

INDIRECT TAX WEEKLY DIGEST

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GOODS & SERVICES TAX

JUDICIAL UPDATES

WHENEVER AN ACTION IS INTENDED TO BE TAKEN BY THE TAX AUTHORITIES REGARDING THE REGISTRATION OF DEALERS, SHOW-CAUSE NOTICE (SCN) IS NOT ONLY REQUIRED TO BE UPLOADED ON THE WEB PORTAL BUT ALSO A COPY OF SAME IS REQUIRED TO BE FORWARDED TO DEALERS BY E-MAIL OR BY HAND DELIVERY.

Facts of the case

- M/s. Mayel Steels Pvt. Ltd. (Taxpayer) was issued a Show Cause Notice (SCN) by the Tax Authorities whereby the GST registration of the Taxpayer was sought to be cancelled.
- Further, the Taxpayer was called upon by the Tax Authorities for a personal hearing on the very next day following the issuance of the Show Cause Notice.
- Since the SCN was merely uploaded on the GST portal, the Taxpayer was unable to appear before the Tax Authorities at the scheduled date & time and upon being informed, the Taxpayer furnished his response.
- In the meantime, the Tax Authorities issued orders in Form GST DRC-22 for Provisional Attachment of Bank Account/Property under Section 83 of the Central Goods and Service Tax Act, 2017 (CGST Act).
- Aggrieved by the above, the Taxpayer filed a Writ Petition before the Hon'ble Bombay High Court.
- Pursuant to the above, the Tax Authorities have passed an order cancelling the Taxpayer's GST registration (Impugned Order), which also seems to be challenged in the aforementioned Writ Petition.

Contentions of the Taxpayer

- The adjudication of the SCN is arbitrary and overlooks the principles of natural justice, since the same inflicted the Taxpayer with civil consequences in respect of which, no opportunity of being heard was provided.
- The Impugned Order takes within its ambit some issues which are not part of the SCN.

Observations and Rulings by the Hon'ble High Court

- The Tax Authorities have acted in an arbitrary manner and violated the principles of natural justice. Accordingly, the SCN as well as the Impugned Order are set aside.
- However, the Tax Authorities are at liberty to issue a fresh SCN and adjudicate the same after adhering to the principles of natural justice.
- Whenever an action is intended to be taken by the Tax Authorities in respect of the registration of dealers, it is expected that the SCN is not merely uploaded on the GST portal but a copy of the same is forwarded via email/ hand delivery to ensure that the same is effectively replied.

[M/s. Mayel Steels Pvt. Ltd. Vs. Union of India & Ors., [2023 (7) TMI 98 - Bombay High Court], dated 19 June 2023]

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

OUT-OF-COURT SETTLEMENT OF LIQUIDATED DAMAGES DUE TO DELAYED COMPLETION OF A PROJECT (PERTAINING TO THE PRE-GST REGIME) IS NOT LEVIABLE TO GST

Facts of the case

- M/s. TPSC (India) Pvt. Ltd. (Taxpayer) is inter alia engaged in setting up Thermal Power Projects. During FY 2013-14, the Taxpayer entered into an Erection and Pre-Commissioning works related to Steam Turbine Generator and Auxiliaries with NTPC. To execute the contract, the Taxpayer had also subcontracted a certain portion of the works to various contractors.
- The entire work was completed prior to the introduction of GST law and hence, the Applicant had discharged applicable Value Added Tax (VAT) and Service Tax on the contract value.

