/- (CGST Rs. 33,118/-+ SGST Rs.33,118 /-)** should not be disallowed and recovered from them under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 as per Revenue Para 4; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- v. ITC amounting to **Rs. 29,798/- (CGST Rs. 14,041/-+ SGST Rs. 14,041/-+ IGST Rs. 1716/-)** should not be disallowed and recovered from them under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 5 ; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- vi. Tax amounting to **Rs. 45,562/- (CGST Rs.22,781/-+SGST Rs.22,781/-)** should not be recovered from them under Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 as per Revenue Para 7; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- vii. Tax amounting to **Rs. 1,17,835/- (CGST Rs.4,976 /-+SGST Rs.4,976/-+IGST Rs. 1,07,883/-)** should not be recovered from them under Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 2as per Revenue Para 8; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- viii. ITC amounting to **Rs. 42,050/- (CGST Rs. 6,394/-+ SGST Rs. 6,394/-+ IGST Rs. 29,262/-)** should not be disallowed and recovered from them under Section 74(1)

of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 9 ; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;

- ix. ITC amounting to Rs. 2,18,62,914/- (CGST Rs. 50,72,940/-+ SGST Rs. 50,72,940/-+ IGST Rs. 1,17,17,034/-) should not be disallowed and recovered from them under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 10; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- x. ITC amounting to Rs. 5,105/-(CGST Rs. 1,296/-+ SGST Rs. 1,296/-+ IGST Rs. 2513/-) should not be disallowed and recovered from them under Section 74(1) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 11; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 appears to be adjusted towards the proposed demand ;
- xi. Interest should not be demanded and recovered from them in respect of demands proposed to be confirmed at (i) to (x) above under Section 50(3) and Section 50(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as applicable and interest already paid by them and informed vide their letter dated 10.10.2022 appears to be adjusted against the proposed demand for interest;
- xii. Penalty should not be imposed on them in respect of demands proposed to be confirmed at (i) to (x) above under Section 74(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as applicable.

Written Submissions

35. The said assessee vide their letter dated 28.03.2023 & 11.08.2023, submitted their defence reply wherein they denies all the allegations made in the said SCN and submits that the SCN is incorrect on legal provisions of the GST law. Therefore, the demand of ITC and recovery along with interest and penalty initiated by the said Intimation are bad in law and are liable to be dropped forthwith in toto.

36. Mere negative values in Table 8 of GSTR 9 cannot be termed as excess availment of ITC:

36.1. The assessee submitted that the current demand raised on the basis of negative values in Table No.8 of GSTR 9 is not correct. Mere negative values reflected in the Table No. 8 cannot lead to the conclusion that the assessee has availed excess ITC.

36.2. In this regard, the assessee submitted that the details of ITC as per 2A reported in Table No 8 of GSTR-9 are auto populated figures. The same is auto fetched while filing the GSTR-9. Further these numbers cannot be directly compared with the ITC claimed in GSTR-3B for the following reasons.

The details in GSTR 3B has been claimed as per the conditions specified in Section 16 of the CGST Act.

The GSTR 2A is only reflection of the Invoices reported by the suppliers on GST Portal.

There is possibility of reporting of ITC claimed in GSTR3B and GSTR2A due to timing difference viz. ITC claimed by recipient on receipt basis and supplier failed to report the supply as per statutory dates / month.

As such, the demand on the basis of negative values is not at all factually correct and Noticee has availed the ITC on the basis of fulfilment of specified conditions under GST regulations and hence the SCN should be dropped on this ground alone.

If at all the GSTR 2A matching has to be done, the same should be on the basis of actual GSTR 2A and ITC availed in GSTR 3B after considering the various adjustments such as timing difference, ITC reversal entries, ineligible ITC etc.

37. Matching of ITC under GST is not implemented and hence the demand on this account is bad in law prior to insertion of Rule 36(4) of CGST Rules upto 09th October 2019.

37.1 Section 16(2)(c) of the Central Goods and Services Tax Act, 2017 ('CGST Act') provides that the recipient is not entitled to take ITC if the supplier has not deposited GST in the Government account. This condition is subject to Section 41 of the CGST Act which provides that a recipient can take self-assessed ITC on provisional basis. Section 42 and 43 of the CGST Act provides for matching of the outward tax declared by the supplier in its GSTR-1 with ITC taken by recipient in its GSTR-2 for validating provisional ITC.

37.2. The government has kept the mechanism of matching of ITC in GSTR-1 of the supplier vis-a-vis GSTR-2 of the recipient **in abeyance**, since inception of GST. Consequently, there is no mechanism for the recipient to know whether the supplier has deposited GST in the government account or not. As such, under GST law, there is no provision which makes ITC not reflected in GSTR-2A as ineligible nor it is one of the mandatory conditions to avail ITC in terms of Section 16 of the CGST Act.

37.3 A new section 43A has been introduced vide CGST Amendment Act 2018 which is a non-obstante clause and override the provisions as provided in Section 16(2), 37, 38, 39(1) 41, 42 & 43, however the same is not yet notified.

37.4 As such from the conjunct reading of all the provisions above, it can be seen that at present there is no legal sanctity for the matching of the ITC from GSTR 2A and in the present case the demand has been proposed on this ground which is bad in law and should be dropped on this ground alone.

38. The Noticee has fulfilled the conditions of Section 16(2) of the CGST Act and the GST Credit has been correctly availed as per procedure prescribed in the GST law

38.1 From the perusal of legal provisions, it can be seen that the condition for availment of credit is provided under Section 16(2) of the CGST Act, 2017, which do not state that credit availed by the recipient needs to be reflected in GSTR-2A. ITC can be availed subject to Section 41 of the GST Act which deals with the claim of ITC and the provisional acceptance thereof.

