

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01.07.2021

CORAM:

THE HON'BLE Dr.JUSTICE ANITA SUMANTH

W.P. Nos.5518 & 1555 of 2020 and
27100 & 30004 of 2019

and

WMP. Nos.1820, 6451, 6452, 6453, 1821 of 2020 29909,
29912, 29906, 26478 & 26479 of 2019

Greenwood Owners Association,
Rep. by its President,
Mr.thilak K Nath,
Buckingham Street,
House of Hiranandani,
5/63, Rajiv Gandhi Salai, Egattur,
Thalambur Post, Chennai – 600 130.

.. Petitioner in W.P. No.5518 of 2020

Oceanic Owners Association,
Rep. by its President,
Maj.Gen.Jose Joseph Manavalan,
Buckingham Street, Oceanic,
House of Hiranandani,
5/63, Rajiv Gandhi Salai, Egattur,
Thalambur Post, Chennai – 600 130.

.. Petitioner in W.P. No.1555 of 2020

M/s.TVH Lumbini Square Owners Association
Represented by its Secretary Mr.A.M.Fakri
Near 2nd Block 127A TVH Lumbini Square,
Bricklin Road, Purasawalkam,
Chennai 600 007.

.. Petitioner in W.P. No.27100 of 2019

Sanjay Kumar Gupta,

<https://www.mhc.tn.gov.in/judis/>

No.2, R.K.Mutt Road,
Mylapore,
Chennai – 600 004.

.. Petitioner in W.P. No.30004 of 2019
Vs

1. The Union of India,
Represented by Secretary to Government,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

2. Principal Chief Commissioner of
GST and Central Excise,
26/1, Uthamar Gandhi Road,
Thousand Lights West,
Chennai 600 034.

... Respondents in W.P. Nos.5518, 1555 of 2020 & 30004 of 2019

1. The Union of India,
Represented by Secretary to Government,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

2. The Assistant Commissioner of
Central Excise and Service Tax,
Pursawalkam Division,
Chennai North Commissionerate,
Newry Towers, No.2054, I Block,
II Avenue, 12th Main Road,
Anna Nagar, Chennai 600 040.

3 Tamil Nadu Authority for Advance Ruling (GST),
PAPJM Buildings, 2nd Floor,
Greens Road, Chennai 600 006.

... Respondents in W.P. No.27100 of 2019

Common Prayer in W.P. Nos.5518 & 1555 of 2020 and 30004 of 2019: The writ petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari to call for the records relating to the impugned Circular dated 22.07.2019 bearing Reference No.109/28/2019-GST issued by the 1st Respondent and quash the same as illegal, arbitrary and ultra vires the Constitution of India and the provisions of the Central Goods and Sales Tax Act, 2017.

Prayer in W.P. No.27100 of 2019: The writ petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus to call for the records of the impugned order No.25/ARA/2019, dated 21.06.2019 passed by the 3rd respondent and Point No.5 of the Circular No.109/28/2019, dated 22.07.2019 issued by the 1st respondent and quash the same as being ultravires and contrary to the provisions of S.No.77 of Notification 12/2017 Central Tax (Rate) dated 28.06.2017 issued in exercise of the powers conferred under Section 11(1) of the Central Goods and Services Tax Act, 2017 as amended by Notification 2/2018 Central Tax (Rate) Dated 25.01.2018 and declare the said Order and Circular as violative of Articles 14, 19(1) (g) Order and Circular as violate of Articles 14, 19(1) (g) and Article 265 of the Constitution of India. सत्यमेव जयते

For Petitioner : M/s.Meera Moganasundan
In W.P. No.5518 of 2020
Ms.R. Vaishali
In W.P. Nos.1555 of 2020
and W.P. No.30004 of 2019
Mr.G.Nataarajan,
In W.P. No.27100 of 2019

For Respondents : Mrs.R.Hemalatha,
Senior Standing Counsel
in W.P. Nos.5518 of 2020,
27100 & 30004 of 2019

in 1555 of 2020 for R2
Mr.C.Kulandaivel,
Senior Panel Counsel for R1
in W.P. No.1555 of 2020

COMMON ORDER

All petitioners are Resident Welfare Associations (RWA) in apartment complexes, barring one individual, who is a resident in an apartment.

2. The petitioner in W.P.No.27100 of 2019 challenges an order of the Authority for Advance Ruling (AAR) levying tax on the entirety of the contribution by him to a RWA and the petitioners in W.P.Nos.5518 and 1555 of 2020 and 30004 of 2019 challenge Circular No.109/28/2019 dated 22.07.2019, also on the same issue.