- The Taxpayer had sub-contracted a portion of the contract to M/s. Delta Global Allied Ltd. (DGAL) for carrying out piping and pre-fabrication work. In respect of such supplies, DGAL had issued invoices for the scope of work performed and had also received the entire consideration (except the retention amount) for the same from the Taxpayer.
- Considering DGAL's inability to duly perform the agreed scope of work, the Taxpayer had reduced the agreed scope and awarded the same to other sub-contractors. Further, on account of the Applicant's delay in supplying isometric drawings, raw materials and IBR pipes, the project completion was delayed. Aggrieved by the above, DGAL commenced arbitration proceedings against the Taxpayer.
- Consequently, the Arbitral award was issued in favour of DGAL requiring the Taxpayer to remit INR 424.55 mn towards compensation (i.e., liquidated damages) and interest thereon towards indirect losses incurred by DGAL.
- Against this, the Taxpayer filed an appeal under Section 34 of the Arbitration and Conciliation Act, 1996 before the Special Court. Pending such appeal, the Taxpayer and DGAL arrived at an out-of-court settlement for a reduction in the quantum of liquidated damages along with interest to INR 385.69 mn (claim amount).
- In respect of payment of the aforesaid settlement amount to DGAL, the Taxpayer has filed an application before the Authority for Advance Ruling (AAR) to determine its taxability.

Contentions of the Taxpayer

- The claim amount is exclusively for damages and compensation for various indirect losses suffered by DGAL due to the delay in the completion of the project. In none of the instances, DGAL has claimed any amount towards the supply of materials or labour.
- The entire claim amount pertains to the pre-GST period. DGAL has also discharged applicable VAT and Service tax on supplies made during the pre-GST period. As a result, damages claimed by DGAL cannot be assessed under the GST law by holding that the claim award is leviable to GST.
- The claim amount agreed during the out-of-court settlement process is not different/ distinct from the Arbitral award. Hence, it cannot be presumed or concluded that the claim amount is to refrain or abstain DGAL from enforcing the Arbitral award.
- Circular no.:178/10/2022 dated 3 August 2022 (Circular dated 3 August 2022) clarified that compensation including liquidated damages claimed for breach or non-performance of the contracts by one of the parties would not be leviable to GST.

Observations and Ruling by the AAR

- While both the members of the AAR (i.e., State Tax and Central Tax) concurred with their views as regards the claim amount not being leviable to GST, the reasons provided by each of the members are summarised in the ensuing paragraphs.

Observations of the State Tax member:

- The gist of the transaction involved in the present case is summarised below:
 - The taxpayer did not fulfil its promise to award the entire agreed work to DGAL.
 - There is a breach of contract by the Taxpayer in respect of which, liquidated damages are payable to DGAL through out-of-court settlement.
 - Accepting liquidated damages cannot imply that DGAL permitted or tolerated the deviation on non-fulfilment of promise.
 - Liquidated damages are paid only to compensate for the injury or loss suffered by the injured party due to a breach of the contract.
- The Circular dated 3 August 2022 clarified that liquidated damages cannot be said to be considered received for tolerating the breach/ non-performance of the contract. Accordingly, where liquidated damages are paid only to compensate for injury, loss or damage suffered by the aggrieved party, the same would be treated as a mere flow of money and hence, not leviable to GST.
- Considering the above, it was concluded that the taxability of the claim amount is squarely covered under the purview of Circular dated 3 August 2022 and hence, the claim amount would not be leviable to GST.

Observations of the Central Tax member:

- Taxability of the claim amount should be assessed as if the same was payable in terms of the Arbitral award since the mutual settlement between the parties was only done based on the said award.
- Considering the above, the claim amount in the present case would be covered under the purview of Circular dated 3 August 2022 and hence, the same would not be leviable to GST.
- Notwithstanding the aforesaid observation, on perusal of the transitional provisions under Section 142 as well as Section 15 of the Central Goods and Services Tax Act, 2017 (CGST Act), it was observed that -
 - Section 142(11)(b) of the CGST Act provides that if a service is already leviable to Service tax, the same cannot attract GST to the extent of such amounts, notwithstanding the provisions of Section 13 of the CGST Act (dealing with the time of supply of services)
 - Generally, receipt of the award during the GST may attract GST as per Section 13 of the CGST Act. However, the same would not apply in the present case considering the non-obstante provision of Section 142(11)(b) of the CGST Act, as highlighted above.
 - GST would be leviable on the additional consideration payable after 1 July 2017 if the same is on account of an upward revision of price as per the contractual agreement. Given that there is

no upward revision of price in the present case, the question of levy of GST on the claim amount would not arise.