38.2 Also, 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. In this regard, in terms of Section 42, *ibid* specifies the mechanism for matching, reversal and reclaim of ITC wherein it was clearly stated the details of every

As such this cannot be applied for the period prior to that and in their case the mismatch in ITC is pertaining to the period 2018-19 and 2019-20 hence provisions of this Rule is not applicable for the entire period in case. Even if the same is to be applied, this would apply to period after 9th October 2019.

The Reconciliation of GSTR-2A vs ITC for the F.Y. 2018-19 & 2019-20 is submitted as under:-

	Particulars	Amount (2018-19)
	ITC As per GSTR-2A	27,17,66,198/-
Add	Not shown in GSTR-2A	1,54,135/-
	Not shown in GSTR-2A confirmation received from vendor	5,68,682/-
	ITC Taken in F.Y. 2018-19 but reported in 2017-18 F.Y GSTR 2A	78,20,828/-
	ITC taken in F.Y. 2018-19 but reported in F.Y. 2019-20 GSTR 2A	9,31,497/-
	RCM -Reg Not in 2A	10,150/-
	RCM- import	1,30,38,458/-
	SEZ Unit	3,26,869/-
	Import	5,92,879/-
	Short amount shown in GSTR-1	61,136/-
Less	ITC Taken in F.Y. 2017-18 but reported in F.Y. 2018-19 by vendor	-33,51,048/-
	Bill of FY 2017-18 reported in F.Y. 2018-19 by vendors	-6,18,018/-
	180days	10,12,840/-
	Stok Out	19,867/-
	ITC not taken (Disallowed/Not in PR) for F.Y. 2018-19	99,16,004/-
	ITC Taken in FY 2019-20	36,49,213/-
	ITC Reverse as per debit note	53,622/-
	Not shown in GSTR 2A ITC reverse through DRC	43,553/-
	Disallowed ITC for 2018-19	35,02,595/-
	Total ITC	27,31,04,070/-
	ITC as per GSTR-9 (7-J)	27,31,55,688/-
	Net Diff	-51,618/-

	Particulars (2019-20)	Amount (2019-20)
	ITC As per GSTR-2A	61,34,72,766/-
Add	Not shown in GSTR-2A	4,22,876/-
	Not shown in GSTR-2A confirmation received from vendor	2,50,808/-
	ITC Taken in F.Y. 2019-20 but reported in F.Y. 2018-19 GSTR 2A	36,49,213/-
	ITC taken in F.Y. 2019-20 but reported in F.Y 2020-21 GSTR 2A	4,48,761/-
	RCM -Reg Not in 2A	21,110/-
	RCM- import	27,97,516/-
	SEZ Unit	1,58,877/-
	Short amount shown in GSTR-1	1,257/-
Less	Excess amount shown in GSTR 2A	21,906/-
	Matched Round off	18,995/-
	Bill of FY 2018-19 reported in F.Y. 2019-20 by vendors	
	180days	14,80,129/-
	ITC Reverse as per debit note	6,21,257/-
	ITC not taken for F.Y. 2019-20	1,20,89,472/-
	ITC Taken in F.Y. 2020-21 shown in GSTR 2A 2019-20	1,05,56,447/-
	ITC taken in 2018-19 but reported in 2019-20 GSTR 2A	9,31,497/-

	Paid through DRC AD2403210238398 dated 24.03.2021	1,84,083/-
	Disallowed in GSTR 3B	11,17,075/-
	Total ITC	59,42,99,151/-
	ITC as per GSTR-9 (7-J)	59,41,99,151/-
	Net Diff	3,174/-

43. Further one also needs to consider that Article 265 of the Constitution of India which provides that no tax shall be levied or collected except by authority of law. Hence not only the levy but even the collection of the tax shall be only by authority of law.

Interest is not payable

44. In view of the submissions made above, the reversal of ITC itself is unsustainable and consequently, the question of payment of interest may not arise. For this, reliance is placed on the following judicial precedents:

Commissioner of C. Ex. & S.T., LTU, Karnataka v. Bill Forge Pvt. Ltd., 2012 (279) E.L.T. 209 (Kar.) In Re: Victor Pushin Cords Pvt. Limited, 2013 (297) E.L.T. 312 (Commr. Appl.) "74. (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice." ... Emphasis Supplied

45. Further, when the tax itself is not payable, the question of imposition of penalty does not arise. Reliance in this regard is placed on the decision of the Hon'ble High Court in the case of Coolade Beverages Ltd. v. CCE, Meerut, [2004 (172) E.L.T. 451 (All.)]. Therefore, no penalty can be imposed under Section 74 of the CGST Act.

46. It is submitted that for the reasons explained in the above submissions, the Noticee is eligible to avail the ITC. Therefore, the allegation of the Department that the Noticee has availed ineligible ITC is incorrect.

PERSONAL HEARING

47. Personal hearing in this matter has been offered on 06.07.2023 & 07.08.2023, later on mutual arrangement personal hearing was held on 11.08.2023. Shri Krishna Hadam, Deputy General Manager- Accounts and Finance, Shri Vimalkumar Maheshwari, Sr. Manager- Accounts and Shri Harsh Adhyaru- Manager- Commercial, all are authorized representative of the said taxpayer appeared for hearing. They have retreated their written submissions dated 28.03.2023. they have requested time till 28.08.2023 for additional written submission and submitted their submission on 22.09.2023 and requested to decide the case on merits.

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.

38.3 Further the proviso to Rule 69 specifies that where the time limit for furnishing FORM GSTR-1 under Section 37 and FORM GSTR-2 under Section 38 has been extended, the date of matching of claim of reduction in the output tax liability shall be extended accordingly. Provided further that the Commissioner may, on the recommendations of the Council, by order, extend the date of matching relating to claim of reduction in output tax liability to such date as may be specified therein." The Government has vide various notifications has extended the dates for filing of GSTR 2 and GSTR 3 returns.

38.4 Therefore, when the Form GSTR 2 itself is not implemented, the question of matching, acceptance of ITC and communication thereof do not arise and becomes in-operative.

38.5 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 by us after satisfying the conditions specified in Section 16 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.