3. We are concerned with the period post 01.07.2017 when the Goods and Services Tax Act, 2017 (GST Act) was introduced. With the onset of GST, various services in respect of which GST was to be levied and collected came under the scanner. Exemptions were granted under Notification 12/17-CT dated 28.06.2017. The Circular to the extent to which it is relevant, is extracted below:

Exemption from CGST on specified intra-State services.

In exercise of the powers conferred by sub-section (1) of Section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra-State supply of services of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding Entry in column (4) of the said Table, unless

specified otherwise, subject to the relevant conditions as specified in the corresponding Entry in column (5) of the said Table namely,

(1)	(2)	(3)	(4)	(5)
Sl. No.	Chapter, Section, Heading, Group or Service Code (Tarrif)	Description of services	Rate (per cent.)	Condition
1			
77	Heading 9995	Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution- (a) as a trade union; (b) for the provision of carrying out any activity which is exempt from the levy of Goods and Service tax; or (c) up to an amount of five thousand rupees per month* per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.	Nil	Nil

* Amended to Rs.7,500/- vide Notification No.2/18 dated 25.01.2018.

4. Thus, an exemption was granted to contributions made to RWA upto an amount of Rs.7,500/- per month per member for sourcing of goods and services from a third person for the common use of the members of RWA, i.e., housing complexes or residential complexes. Since contributions solicited from members of RWA were on some occasions more than Rs.7,500/- as well,

one of the questions that arose was whether, in a case where the contribution exceeded the amount of Rs.7,500/-, the resident in that RWA would lose the entitlement to exemption altogether, as a result that the entire contribution would be liable to GST or whether the exemption would still continue to be available upto to a sum of Rs.7,500/- and only the difference (excess) becoming exigible to tax.

5. In the early years of GST, The Goods and Services Tax Department issued a clarification in the case of Co-operative Housing Societies, wherein they categorically stated that GST would be applicable only on the amount in excess of Rs.7,500/-. The fliers covers all Co-operative Housing Societies, in essence, RWAs, Housing Societies or Societies in residential complexes. Thus and since this clarification had been issued, this was the methodology that was followed by all RWAs consistently in the collection of contributions and levy of GST thereupon.

6. While this is so and this method was being followed from 2017 till 2019, one of the petitioners, ie., W.P.No.27100 of 2019 approached the AAR seeking clarification in regard to this issue. The AAR, by impugned order dated 21.06.2019, held adverse to it stating that the grant of exemption was conditional upon the contribution being an amount of Rs.7,500/- or less. If the contribution exceeded the sum of Rs.7,500/-, then the very entitlement of that

RWA to exemption would stand defeated and the entirety of the amount collected would have to be brought to tax.

7. The relevant portion of the ruling of the AAR is as follows:

RULING

If a service by the applicant, a registered housing society/resident welfare association to its members by way of reimbursement of charges or share of contribution for sourcing of goods or services from a third person for the common use of its members, is such that it is above 7500 rupees per month effective from 25.01.2018 (5000 rupees before), it is not eligible S No 77 (c) of Notification No. 12/2017-C.T. (Rate) dated 28.06.2017 as amended for CGST and of SI No 77 (c) of Notification No.11(2)/CTR/532(d-15)/2017 vide G.O. (Ms) No. 73 dated 29.06.2017 as amended for SGST. COST and SGST at appropriate rates are to be paid by the members on the full amount of reimbursement of charges or share of contribution,

8. Taking inspiration from this position, the impugned Circular has come to be passed toeing the line of the AAR. The question and answer relating to this issue is extracted below:

Circular No.109/28/2019-GST

F. No.332/04/2017-TRIJ

Government of India

Ministry of Finance

Department of Revenue

(Tax Research Unit)

New Delhi, the 22nd July, 2019

To,

The Principal Chief Commissioner/Chief Commissioners/Principal Commissioner/Commissioner of Central Tax (All)/The Principal Director Generals/Director Generals (All)

Madam Sir,

Subject: Issues related to GST on monthly subscription/contribution charged by a Residential Welfare Association from its members – reg.