- As per Section 15 of the CGST Act, interest for delayed payment of consideration has to be assessed at the same rate as the principal supply. Accordingly, the interest component forming part of the claim amount would be taxable based on the taxability of the principal supply. Considering that the principal supply itself is not leviable to GST, the question of the levy of GST on the interest component would not arise.
- In view of the above, both the members of the AAR concluded that the claim amount would not be leviable to GST.

[AAR - Telangana, M/s. TPSC (India) Pvt. Ltd. [2023 (6) TMI 1229 - Authority for Advance Ruling, Telangana], dated 17 April 2023]

INPUT TAX CREDIT (ITC) OF GST PAID ON PROCUREMENTS USED IN THE CONSTRUCTION OF THE WAREHOUSE FOR ONWARD RENTING

Facts of the case

- M/s. Mindrill Systems and Solutions Pvt. Ltd. (Taxpayer) is inter alia engaged in the construction of a warehouse/ godown for onward letting.
- Construction of the warehouse involves goods like cement, marble, paver block, shutter door, electrical equipment, fire protection system, prefabricated steel building and structural installation thereof along with works contract services such as painting, plumbing, electrical installation, etc.
- For the construction of a warehouse, the Taxpayer inter alia procures the following goods/ services for the construction of warehouse:
 - Construction services are provided by builders, developers, and contractors.
 - Goods and services which are directly used for the construction of a building.
- In respect of the aforesaid procurements, the Taxpayer has filed an application before the AAR to determine its eligibility to claim ITC in respect of the aforesaid procurements in case where the aforesaid procurements are -
 - Capitalised in the books of accounts.
 - Not capitalised in the books of accounts.

Contentions by the Taxpayer

- Section 17(5)(d) of the CGST Act restricts ITC where inward supplies are received by a recipient for construction of an immovable property '*on his own account*'. The phrase '*on his own account*' would cover those instances where the constructed immovable property (i.e., warehouse) is used by the recipient for its own use. However, considering that the warehouse constructed by the Taxpayer would be given on rent to another person, the same would not be covered under the purview of the phrase '*on his own account*'.

- The term 'construction' as defined under Section 17(5) of the CGST Act includes reconstruction, renovation, additions, alterations, or repairs to the extent of capitalisation to the said immovable property.
- Further, Section 17(5)(d) of the CGST Act restricts ITC on procurements used for the construction of immovable property. In the present case, the warehouse cannot be treated as an immovable property on account of the following:
 - Warehouse is constructed by using pre-engineered steel structures fixed to a civil foundation using nut bolt technology.
 - Warehouse can be detached and dismantled without any damage and is capable of being re-erected at another site. Accordingly, the principle laid down by the Hon'ble Supreme Court in *CCE Vs. Solid & Correct Engineering Works [2010 (95) SCC 122]* would squarely apply to the present case and hence, the warehouse constructed by the Taxpayer would not be treated as an immovable property.
- Reliance was also placed on the decision of the Hon'ble Orissa High Court in *Safari Retreats Pvt. Ltd. Vs. Chief Commissioner of Central Goods & Services Tax [2019 (105) taxmann.com 324]* wherein it was held that if the Taxpayer is required to pay GST on rental income arising on account of letting out of the mall, the restriction under Section 17(5)(d) of the CGST Act is required to be read down and ITC on goods and services used for construction of malls would be available. The aforesaid ruling is squarely applicable to the present case and hence, the restriction under Section 17(5)(d) of the CGST Act would not apply to the present case.