38.6 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 them is rightly eligible and need not be reversed.

39. The assessee submitted 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:

(i) *Arise India Limited vs. Commissioner of Trade and Taxes, Delhi - 2018-TIOL-11SC-VAT* was rendered favourable 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.

(ii) *M/s. Tarapore and Company Jamshedpur v. State of Jharkhand - 2020-TIOL-93HC-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*.

40. They further submitted that it is only Rule 36(4) of CGST Rules, 2017 as inserted w.e.f. 09.10.2019 which 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 of 2018-19 and part period of 2019-20.

40.1 Without prejudice to above, it is submitted that 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 the CGST Rules based on which they have availed ITC. Further, they submitted 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. The proposal to reverse the ITC due to mis-match in GSTR 2A is therefore illogical and illegal when the recipient has received the goods and made the payment of taxes to the supplier.

As such from the conjunct reading of all the provisions above, it can be seen that at present there is no legal sanctity for the matching of the ITC from GSTR 2A. As all the conditions of Section 16(2) are satisfied, the ITC on the same is eligible, hence, request your good self to note as above and allow the ITC.

41. Insertion of Rule 36 (4) of CGST Rules, 2017 - Validity of Rule 36(4)

41.1. Recently a new clause (aa) has been added to Sec 16(2) of the CGST Act, 2017 to provide a new condition to determine the eligibility of ITC. One need to keep a note that the said clause has been notified w.e.f. 01 January 2022 and cannot have retrospective effect.

41.2. The condition states that in order to avail the input tax credit, the details of the invoice or debit note has to be furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under Section 37.

41.3 It is important to note that Section 16 i.e., ITC eligibility does not prescribe any specific proviso relating to Rule 36(4). The restriction on the quantum of ITC was incorporated by the parliament vide section 43A (4) of the CGST Act. (CGST Amendment Act, 2018). However, it is to be noted that the said provision is not yet been notified and thereby not effective as on date to enable the rule 36(4) ibid to derive the power.

41.4 Further one needs to take a note that Rule 36(4) violates the right of the recipient as it lacks the machinery provisions for the de-facto implementation.

It has been well settled that Indian Constitution recognizes the concept of distribution of powers, where the executive arm cannot exercise powers of legislative arm and any such exercised action is void abinitio [Alstom India Ltd. (Gujarat High Court)]. The introduction of Rule 36 (4) suffers from vice of excessive delegation and hence can be challenged.

42. Reliance in this regard needs to be placed on the judgement of

(i) *Union of India v. Deoki Nandan Aggarwal* [1992 Supp (1) SCC 323] and *Shyam Kishori Devi v. Patna Municipal Corpn.* [AIR 1966 SC 1678].

(ii) *General Officer ... vs Subhash Chandra Yadav & Anr* on 25 February, 1988, 1988 AIR 876, 1988 SCR (3) 62

(iii) *Sukhdev Singh & Ors vs Bagatram Sardar Singh* 1975 AIR 1331, 1975 SCR (3) 619

(iv) 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 as under:

"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"

DISCUSSION AND FINDINGS

48. I have carefully gone through the show cause notice, records available/ placed, the submissions made by M/s in their written submissions and at the time of personal hearing.

49. I find that the present show cause notice is issued based on objections/points noticed during the course of audit of records of the taxpayer which was culminated into Revenue Paras. I take up the issues for discuss Revenue Paras wise one by one as below.

Revenue Para	Issue involved	Amount of ITC	Paid during audit
1	Wrong availment of Input tax credit as per Section 16 of the CGST Act, 2017	24,340/-	24,340/-
2	Wrong availment of ITC of Hotel Charges	62,876/-	62,876/-
3	Wrong availment of ITC of Blocked Credit	4,33,200/-	4,33,200/-
4	ITC availed on GST paid on services provided for destruction of goods by Service Provider	66,236/-	66,236/-
5	Wrong availment of ITC of Cross head	29,798/-	29,798/-
7	Short Payment of tax for credit note not shown in GSTR1	45,562/-	45,562/-
8	Short payment of tax as per Sales register as per difference noticed in GSTR-3B in 2018-19	1,17,835/-	1,17,835/-
9	Wrong availment of ITC after due date	42,050/-	42,050/-
10	Excess availment of ITC in comparison to GSTR-2A	2,18,62,914/-	0
11	Excess availment of ITC in 2018-19 in GSTR-3B as per purchase register	5,105/-	5,105/-

49.1. I find that ITC/payment of tax in respect of all Revenue Paras, **except Revenue Para No. 10 regards Excess availment of ITC in comparison to GSTR-2A**, has already been reversed/paid by the said taxpayer before issuance of the present notice but applicable interest and penalty has not been paid by the taxpayer. The taxpayer has neither made any arguments nor submitted any reply in respect of these revenue paras except revenue para 10. I find that the taxpayer has filed reply in respect of Revenue Para 10. I take up the issue of wrong availment of ITC /short payment of tax first and the other aspect regards interest and penalty would be discussed later.

49.2. First of all, I take a cursory look towards the relevant legal provisions of CGST/SGST/IGST Act, 2017 deals with eligibility of availment of input tax credit:-

Section 2(59) - "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

Section 2(60) - "input service" means any service used or intended to be used by a supplier in the course or furtherance of business;

Section 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.

(2) Notwithstanding anything contained in this section, no registered person

shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(4) A registered person shall not be entitled to take input tax credit in respect

of any invoice or debit note for supply of goods or services or both **after the due date of furnishing of the return under section 39 for the month of September** following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Section 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) to (4)

(5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, **input tax credit shall not be available in respect of the following, namely: -**

(a)

~~(b)~~

(b) [the following supply of goods or services or both—

(i) **food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:**

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness center; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.]