<i>Sl. No.</i>	<i>Issue</i>	<i>Clarification</i>

1.	
5.	<i>How should the RWA calculate GST payable where the maintenance charges exceed Rs.7500/- per month per member? Is the GST payable only on the amount exceeding Rs.7500/- or on the entire amount of maintenance charges?</i>	<i>The exemption from GST on maintenance charges charged by a RWA from residents is available only if such charges do not exceed Rs.7500/- per month per member. In case the charges exceed Rs.7500/- per month per member, the entire amount is taxable. For example, if the maintenance charges are Rs.9000/- per month per member, GST @ 18% shall be payable on the entire amount of Rs.9000/- and not on (Rs.9000-Rs.7500) = Rs.1500/-</i>

9. Learned counsel for the petitioner would argue that this interpretation is contrary to the express language as well as the intendment of the exemption granted. They take me through various instances of grant of exemption under different Indirect Tax enactments, to illustrate the difference in language used and the meaning conveyed. Emphasis is placed on the use of the phrase ‘upto’ in the relevant Entry stating that the grant of exemption was for contribution upto Rs.7,500/- and this entitlement remained constant notwithstanding any change in the amount of contribution.

10. My attention is drawn to Article 13(3) of the Constitution of India, as per which ‘law’ would include any Ordinance or Bye law, Rule, Regulation, Notification, custom or usage, excluding Circulars. Thus the withdrawal of a statutory exemption by way of a Circular is contrary to the provisions of the Constitution.

11. Based on the aforesaid clarification initially issued by the Department, the petitioner RWAs have been collecting tax only on that component of the contribution that exceeds Rs.7,500/-. They urge that if a contrary view were to be taken at this juncture, it would be impossible for the Associations to collect the shortfall as there would have been several changes in ownership of the property, in the interim.

12. Learned Senior Standing Counsel appearing for the revenue would stress on the provisions of Section 15 of the GST Act, as per which, it is the transaction value that is liable to GST. The transaction value in this case is represented by the contribution made and it should, in entirety, be taken into account for the purpose of levying tax. She points out that the exemption is intended for the middle class and not for luxury apartments/their owners.

13. She compares the provisions of the Tamil Nadu Additional Sales Tax Act, 1970 (TNAAT), particularly the charging section, Section 2 to state that where Legislature intended beneficial tax treatment by insisting upon a slab rate, such slab is usually indicated in the Statute itself. In the case of levy of TNAAT, the charge is as follows:

(3) By Act 35 of 1986, which came into force on 1st April 1986, the words 'three lakhs' in sub-section (1) of this section was increased to 'ten lakhs' and the four slabs mentioned above were replaced by two slabs as under:-

Rate of tax

(i) where taxable turnover exceeds ten 1.25 percent of the taxable Lakhs of rupees but does not exceed turnover Forty lakhs of rupees

(ii) Where the taxable turnover is Forty lakhs of rupees 1.5 percent of the taxable turnover

14. In the instant case, there is no slab prescribed, but only a range which entitles the assessee to exemption. Any variation in that amount thus leads to automatic disentitlement, according to her. She relies on the judgment of the Constitutional Bench of the Supreme Court in the case of *Commissioner of Customs Import, Mumbai V. Dilip Kumar & Company* (361 ELT 577), wherein the Supreme Court dealing with the grant of exemption from duty under the Customs Act, 1962, holding that, in the case of ambiguity in interpretation of a tax exemption provision or Notification in regard to its applicability qua entitlement or rate of tax to be applied, the interpretation should be strict and the burden of proving applicability would fall on the assessee. In this case as well, she would say, the exemption provision must be construed strictly and the petitioners are thus not entitled to seek beneficial treatment.

15. To summarise, her submission is that while a contribution of Rs.7,500/- or less would entitle the concerned assessee to the grant of exemption, if the contribution exceeded Rs.7,500/-, there was an automatic disentitlement.

16. Heard learned counsel. I am of the view that there is no ambiguity in the language of the exemption provision in this case and thus the judgment

of the Supreme Court in *Dilip Kumar* (supra) would not be applicable to the facts and circumstances of this case. The ratio of that decision would apply only in a case where the provisions granting exemptions are ambiguous, whereas, in the present case, the Entry, in my view, is clear and hence it is only a question of interpreting the same.

17. The intention of the Circular appears clear, that is, to grant exemption in regard to the receipts from services that answer to the description set out therein. The description of the services is also clear, that is, services to the members of an unincorporated body or non-profit by way of reimbursement of charges or share of contribution upto an amount of Rs.7,500/- in the sourcing of goods or services from a third person for the common use of its members. No ambiguity presents itself on a plain reading of the Entry and the intention is clear, so as to remove from the purview of taxation contribution upto an amount of Rs.7,500/-.

18. Let me compare the Entry in question with other entries granting exemptions. The difference in language is emphasized in bold.

(i) SSI Exemption Notification No. 8/2003 C.E. dt. 01.03.2003.