Observations and Ruling by the AAR

- When any purchase or sales are claimed to have been made by a person '*on his own account*', it means that the person is not making such purchases or sales on behalf of others and the person accounts for expenses/ income in his books. Considering the above, it was concluded that the warehouse has been constructed by the Taxpayer '*on his own account*' because the Taxpayer is providing outward supplies of warehousing services and/ or renting or leasing services '*on his own account*'.
- The warehouse constructed by the Taxpayer is not intended to be moved and indeed has not been moved after the construction of the same at a given place. Further, while constructing the warehouse, goods such as cement, marble, paver block, shutter door, electrical equipment, etc., do not get transferred chattel as a chattel.
- On perusal of the decision in *Solid & Correct Engineering Works (supra)*, it was observed that the object or intention of annexation is the pertinent test to determine whether something is for a permanent beneficial enjoyment, and the same must be determined based on the facts and circumstances of each case.
- In the present case, the Taxpayer neither removes the entire warehouse with its flooring without any damage or deterioration and re-erect it on other pieces of vacant land nor does he intends to do so. The intention behind the

construction of the warehouse is to let it out and earn rental income from it. Therefore, the warehouse constructed by the Taxpayer for its permanent characteristics and in the absence of mobility like other goods, would be regarded as an immovable property.

- The decision in *Safari Retreats Pvt. Ltd. (supra)* dealt with the eligibility of ITC on goods/ services used for the construction of a shopping mall. However, the following issues were not the subject matter of dispute before the Hon'ble High Court:
 - Whether the mall can be regarded as an immovable property or not.
 - Whether the procurements can be considered to have been made '*on his own account*' or not.
 - Whether or not the procurements were capitalised in the books of accounts.

Considering the above, the aforesaid ruling, being distinguishable on facts, would not apply to the present case.

- The restriction under Section 17(5)(d) of the CGST Act would apply in respect of goods or services used for the construction of a warehouse (held to be an immovable property in this case) which are capitalised in the books of accounts.
 - In view of the above, the ITC eligibility on the aforesaid procurements is summarised below:
 - **If the construction expenses are capitalised in books** - ITC is not available, being restricted under Section 17(5)(d) of the CGST Act.
 - **If the construction expenses are not capitalised in the books** - ITC would be available to the Taxpayer.
- [AAR - West Bengal, M/s. Mindrill System Solutions Pvt. Ltd., [TS-287-AAR(WB)-2023-GST], dated 26 June 2023]

GSTN ADVISORY

GSTN ADVISORY: ONLINE FUNCTIONALITY IN RESPECT OF THE DIFFERENCE IN TAX LIABILITIES BETWEEN FORM GSTR-1 AND FORM GSTR-3B

The GSTN has recently issued an advisory in respect of the new online functionality that enables the taxpayers to provide reasons for differences in tax liabilities declared in Form GSTR-1/ Invoice Furnishing Facility vis-à-vis the taxes paid while filing Form GSTR-3B, a move taken in line with the recommendations of the GST Council in the 48th GST Council Meeting¹.

[GSTN Advisory dated 29 June 2023]

CUSTOMS

NOTIFICATION

AMENDMENT TO THE RATE OF IMPORT DUTY ON LIQUIFIED PROPANE, LIQUIFIED BUTANE AND LIQUIFIED PETROLEUM GAS (LPG).

By exercising the power under Section 8A(1) of the Customs Tariff Act, 1975 (Customs Tariff Act), the CBIC has notified the following tariff changes in the First Schedule to the Customs Tariff Act, with effect from 1 July 2023:

HSN Code	Description of goods	Existing Rate	Proposed Rate
2711 1200	Liquified Propane	2.5%	15%
2711 1300	Liquified Butane		
2711 1910, 2711 1920 & 2711 1990	LPG	5%	

[Notification no:40/2023-Customs dated 30 June 2023 & Notification no:43/2023-Customs dated 1 July 2023]

EFFECTIVE RATE OF BASIC CUSTOMS DUTY (BCD) ON LIQUIFIED PROPANE, LIQUIFIED BUTANE AND LPG

Notification no:50/2017-Customs dated 30 June 2017 which inter alia prescribes the effective rate of BCD on import of goods is amended whereby the following entries have been inserted in the table therein with effect from 1 July 2023 as under:

Entry No.	HSN Code	Description of goods	Rate of BCD
153A	2711 12 00	Liquified Propane	2.5%
	2711 13 00	Liquified Butane	
155A	2711 19 10, 2711 19 20 & 2711 19 90	LPG	5%

[Notification no:41/2023-Customs dated 30 June 2023 & Notification no:44/2023-Customs dated 1 July 2023]

EFFECTIVE RATE OF AGRICULTURE INFRASTRUCTURE AND DEVELOPMENT CESS (AIDC) ON LIQUIFIED PROPANE, LIQUIFIED BUTANE AND LPG.