(c) to (f)

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples;

Section 34. Credit and debit notes.—

“(1) Where a tax invoice has been issued for supply of any goods or services or both and the taxable value or tax charged in that tax invoice is found to exceed the taxable value or tax payable in respect of such supply, or where the goods supplied are returned by the recipient, or where goods or services or both supplied are found to be deficient, the registered person, who has supplied such goods or services or both, may issue to the recipient a credit not containing such particulars as may be

prescribed.

(2) Any registered person who issues a credit note in relation to a supply of goods or services or both shall declare the details of such credit note in the return for the month during which such credit note has been issued but not later than September following the end of the financial year in which such supply was made, or the date of furnishing of the relevant annual return, whichever is earlier, and the tax liability shall be adjusted in such manner as may be prescribed:

Provided that no reduction in output tax liability of the supplier shall be permitted, if the incidence of tax and interest on such supply has been passed on to any other person.”

49.3. From conjoint reading the provisions of Section 16(1) & 17(1) of the Act, the Input tax credit is admissible only on inputs and input service which are used or intended to be used by a supplier in the course or furtherance of business and the amount of credit to be restricted to so much of the input tax as is attributable to the purposes of such business.

49.4. On perusing the provisions of Section 17(5)(b)(i) of the Act with its proviso, the input tax credit shall not be available in respect of canteen expenses and Food Expenses where an inward supply of such goods or services or both is not used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply.

49.5. Further, on perusing the provisions of Section 17(5)(g) & (h) of the Act, the input tax credit shall not be available in respect of goods or services or both used for **personal consumption, destroyed and written off or disposed of by way of gift or free samples.**

50. As regards **Revenue Para No. 1**, I find that the taxpayer had availed ITC of Rs. 24,340/- (CGST of Rs. 8,876/- + SGST of Rs. 8,876/- + IGST of Rs. 6,588/-) related to banquet charges, medical camp for employees, repair of amplifier, telephone bill for staff (personal use), distribution of silver coin to staff which was not in course of furtherance of their business as per Section 16 of the CGST Act, 2017.

50.1. I find that the ITC of these items appears to be either of personal use or distribution of free of cost or have no nexus to the activity of the taxpayer performed in relation to his business hence the ITC of these items is not admissible to the taxpayer in terms of provisions of Section 16 of the CGST Act, 2017 stipulated in aforesaid paras. The said inadmissible ITC is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. Moreover, I find that the ITC of Rs. 24,340/- in this regard had already been reversed by the taxpayer. The same is required to be adjusted and appropriated against the proposed demand.

51. As regards **Revenue Para No. 02**, I find that the taxpayer has availed ITC of Rs. 62,876/- (CGST of Rs. 30,403/- + SGST of Rs. 30,403/- + IGST of Rs. 2,070/-) towards hotel expenses wherein the supply of service was made to the recipient located in inter-state.

51.1. In this connection, I find the provisions of Section 12(3)(b) of the IGST Act, 2017 describes as under:-

Section 12 of the IGST Act, 2017 :- **The place of supply of services**

Section 12 (3)(b):- "the place of supply of services by way of lodging accommodation by a hotel, inn, guest house, home stay, club or campsite, by whatever name called, and including a house boat or any other vessel shall be the location at which the immovable property or boat or vessel, as the case may be, is located or intended to be located."

From plain reading the above provisions, in case of service of hotel, the place of supply shall be the location of service provider where the property is situated. Hence the place of supply cannot be treated as inter-state for this particular service and accordingly, the ITC is not admissible to the said taxpayer for inter-state supply of services. The said inadmissible ITC is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. I find that the taxpayer had already been reversed the ITC of Rs. 62,876/-. The same is required to be adjusted and appropriated towards the demand as proposed.

52. As regards **Revenue Para 03**, I find that that the taxpayer had availed ITC of 4,33,200/- towards Canteen Expenses, food expenses related to stay in hotels and purchase of Motor vehicles which cover under block credit under the provisions of Section 17(5) of the CGST Act, 2017.

52.1. I refer to the provisions of Section 17(5) of the CGST Act, 2017, as stipulated in aforesaid paras which speaks about block of input tax credit. I find that ITC of canteen expenses, food expense, Motor Vehicle except when a taxpayer engaged in same business/transporting of passengers are not available to a taxpayer. Thus, I find that the ITC towards expenses related to Canteen expenses, food expenses and purchase of New Motor vehicles which falls under block credit is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. I find that the taxpayer had already been reversed the ITC of Rs. 4,33,200/-/-. The same is required to be adjusted and appropriated towards the demand as proposed.

53. As regards **Revenue Para 04**, I find that the taxpayer had availed ITC of Rs. 66,236/- towards payment of tax paid on clearance of expired finished goods/expired samples for destruction. As the destruction of these goods is carried out after supply of goods and not provided for furtherance of any business.

53.1. I find that service received in respect of destruction of these goods after clearance/supply of goods which do not amount to input or input service which are used or intended to be used in the course or furtherance of business hence the ITC of tax paid on such goods cleared for destruction is admissible as per provisions of Section 16(1) of the CGST Act, 2017. The said inadmissible ITC is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. Further, I find that the taxpayer had already been reversed the ITC of Rs. 66,230/-. The same is required to be adjusted and appropriated against the demand as proposed.

54. As regards **Revenue Para 05**, I find that the taxpayer had availed ITC of 29,798/- cross head availment of ITC (i.e. ITC of CGST and SGST availed in IGST head & ITC of IGST availed in CGST & SGST head). The provisions regarding levy and collections of tax is prescribed under Section 9 (1) of the CGST Act, 2017 and eligibility and conditions for taking input tax credit is prescribed under Section 16 of the CGST Act, 2017 and similar provisions of SGST/ Section 5 of the IGST Act, 2017 read with Section 20 of the IGST Act, 2017. The relevant text are reproduced hereunder for ease of reference :-

“Section 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.”

“9. Levy and collection.— (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the

Council and collected in such manner as may be prescribed and shall be paid by the taxable person.”