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) (herein after referred to as the Central Excise Act) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 8/2002-Central Excise. dated the 1st March, 2002, published in the Gazette of India vide number G.S.R. 129(E), dated the 1st March, 2002, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts clearances, specified in column (2) of the Table below (hereinafter referred to as the said

Table) for home consumption of excisable goods of the description specified in the Annexure appended to this notification (hereinafter referred to as the specified goods), from so much of the aggregate of, –

Table

S. No	Value of clearances	Rate of duty
(1)	(2)	(3)
1.	<i>First clearances up to an aggregate value not exceeding one hundred lakh rupees made on or after the 1st day of April in any financial year.</i>	Nil
2.	<i>All clearances of the specified goods which are used as inputs for further manufacture of any specified goods within the factory of production of the specified goods.</i>	Nil

(ii) S.No.28 of Notification No. 25/2012-Service Tax Dt.20.06.2012

Incorporating changes made till issuance of notification no 10/2017-Service Tax dated 8-3-2017 G.S.R. 467(E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

-
28. Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution –
- (a) as a trade union; (No monetary limit)
- (b) for the provision of carrying out any activity which is exempt from the levy of service tax; or (No monetary limit)
- (c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;

(iii) S.No.30 of Notification 25/2012 ST Dt.20.06.2012.

Notification No. 25/2012-Service Tax dated- 20th June, 2012, as amended. Incorporating changes made till issuance of notification no 10/2017-Service Tax dated 8-3-2017 G.S.R. 467(E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely:-

30. Services by way of carrying out,- (i) any process amounting to manufacture or production of goods excluding alcoholic liquor for human consumption; or

.....

(d) processes of electroplating, zinc plating, anodizing, heat treatment, powder coating, painting including spray painting or auto black, during the course of manufacture of parts of cycles or sewing machines upto an aggregate value of taxable service of the specified processes of one hundred and fifty lakh rupees in a financial year subject to the condition that such aggregate value had not exceeded one hundred and fifty lakh rupees during the preceding financial year;”.

(iv) S.No.47 of Notification 25/2012 ST Dt.20.06.2012.

*Notification No. 25/2012-Service Tax dated- 20th June, 2012, as amended. Incorporating changes made till issuance of notification no 10/2017-Service Tax dated 8-3-2017 G.S.R. 467(E).- In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210 (E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from **the whole of the service tax leviable thereon** under section 66B of the said Act, namely:-*

.....

“47.Services by way of right to admission to,-

.....

(iii) award function, concert, pageant, musical performance or any sporting event other than a recognised sporting event, where the consideration for admission is not more than Rs 500 per person.”.

(v) S.No.56 of Notification 25/2012

Notification No. 25/2012-Service Tax dated- 20th June, 2012, as amended. Incorporating changes made till issuance of notification no 10/2017-Service Tax dated 8-3-2017.

.....

56. Services provided by Government or a local authority **where the gross amount charged for such services does not exceed Rs. 5000/- :**

Provided that nothing contained in this Entry shall apply to services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994:

*Provided further that in case where continuous supply of service, as defined in clause (c) of rule 2 of the Point of Taxation Rules, 2011, is provided by the Government or a local authority, **the exemption shall apply only where the gross amount charged for such service does not exceed Rs. 5000/- in a financial year;***

19. A reading of the above extracts would indicate the difference in language adopted by the revenue in the matter of grant of exemptions. In a case where legislature intended that the exemption shall apply only to cases where the amount charged does not exceed a specified pecuniary limit, it states as much, as can be seen from the language deployed in the proviso to Clause 56 in Notification 25 of 2012 where it is stated '*the exemption shall apply only where the gross amount charged for such service does not exceed Rs.5,000/- in a financial year*'.

20. Then again in Notification No.12/2017 dated 28.06.2017, Entry 78, dealing with services rendered by an artist reads thus:

(1)	(2)	(3)	(4)	(5)
Sl. No.	Chapter, Section, Heading, Group or Service Code (Tarrif)	Description of services	Rate (per cent.)	Condition
1			

78	<i>Heading 9996</i>	<i>Services by an artist by way of a performance in folk or classical art forms of-</i> <i>(a) music, or</i> <i>(b) dance, or</i> <i>(c) theatre,</i> <i>if the consideration charged for such performance is not more than one lakh and fifty thousand rupees:</i> <i>Provided that the exemption shall not apply to service provided by such artist as a brand ambassador..</i>	<i>Nil</i>	<i>Nil</i>
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21. Here too, the categorization of ‘artist’ is on the basis of the earning of the artist, one who charges less than Rs.1.50 lakhs and one who charges more. The intention is clear, to exempt only such consideration, which is below Rs.1.50 lakhs. If the consideration exceeds Rs.1.50 lakhs by even a rupee, the artist would stand elevated to the next slab, losing the benefit of exemption.

