To,
Commissioner,
Central/State GST,
Commissionerate ____

Respected Sir/Madam,

Re.:- Notice dated _____ seeking recovery of interest on the gross tax dues on account of delayed filing of GSTR – 3B

1. We are in receipt of the captioned notice wherein we have been directed to us to pay the interest computed in the said notice voluntarily failing which recovery action would be initiated u/s 79 of the CGST Act, 2017. In this regard we submit as under.

2. We submit that we have already discharged interest on the delayed payment of tax from the electronic cash ledger. Working for the same is annexed with this letter. We hence submit that the captioned letter directing us to pay the interest in excess of the amount paid on self-assessment basis (purportedly interest is also sought on the tax paid by utilizing the input tax credit ("ITC")) is not tenable on the following grounds.

3. Before adverting to the merits of the issue we submit that the captioned notice directing us to pay the interest is not in accordance with the law for the following reasons:

4. It is settled principle that the Government cannot demand any tax or interest without following the principles of natural justice. Said principle has been enshrined in the CGST Act, 2017 by virtue of Sec. 73 and 74 *which inter alia* provides for the issuance of a show cause notice which requires the tax payer to show cause as to why the tax along with interest u/s 50 as

determined by the officer should not be paid. Said provisions also provides that the tax payer can pay the tax and/or interest on the basis of his own ascertainment and in such circumstances the officer may issue the show cause notice for the amount falling short. Hence we submit that the interest paid by us on our own ascertainment of INR _____ be kindly considered and if found that the said interest amount falls short of the amount determined, law requires you to issue the show cause notice giving us an opportunity of being heard. Hence the captioned notice refraining from providing any opportunity to show cause is not in accordance with the stated legal provisions.

5. We also submit that what is contemplated u/s 75(12) read with Sec. 79 of the CGST Act, 2017 permitting initiation of recovery proceedings without issuance of the SCN is only limited to the interest amount which has been self-assessed by the taxpayer. Hence the amount of interest sought to be recovered either on account of quantification or determination which is in excess of the self-assessed interest can only be done by resorting to the provisions of Sec. 73 and 74 following the principles of natural justice.

6. Reference here is also invited to the decision of Hon'ble Karnataka High Court in the case of LC Infra Projects Pvt. Ltd. v. Union of India 2019 VIL 365 (Kar.). In the said case the above referred principle of natural justice has been upheld by holding that the law requires the officer to issue the show cause notice even for the recovery of interest u/s 50 which has not been self-assessed by the tax payer. Relevant paragraph of the said judgement is reproduced below for ready reference:

"Thus, the issuance of Show Cause notice is sine qua non to proceed with the recovery of interest payable thereon under Section 50 of the Act and penalty leviable under the provisions of the Act or the Rules. Undisputedly, the interest payable under Section 50 of the Act has been determined by the third respondent - Authority without issuing Show Cause Notice, which is in breach of principles of natural justice. It is trite law that any order passed by the quasi-

judicial authorities in contravention of the principles of natural justice, cannot be sustained. Similarly, after determination of the interest liable to be paid by the petitioner, no notice has been issued before attaching the bank account of the petitioner. There is a lapse on the part of the third respondent - Authority. The notion of the third respondent - Authority that Section 75(12) of the Act empowers the authorities to proceed with recovery without issuing Show Cause Notice is only misconceived. The said Section is applicable only to the self-assessment made by the assessee and not to quantification or determination made by the Authority."

7. Therefore we submit that the captioned notice is not in accordance with law.

8. On merits we submit that the levy of interest u/s 50(1) of the CGST Act, 2017 on the portion of output tax paid by utilizing the input tax credit is not tenable on the following grounds:

9. Hon'ble Supreme Court in the case of Eicher Motors Ltd. v. Union of India 1999 (106) E.L.T. 3 (S.C.) has held that that the credit is as good as the tax paid. Said principle was also reiterated in the case of Collector of Excise v. Dai Ichi Karkaria Ltd. 1999 (112) E.L.T. 353 (S.C.). Relevant extract of the said decision is reproduce below for ready reference:

"We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India [1999 (106) E.L.T. 3] this Court said that a credit under the Modvat scheme was "as good as tax paid."

10. Hence we submit that the input tax credit available with us is to be considered as tax already paid (by the concerned suppliers) to the Government and hence the collection of tax which can be done from us would be the amount of tax which remains to be paid after considering the input tax credit. In this regard we also submit that we have availed the ITC and utilized the same for paying the output tax by the due date for filing the return as per the records maintained by us u/s 35(1) of the CGST Act, 2017

11. With the above background we refer to the decision of Hon'ble Supreme Court in the case of Pratibha Processors v. Union of India 1996 (88) E.L.T. 12 (S.C.) wherein the word "interest" has been explained as under:

"13. In fiscal Statutes, the import of the words — "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforce by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty — which is penal in character."

12. Hence we submit that the interest can be imposed only on the "actual amount of tax withheld" by delayed filing of the return. Therefore as input tax credit has to be considered as good as the tax paid and the same has been availed and utilized in the records maintained u/s 35(1), the actual amount of tax withheld by us would only be the amount of tax payable from the cash

ledger and hence interest can be demanded only on the said portion of output tax paid with delay.