54.1. As regards IGST, the levy and collection of IGST is prescribed under Section 5 of the IGST Act, 2017 and eligibility and conditions for taking input tax credit under CGST Act, 2017 is made applicable for IGST matter as per Section 20 of the IGST Act, 2017.

54.2. On combined reading of the above provisions, it transpires that the input tax charged under this is central goods and service tax and a registered person is entitled to take credit of central goods and services tax charged as input tax in CGST head only under CGST Act, 2017. Identical provisions are also legislated under Gujarat GST Act of the state and as regards IGST, the levy and collection of IGST is prescribed under Section 5 of the IGST Act, 2017 and eligibility and conditions for taking input tax credit under CGST Act, 2017 is made applicable for IGST matter as per Section 20 of the IGST Act, 2017 and a registered person is entitled to avail credit of integrated goods and services tax charged as input tax in IGST:

54.3. In the era of self assessment, the taxpayer deserves to be well aware with the provisions of GST Rules and Regulations. Further, Section 49(5) of the CGST Act, 2017 has put some restriction on use of credit of IGST, CGST and SGST, for ease of reference, the same is reproduced as under:-

Section 49. Payment of tax, interest, penalty and other amounts.—

(1) to (4)

(5) The amount of input tax credit available in the electronic credit ledger of the registered person on account of—

- (a) integrated tax shall first be utilised towards payment of integrated tax and the amount remaining, if any, may be utilised towards the payment of central tax and State tax, or as the case may be, Union territory tax, in that order;
- (b) the central tax shall first be utilised towards payment of central tax and the amount remaining, if any, may be utilised towards the payment of integrated tax;
- (c) the State tax shall first be utilised towards payment of State tax and the amount remaining, if any, may be utilised towards payment of integrated tax

[Provided that the input tax credit on account of State tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;]

- (d) the Union territory tax shall first be utilised towards payment of Union territory tax and the amount remaining, if any, may be utilised towards payment of integrated tax:

[Provided that the input tax credit on account of Union territory tax shall be utilised towards payment of integrated tax only where the balance of the input tax credit on account of central tax is not available for payment of integrated tax;]

- (e) the central tax shall not be utilised towards payment of State tax or Union territory tax; and

(f) the State tax, or Union territory tax shall not be utilised towards payment of central tax.

On perusal of the above, it appears that Section 49 (5) places some restriction and order towards payment of tax under head wise from input tax credit available in taxpayer's electronic credit ledger.

54.4. I find that the taxpayer in his submission dated 05.09.2023 has submitted that due to oversight this mistake was happened and agreed to reverse the said credit amount but later vide their submission dated 21.08.2023, they have argued that though they have availed wrong head but the said ITC were utilized for payment of outward liability only and this is a revenue natural hence there is no loss to government. At this stage, it would be appropriate to mention here that such a causal behaviour of taxpayer is not accepted for taking ITC and further, Section 155 of the CGST Act, 2017 specify the burden of proof of claims of eligible ITC under the Act shall lie on the taxpayer.

54.5. Thus, the availment of ITC in cross head (i.e. ITC of CGST and SGST availed in IGST head & ITC of IGST availed in CGST & SGST head) is not admissible to the taxpayer in terms of provisions of Section 16(1) of the CGST Act, 2017. The same would be treated as inadmissible ITC which is required to recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 readwith Section 20 of the IGST Act, 2017. Further, I find that the taxpayer had already been reversed the ITC or Rs. 29,798/-. The same is required to be adjusted and appropriated against the demand as proposed.

55. As regards **Revenue Para 07**, I find that the SCN alleges that the taxpayer had shown excess credit notes in GSTR-9 in comparison to GSTR-1 and hence made short payment of tax of Rs. 45,562/-. I find that as per provisions of Section 34 of the CGST Act, 2017, as referred above.

55.1. A credit note is required to be issued by the supplier of taxable goods/service/both in case where the taxable value of any supply of goods/service/both or tax charged in the tax invoice is found excess or the goods found some shortage/deficient/returned by the recipient. The details of said credit note is required to be furnished in **GSTR-1** monthly returns but not later than September following the end of the financial year of such supply or the date of furnishing of the relevant annual return (**GSTR-9**) whichever is earlier. The GSTR-1 is referred to details of outwards supplies effecting during a tax period (**Monthly Returns**) whereas GSTR-9 is referred to an **annual return** which may include a self-certified reconciliation statement, reconciling the value of supplies declared in the returns furnished for the financial year.

55.2. It appeared that the amount of credit notes furnished in GSTR-9 return in comparison to GSTR-1 was found in excess which amount to taxable supply. Thus, the taxpayer had contravened the provisions of Section 34 of CGST Act, 2017/Gujarat GST Act, 2017 and paid short payment of tax which comes to Rs. 45,562/-. The same is required to recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 readwith Section 20 of the IGST Act, 2017. Further, I



find that the taxpayer had already paid the total tax of Rs. 45,562/-. The same is required to be adjusted and appropriated against the demand as proposed.

56. As regards **Revenue Para 08**, I find that the taxpayer had short paid the tax of Rs. 1,17,835/- which came to notice on comparison of the sale register with the tax liability discharged by the said taxpayer under GSTR-3B for the period 2018-19.

56.1. This is an arithmetical/ factual details which resulted in short payment of tax. The same is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. Further, I find that the taxpayer had already paid the total tax of Rs. 1,17,835/-. The same is required to be adjusted and appropriated against the demand as proposed.

57. As regards **Revenue Para 09**, I find that that the taxpayer has availed ITC of Rs. 42,050/- after the prescribed date.

As per provisions of Section 16(4) of the CGST Act, 2017 :-

Section 16(4):- A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier”

On plain reading the above provisions, the due date for taking the ITC towards a tax invoice or debit note for supply of goods or service is furnishing of GSTR-3B return under Section 39 of the month of September following the end of a financial or furnishing of the relevant annual returns, which ever is earlier.