22. It is relevant to note that entries 77 and 78 are from the same circular thus the choice of words employed is a conscious one intended to have different applications.

23. In the case of *Dilip Kumar* (supra), the Supreme Court reiterates the settled proposition that an Exemption Notification must be interpreted strictly. The plain words employed in Entry 77 being, ‘upto’ an amount of Rs.7,500/-

can thus only be interpreted to state that any contribution in excess of the same would be liable to tax.

24. The term '*upto*' hardly needs to be defined and connotes an upper limit. It is interchangeable with the term '*till*' and means that any amount till the ceiling of Rs.7,500/- would exempt for the purposes of GST.

25. As regards the argument concerning slab rate, a slab is a measure of determining tax liability. The prescription of a slab connotes that income upto that slab would stand outside the purview of tax on exigible to a lower rate of tax and income above that slab would be treated differently. The intendment of the exemption Entry in question is simply to exempt contributions till a certain specified limit. The clarification by the GST Department even as early as in 2017 has taken the correct view.

26. The discussion as above leaves me no doubt that the conclusion of the AAR as well as the Circular to the effect that any contribution above Rs.7,500/- would disentitle the RWA to exemption, is contrary to the express language of the Entry in question and both stand quashed. To clarify, it is only contributions to RWA in excess of Rs.7,500/- that would be taxable under GST Act.

27. These writ Petitions are allowed. No costs. Connected

Miscellaneous Petitions are closed.

01.07.2021

Internet: Yes/No

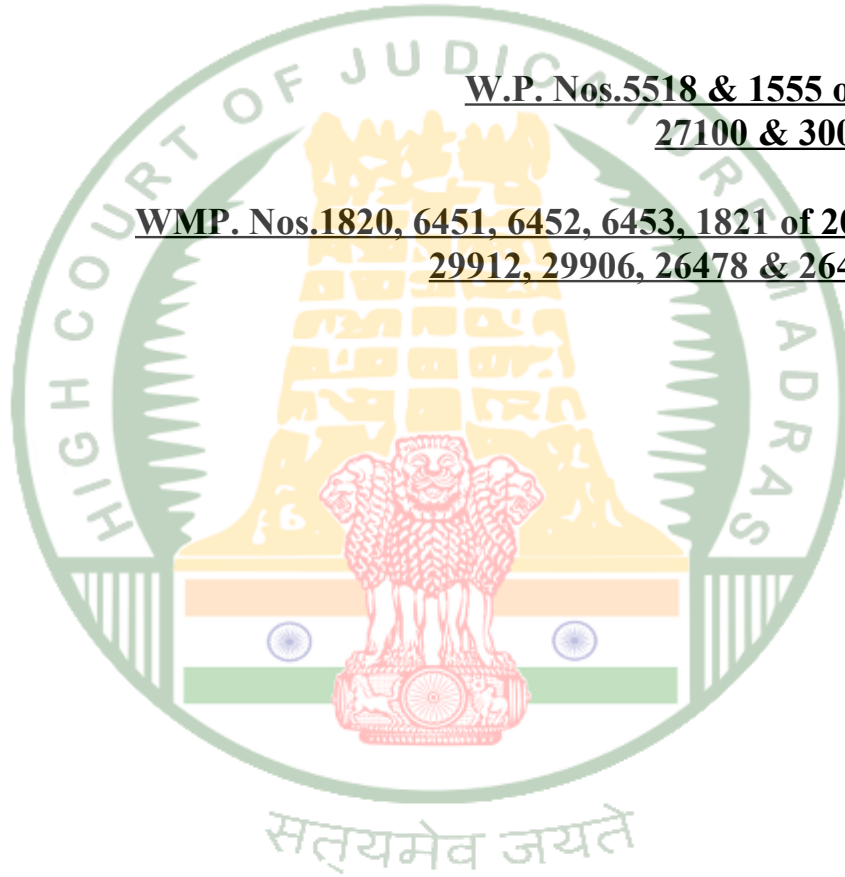
Index: Yes/No

Speaking order/Non speaking order
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To

1. The Union of India,
Represented by Secretary to Government,
Department of Revenue, Ministry of Finance,
North Block, New Delhi.
2. The Assistant Commissioner of
Central Excise and Service Tax,
Pursawalkam Division,
Chennai North Commissionerate,
Newry Towers, No.2054, I Block,
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4. Principal Chief Commissioner of
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