13. Please consider the scheme of Act with respect to the filing of the returns as contained u/s 39 of the CGST Act, 2017. Said provisions merely link the due date for payment of tax with the due date for the filing of the return but does not provide that the return can be filed only after paying the entire tax. Attention is also draw to the definition of "valid return" u/s 2(117) of the CGST Act, 2017 which considers a return on which entire tax has been paid as a valid return (which would have been considered for matching if the GSTR – 2/3 would not have been suspended). Therefore a return filed on the due date reflecting the tax paid by way of utilizing the input tax credit and showing the balance tax as payable, although not a valid return for matching, would still remain a return filed u/s 39.

14. However the GSTN portal does not permit filing of the return showing the tax payable by cash as outstanding. The same is thus contrary to the legal provisions cited above. Said proposition has also been acknowledged by the GST Council at their 31st meeting. Relevant agenda note reads as under:

"A perusal of above provisions indicate that the law permits furnishing of a return without payment of full tax as self-assessed as per the said return but the said return would be regarded as an invalid return. The said return, however, would not be used for the purposes of matching of ITC and settlement of funds. Thus, although the law permits part payment of tax but no such facility has been yet made available on the common portal. This being the case, a registered person cannot even avail his eligible ITC as he cannot furnish his return unless he is in a position to deposit his entire tax liability as self-assessed by him. This inflexibility of the system increases the interest burden."

"It may be seen from the above that if the facility for part payment, as permitted under law, was available, the registered person would have been required to

pay interest only on Rs. 10/- but presently he is liable for interest on entire tax liability of Rs. 100/-."

15. Thus in the absence of the facility of allowing filing of the return with outstanding amount (after utilizing ITC) we were left with no option but to delay the filing of the return. Hence we submit that we cannot be penalized by way of demanding the interest on the amount of tax paid by utilizing the ITC for the fault of the GSTN portal. It is settled principle that the taxpayer cannot be made to suffer for no fault (re: Vision Distribution Pvt. Ltd. v. Commissioner W.P.(C) 8317/2019 (Del.) wherein it has been held that the tax payer cannot be made to suffer on account of failure of the Government in devising smooth GST systems). Hence we submit that even on this ground interest cannot be demanded on the gross amount of output tax.

16. Sec. 50(1) of the CGST Act, 2017 reads 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:"

17. A proviso has been introduced (yet to be notified) to the said sub-section which reads as under:

"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."

18. Now perusal of the agenda of the 31st GST Council Meeting held on 22.12.2018 would show that the GST Council has acknowledged the fact that the GSTN portal does not permit filing of the return with tax amount due. Further the fact that GST is a tax on value addition was also acknowledged and thus had agreed to insert the proviso as reproduced above. Relevant extract of the agenda is as under:

"It is also pertinent to mention that the liability of any registered person is related to the value addition made by him since GST is leviable only on value addition. Accordingly, input tax credit is allowed to the registered person in respect of the tax paid by him on his inward supplies. And, while making the outward supplies, the input tax credit so allowed is permitted to be utilised for discharging his output tax liability. The remaining part which is generally equivalent to the tax on value addition is discharged through electronic cash ledger. Hence, by this mechanism the registered person effectively pays tax only on the value addition made by him. If this concept is applied for interest payable, then, it appears that the interest should also be charged on the tax payable on the value addition only, i.e. the amount of tax which is required to be paid through electronic cash ledger."

19. Therefore we submit that the intent of the GST Council as well as the legislators in inserting the given proviso has to be respected and accordingly Sec. 50(1) has to be read as authorizing the imposition of interest on the basis of self-assessment only on the tax paid by way of cash right from the implementation of GST i.e. 01.07.2017 as both the factors which resulted in the proviso are persisting from the said date.

20. Without prejudice to above we also submit that Sec. 50(1) seeks imposition of interest by way of self-assessment on failure of pay the tax "or any part thereof". We thus submit that Sec. 50(1) envisages a scenario wherein a part tax (i.e. the tax payable by way of cash) would remain outstanding had the portal permitted filing of the return with tax shown as

due and hence interest can be imposed on such net portion which remains due. Thus we submit that Sec. 50(1) even without the notification of the proviso permits imposition of interest only on the tax payable by cash.

21. Sec. 50(2) of the CGST Act, 2017 reads as under:

"(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."

22. We thus submit that Sec. 50(2) provides for the calculation of interest imposed u/s 50(1) in a manner which may be prescribed. The word "prescribed" has been defined u/s 2(87) of the CGST Act, 2017 to mean prescribed by rules made under the Act on the recommendation of the Council. We thus submit that till date no such rules have been formulated to prescribe the manner for calculating the interest u/s 50(1). Therefore demanding the interest on the gross amount of tax is not in accordance with Sec. 50(2) in absence of any rule allowing such determination of interest amount on gross dues.

23. We also submit that the word "prescribed" signifies an executive action (by way of rules) on the recommendations of the Council. As stated earlier the GST Council has already acknowledged the issue in their 31st meeting and recommended to impose interest only on the net amount paid by way of cash. Hence Sec. 50(2) has to be read in accordance with the GST Council recommendation and therefore interest can be imposed only on the tax paid by way of cash.

24. Reliance is also placed on the decisions in the case of M/s Landmark Lifestyle Vs. Union of India and Ors. (Case No. 6055/2019) (Del.) and Bharatbhai Manilal Patel Vs. State of Gujarat (Case No. 17642 of 2019) (Guj.) wherein on the said issue Hon'ble Courts have already granted stay.

25. We therefore submit that the recovery initiated u/s 79 based on the amount determined by your good-self is not in accordance with law for the reasons cited above. Hence we request you to kindly adjudicate the matter based on the present submissions before initiating any other proceedings.

Thanking You,
Yours Sincerely,

For _____