57.1. However, I find from the details of case in my hand that the taxpayer has availed input tax credit of Rs. 42,050/- after due date as prescribed under the above provisions and thereby, they have contravened the provisions of Section 16(4) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. The ineligible ITC is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. Further, I find that the taxpayer had already paid the total tax of Rs. 42,050/-. The same is required to be adjusted and appropriated against the demand as proposed.

58. As regards **revenue para 10**, I find that the taxpayer had availed excess ITC in GSTR-3B returns in comparison to GSTR-2A in table 8 of GSTR-9 for the period 2018-19 & 2019-20 and total ITC of Rs. 2,18,62,914/- was detected excess.

The relevant provisions deals the issue are as under:-

GSTR-3B under Section 39 of the CGST Act, 2017:-

39. *Furnishing of returns.— (1) Every registered person, other than an Input Service Distributor or a non-resident taxable person or a person paying tax under the provisions of section 10 or section 51 or section 52 shall, for every calendar month or part thereof, furnish, in such form and manner as may be prescribed, a return, electronically, of inward and outward supplies of goods or services or both, input tax credit availed, tax*



payable, tax paid and such other particulars, in such form and manner, and within such time, as may be prescribed, on or before the twentieth day of the month succeeding such calendar month or part thereof.

Rule 60 of the CGST Rules, 2017 prescribes an auto populated statement containing details of ITC shall be available in GSTR-2A to the concerned registered person (recipient of such supply) in respect of :-

- 1. The details of outward supplies furnished the supplier in Form GSTR-1*
- 2. The details of invoices furnished by a non -resident taxable in Form GSTR-5*
- 3. The details of invoices furnished by an Input Service Distributors in Form GSTR-6*
- 4. The details of tax deducted at source furnished by an e-commerce operator in Form GSTR-7*
- 5. The details of tax collected at source furnished by an e-commerce operator in Form GSTR-8*
- 6. The details of the integrated tax paid on the import of goods or goods brought in DTA from SEZ on a bill of entry*

On perusing the above provisions, it appears that the details of Input Tax Credit (ITC) availed during the month towards inwards supply is recorded in GSTR-3B returns whereas an auto populated details of input tax credit (ITC) ought to be available in Form-GSTR-2A of the recipient. It means the ITC in GSTR-2A is auto drafted on filing of requisite details in GSTR-1 by the end of the supplier. Thus, if no details of supply are auto drafted in GSTR-2A then it deemed to be no supply or furnishing of the details of outwards supply by the supplier. In view of the above, it appears that non reflection of details of supply at the recipient end in his GSTR-2A returns would amount to be a supply without proper documents.

58.1 The provisions of Section 16(2)(a) of the CGST Act, 2017 is relevant to clarify the issue reproduced as under:-

"(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,-

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;"

From the above provisions, it stipulates that the input tax credit is available based on possession of a tax invoice or debit note or any tax paying documents issued by the supplier whereas I find from the show cause notice that the taxpayer had not produced any tax paying documents evidencing proof with effect to excess credit (i.e difference of ITC between GSTR-3B and GSTR-2A).

58.2. Now coming to the submission of the taxpayer, I find that the said taxpayer had made too large submission with various cases laws which does not appear to be relevant with facts of instant case. It is incumbent upon to me to mention here that the ITC available in GSTR-2A is based on taxpaying details fill up by the suppliers whereas GSTR-

3B refers to availment of ITC by the recipient of inward supplies of input or input services and if there is any mismatch between both of these, then the taxpayer is required to justify the same with documentary proofs. But unfortunately, the taxpayer, rather to submit the relevant factual documents to explain the mismatch of ITC, just relied upon various cases laws of higher appellate forums in hypothetical manner and made attempt to reconcile the ITC with GSTR-2A which does not clarify the issue of mismatching of ITC.

58.3. However, I focus on the details/documents submitted by the taxpayer and find the following details/documents: -

- (i) GSTR-9 & GSTR-9C returns (F.Y. 2018-19 & 2019-20)
- (ii) GSTR-3B Returns (F.Y. 2018-19 & 2019-20)
- (iii) Details not shown in GSTR-2A invoices confirmation received from the vendors as per Circular No. 183/15/2022-GST dated 27th December, 2022.
- (iv) Reconciliation for ITC as per GSTR-2A with GSTR-9C.
- (v) Details of payment of tax paid under Reverse charge Mechanism (RCM)

As regards tax paid against RCM transactions made with unregistered vendors and import, the said taxpayer replied that the details in respect of RCM transactions were not reported in GSTR-1 which resulted into non reflection of these transactions in their GSTR-2A returns. However, they have availed the ITC in respect of RCM payment as inputs or input services. Hence there was mismatch in ITC between GSTR-2A as well as GSTR-3B. the details are as under :-

Particulars	2018-19	2019-20
RCM- Not in 2A	10,150/-	21,110/-
RCM-import	1,30,38,458/-	27,97,516/-

The above contention of the said taxpayer is not accepted as on going through the details of ITC availed as per table 8 of the GSTR-9, I find that the differential ITC was exclusively pertain to

- (i) Inward supplies (other than imports and inward supplies liable to reverse charge but includes services received from SEZs),
- (ii) Amount of ITC reclaimed (other than (i)) under the provisions of the Act,
- (iii) ITC on inward supplies (other than imports and inward supplies liable to reverse charge but includes services received from SEZs) received during the financial year but availed in the next financial year upto specified period.

Looking to the above details, I find that the ITC in respect of reverse charge payment has neither included in the ITC availed in GSTR-9 (table 8) nor reflected as ITC auto-populated as per GSTR-2A, hence the said ITC (RCM) does not appear to be taken into consideration in respect of the present case. Thus, the difference of ITC as per table 8 in GSTR-9 is appears to be excess availment of ITC without having proper tax paying documents as required under the provisions of Section 16(2)(a) of the CGST Act, 2017.

The ineligible ITC is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017.