Notification no:11/2021-Customs dated 1 February 2021 which inter alia prescribes the effective rate of AIDC on import of goods is amended whereby the following entries have been inserted in the table therein with effect from 1 July 2023 as under:

Entry No.	HSN Code	Description of goods	Rate of AIDC
10AA	2711 12 00	Liquified Propane	15%
	2711 13 00	Liquified Butane	
10B	2711 19 10, 2711 19 20 & 2711 19 90	LPG	

However, AIDC would not be leviable on aforesaid products or a mixture of the same imported by the Indian Oil Corporation Ltd., Hindustan Petroleum Corporation Ltd., or Bharat Petroleum Corporation Ltd. for supply to household domestic customers or non-domestic exempted category customers.

[Notification no:42/2023-Customs dated 30 June 2023 & Notification no:45/2023-Customs dated 1 July 2023]

AMENDMENTS IN EXEMPTION FROM THE APPLICABILITY OF SECTION 51A OF THE CUSTOMS ACT, 1962 (CUSTOMS ACT)

- Notification no.:18/2023-Customs (NT) dated 30 March 2023 has been amended to exempt the following class of deposits from the applicability of Section 51A of the Customs Act till 30 September 2023:
 - With respect to goods imported or exported in customs stations where a customs automated system is not in place
 - With respect to goods imported or exported in international courier terminals
 - with respect to accompanied baggage
 - Other than those used for making electronic payments of:
 - Any duty of customs, including cesses and surcharges levied as duties of customs.
 - Integrated tax.
 - Goods and Service Tax Compensation Cess.
 - Interest, penalty, fees, or any other amount payable under the Act, or Customs Tariff Act, 1975 (51 of 1975).
 - Notification no:19/2022 dated 30 March 2022 granting exemption in respect of the aforesaid situations, except for goods imported or exported into International Courier Terminals would now come into force on 1 October 2023 (earlier, the same was to be introduced effective 1 July 2023).

[Notification no:48&49/2023-Customs (N.T.) dated 30 June 2023]

INSTRUCTION

IMPORTS UNDER INDIA-JAPAN CEPA

- India-Japan Comprehensive Economic Partnership Agreement (CEPA) was negotiated based on HS 2007, where it is stated that as per the Operational Certification Procedures, the Certificate of Origin (CoO) should include the six-digit tariff classification based on HS 2007.
- However, vide Notification no:69/2011-Customs dated 29 July 2011, the tariff preference under India-Japan CEPA has been extended, as amended on account of the transition to the existing HS code, i.e., HS 2022.
- Further, for the purpose of Customs clearance, it is clarified that it is necessary to correlate the HS code (2007 version) mentioned in the CoO issued under the India-Japan CEPA with the HS code (2022 version) mentioned in the Bill of Entry (B/E) at the time of Customs clearance.

[Instruction no:19/2023-Customs dated 4 July 2023]

FOREIGN TRADE POLICY (FTP)

NOTIFICATION

AMENDMENT IN IMPORT POLICY CONDITION OF CIGARETTE LIGHTERS

The import policy of Cigarette lighters under ITC(HS) Codes 96131000 and 96132000 is revised from 'Free' to 'Prohibited', except where the CIF value is INR 20 or above per lighter.

[Notification no:15/2023 dated 29 June 2023]

AMENDMENT IN IMPORT POLICY CONDITION OF POTATOES

Import of 'Potatoes, fresh or chilled: Other' under ITC(HS) code 07019000 from Bhutan is now permitted freely, without any license till 30 June 2024 (earlier, it was freely permitted till 30 June 2023).