59. As regards revenue para 11, I find that the taxpayer had availed excess ITC of Rs. 5,105/- in GSTR-3B returns in comparison to their purchase register for F.Y. 2018-19. It is mentioned here that for availing the ITC, a taxpayer is required to submit the satisfactory duty paying documentary evidences and comply the same as per provisions of the Section 16(1) & 16(2)(a) of the CGST Act, 2017. It is also not placed out to be mentioned here that the ITC is available only towards inward supply/purchases only, hence the same is required to be tallied with the details endorsed in the records maintained by the taxpayer. I find that on comparison the ITC availed in GSTR-3B is in excess of Rs. 5,105/- as per their purchases which appears to be excess availment of ITC without having proper tax paying documents as required under the provisions of Section 16(2)(a) of the CGST Act, 2017. The ineligible ITC is required to be recovered from the taxpayer under the provisions of Section 74(1) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of the IGST Act, 2017. Further, I find that the taxpayer had already paid/reversed ITC of Rs. 5,105/-. The same is required to be adjusted and appropriated against the demand as proposed.

60. Now, I discuss that the applicability of interest under the provisions of Section 50 of the CGST Act, 2017 read with similar of SGST Act, 2017 and IGST Act, 2017. The legal positions towards applicability of interest is as under:-

Section 50 : Interest on delayed payment of tax

(1) Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council.

[Provided that the interest on tax payable in respect of supplies made during a tax period and declared in the return for the said period furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.]

2. The interest under sub-section (1) shall be calculated, in such manner as may be prescribed, from the day succeeding the day on which such tax was due to be paid.

[(3) where the input tax credit has been wrongly availed and utilised, the registered person shall pay interest on such input tax credit wrongly availed and utilised, at such rate not exceeding twenty-four per cent - four percent as may be notified by the Government, on the recommendations of the Council, an interest shall be calculated, in such manner as may be prescribed.]

The section 50 of the Act contains provisions relating to levy of interest on delayed payment of tax on his own. I find that in the instant case the taxpayer has either reversed ITC on later date or not paid/short paid the tax after the due time hence, the liability of interest would automatic be arisen on part of the said taxpayer.

60.1. I relying upon the judgement of Hon'ble Jharkhand High Court in case of Mahadev Construction reported at 2020 (36) G.S.T.L. 343 (Jhar.), wherein it was held that

“Liability of interest is automatic, the same is required to be adjudicated in event of an assessee disputes in computation or vary levability of interest, by initiation of adjudication proceeding under section 73 or section 74 of the CGST Act.”

The fact regards delay payment of tax are under dispute hence the interest on delayed payment of tax or non-payment of tax is squarely applicable in the present case and the same is required to be recovered from the said taxpayer under the provisions of Section 50(1)/50(3) of the CGST Act, 2017/Gujarat GST Act, 2017.

61. Now, I discuss the applicability of penal action under Section 74 of the CGST Act, 2017 read with similar of SGST Act, 2017 and IGST Act, 2017 read with Section 20 of the IGST Act, 2017 under clause of suppression of facts and other contraventions of provisions of Act. It is pertinent to mention here that the system of self-assessment is specifically incorporated in respect of GST under the provisions of Section 59 of CGST Act 2017 /Gujarat GST Act 2017 which reads as "59. Every registered person shall self-assess the taxes payable under this Act and furnish a return for the tax period as specified under section 39." From the findings in above para, I find that that the said taxpayer has suppressed the non/short payment of GST; wrong availment of ITC; non-payment of interest and thereby it appeared that they have knowingly failed to correctly self assessed tax payable / interest payable with an intent to evade payment of proper tax. In the scheme of self-assessment, the Department comes to know about the supplies made and ITC availed only during the scrutiny/Audit of the statutory returns filed by the taxpayers under the statute. Therefore, the government places greater onus on the taxpayer to comply with standards of disclosure of information in the statutory returns.

61.1. The Government has from the very beginning placed full trust on the taxpayer and accordingly measures like self-assessments, etc., based on mutual trust and confidence are in place. All these operate on the basis of honesty of taxpayer; therefore, the governing statutory provisions create a liability on taxpayer when any provision is contravened or there is a breach of trust placed on the payer.

61.2. From the Information/data of the taxpayer verified during the course of audit, it appears that the taxpayer had suppressed the fact of short payment/ non-payment of GST and wrongly availed and utilized irregular ITC. It appears that the taxpayer's liabilities are not properly discharged. The failure to properly discharge their Tax liability is utter disregard to the requirements of law and breach of trust deposed on them is outright act in defiance of law by way suppression, concealment & non-furnishing value of taxable supply; wrong availment and utilization of ITC with intent to evade payment of

tax. The above said short payment/ non-payment of GST and wrong availment and utilization of ITC is unearthed after audit was conducted by officers of Central Tax Audit, Ahmedabad and therefore had the said short payment of GST and wrong availment and utilization of ITC had not been detected during audit, it would have remained unnoticed. All the above facts of contravention on the part of the Taxpayer have been committed with an intention to evade the payment of GST by suppressing the facts. Therefore, the same is required to be demanded from them under Section 74(1) of the CGST Act, 2017/Gujarat GST Act'2017 read with Section 20 of IGST Act'2017 by invoking extended period of five years.

Section 74 of the CGST Act, 2017 :-

"74. (1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized by reason of fraud, or any willful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilized input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

Explanation 2 to Section 74 of the CGST 2017 has defined suppression as under:

"Explanation 2.-For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer".

61.3. Since the said taxpayer was liable to self-assess the liability to pay tax, they had an obligation to furnish the correct and complete information.

61.4. Further, it appeared that the taxpayer had not paid/reversed the wrongly availed and utilized ITC in the prescribed due dates. Also, they had not paid applicable interest on the wrongly availed irregular ITC. Hence, it appeared that they had wrongly availed ITC of CGST/SGST/IGST. These supplies; wrongly availed ITC were not shown in their GSTR 2A returns. It, therefore, appears that there is a case of suppression of facts with intent to evade the payment of tax; payment of interest; wrong availment and utilization of ITC. The short paid/ not paid CGST/SGST and wrongly availed & utilized ITC of CGST/SGST is required to be demanded/ recovered from the said taxpayer under the provisions of Section 74(1) of the CGST Act' 2017 along with interest as per provisions of Section 50 of CGST Act,2017. Similarly, short paid IGST and wrongly availed and utilized ITC of IGST is also liable to be demanded/ recovered from them under the provisions of Section 74(1) of the CGST Act' 2017 read with the provisions of Section 20 of the IGST Act,2017. The said tax payer is also liable to pay interest as per provisions of Section 50 of CGST Act,2017 read with the provisions of Section 20 of the IGST Act,2017.

61.5. By their various acts discussed herein above, **M/s Emcure Pharmaceuticals Pvt. Ltd.** appears to have rendered themselves liable for penal action under Section 74 of the CGST Act' 2017 / the Gujarat GST Act, 2017 read with Section 20 of IGST Act,2017 for failure to file proper statutory GST returns duly discharging the proper tax liability, failure to pay tax, failure to self assess the tax liability, wrong availment of ITC and suppression of facts and contravention of various provisions of the CGST Act'2017 and Rules made there under with intent to evade payment of Goods and Services Tax; thereby a penalty under Section 74 of the CGST Act' 2017Gujarat GST Act, 2017 read with the provisions of Section 20 of the IGST Act,2017 is to be invoked.

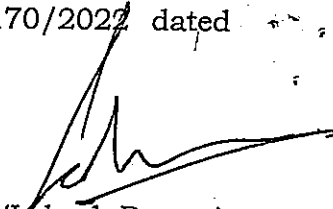
62. In view of the above discussion and findings, I pass the order as under:-

ORDER

- (i) I disallow the ITC amounting to **Rs. 24,340/- (CGST Rs. 8,876/-+ SGST Rs. 8,876/-+ IGST Rs. 6,588/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 1; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (ii) I disallow the ITC amounting to **Rs. 62,876/- (CGST Rs. 30,403/-+ SGST Rs.30,403/- + IGST Rs. 2070/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 2; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (iii) I disallow the ITC amounting to **Rs. 4,33,200/- (CGST Rs. 2,16,600/-+ SGST Rs.2,16,600/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 as per Revenue Para 3; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (iv) I disallow the ITC amounting to **Rs. 66,236/- (CGST Rs. 33,118/-+ SGST Rs.33,118 /-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 as per Revenue Para 4; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (v) I disallow the ITC amounting to **Rs. 29,798/- (CGST Rs. 14,041/-+ SGST Rs. 14,041/-+ IGST Rs. 1716/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 5; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;

- (vi) I Confirm the demand of GST amounting to **Rs. 45,562/- (CGST Rs.22,781/- +SGST Rs.22,781/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act, 2017/Gujarat GST Act, 2017 as per Revenue Para 7; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (vii) I Confirm the demand of GST amounting to **Rs. 1,17,835/- (CGST Rs.4,976 /- +SGST Rs.4,976/-+IGST Rs. 1,07,883/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 8; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (viii) I disallow the ITC amounting to **Rs. 42,050/- (CGST Rs. 6,394/-+ SGST Rs. 6,394/-+ IGST Rs. 29,262/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 9; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (ix) I disallow the ITC amounting to **Rs. 2,18,62,914/- (CGST Rs. 50,72,940/-+ SGST Rs. 50,72,940/-+ IGST Rs. 1,17,17,034/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 10;
- (x) I disallow the ITC amounting to **Rs. 5,105/- (CGST Rs. 1,296/-+ SGST Rs. 1,296/-+ IGST Rs. 2513/-)** and order to recovery the same from the said taxpayer under the provisions of Section 74(9) of the CGST Act 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as per Revenue Para 11; the dues paid by them from electronic cash ledger as informed vide letter dated 10.10.2022 is adjusted towards the confirmed demand;
- (xi) I hold the demand of Interest and order to recovery the same from the said taxpayer in respect of confirmed demands at sr. no. (i) to (x) above under the provisions of Section 50(3) and Section 50(1) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as applicable and interest already paid by them and informed vide their letter dated 10.10.2022 is adjusted against the confirmed demand for interest;
- (xii) I impose Penalty of **Rs. 2,26,89,916/- (Rupees. Two Crores Twenty Six Lakhs Eighty Nine Thousand Nine Hundred and Sixteen Only)** on the said taxpayer towards the confirmed demands at sr. no. (i) to (x) above under the provisions of Section 74(9) of CGST Act, 2017/Gujarat GST Act, 2017 read with Section 20 of IGST Act, 2017 as applicable.

62. The show cause notice bearing F.No. GADT/TECH/SCN/GST/170/2022 dated 30.12.2022 is disposed off in above terms.


(Lokesh Damor)

Joint Commissioner,
Central Excise & CGST,
Ahmedabad North.

Place: Ahmedabad.

Date 05/10/2023

F.No. GST/15-61/OA/2022

To,

M/s Emcure Pharmaceuticals Pvt. Ltd., (24AAACE4574C1Z1)

SM-14, SM-15 and SM-16/1,

G.I.D.C. Sanand-II Industrial Estate,

Taluka Bol and Charal Sanand,

Ahmedabad, Gujarat, 382110

Copy to:-

1. The Commissioner, Central GST & Central Excise, Ahmedabad North.
2. The DC/AC, CGST & Central Excise, Division-III Ahmedabad North.
3. The Superintendent, Range-V, Division-III Sanand, CGST & Central Excise, Ahmedabad North with a request to create Form GST DRC-07 electronically in terms of DSR Advisory no.01/2018 dated 26.10.2018 of the ADG, Systems & Data Management, Bengaluru.
- ✓ 4. The Superintendent (System), CGST & Central Excise Ahmedabad North for uploading the order on website.
5. Guard File.