[Notification no:16/2023 dated 3 July 2023]

AMENDMENT IN IMPORT POLICY CONDITION OF ARECA NUTS: WHOLE

The Import Policy Condition of Areca nuts: Whole (classifiable under HSN code 08028010) is amended to also permit the importation of specified quantities of Fresh (green) Areca Nut without Minimum Import Price conditions from Bhutan where such imports are made from Land Customs Station (LCS) Chamurchi (INCHMB) In addition to LCS Jaigaon. However, such imports shall be subject to a valid port-specific Registration Certificate issued by DGFT.

[Notification no:17/2023 dated 3 July 2023]

TRADE NOTICE

AMENDMENT IN THE PROCEDURE FOR ALLOCATION OF QUOTA FOR EXPORT OF BROKEN RICE

- Trade Notice no:08/2023 dated 20 June 2023 has been amended which deals with the procedure for allocation of quota for export of broken rice to Senegal, Gambia, and Indonesia based on humanitarian and food security grounds as under:
 - The applications for obtaining a license for the export of broken rice to Senegal, Gambia, and Indonesia during the period from 21 June 2023 to 6 July 2023 will only be considered.
 - The allocation of quota may be made with a minimum threshold of 2,000 Metric tons (MT) by sea as against the earlier threshold of 8,000 MT.
 - Exporters who have been allocated quota for the export of broken rice shall submit the 'Landing Certificate' within 90 days from the date of completion of export.
 - In case of any misdeclaration by the applicant or where the applicant fails to export the allocated quota to the respective country within the specified time, the applicant will be blacklisted for the next two financial years and action will be taken against the applicant under the provisions of the Foreign Trade (Regulations & Development) Act, 1992.

[Trade Notice no:12/2023 dated 30 June 2023 & Trade Notice no:13/2023 dated 3 July 2023]

NEWS FLASH

"DGGI seeks higher GST from auto parts makers"

<https://economictimes.indiatimes.com/industry/auto/auto-news/dggi-seeks-higher-gst-from-auto-parts-makers/articleshow/101496255.cms>

[Source: Economic Times, 5 July 2023]

"India's GST revenue collection for June rises 12% YoY to Rs 1.61 lakh crore"

<https://economictimes.indiatimes.com/news/economy/indicators/indias-gst-revenue-collection-for-june-rises-12-yoy-to-rs-1-61-lakh-crore/articleshow/101415418.cms?from=mdr>

[Source: Economic Times, 1 July 2023]

"Taxpayers can explain discrepancy in their GST returns on GST portal before getting notice"

<https://economictimes.indiatimes.com/news/economy/policy/taxpayers-can-explain-discrepancy-in-their-gst-returns-on-gst-portal-before-getting-notice/articleshow/101372925.cms?from=mdr>

[Source: Economic Times, 29 June 2023]

"Geotagging may become must for GST registrations"

<https://economictimes.indiatimes.com/news/economy/policy/geotagging-may-become-must-for-gst-registrations/articleshow/101438613.cms>

[Source: Economic Times, 2 July 2023]

"Exemplar' GST regime reduced tax burden on people: Sitharaman"

<https://www.hindustantimes.com/india-news/gst-regime-an-exemplar-that-reduced-tax-burden-and-created-efficient-federal-institution-nirmala-sitharaman-101688237743447.html>

[Source: Hindustan Times, 2 July 2023]

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For any content related queries, you may please write to the service line experts at taxadvisory@bdo.in

For any other queries or feedback, kindly write to us at marketing@bdo.in

BDO IN INDIA OFFICES

Ahmedabad

The First, Block C - 907
Behind ITC Narmada, Keshavbaug
Vastrapur, Ahmedabad 380015, INDIA

Bengaluru - Office 1

Prestige Nebula, 3rd Floor,
Infantry Road,
Bengaluru 560095, INDIA

Bengaluru - Office 2

SV Tower, No. 27, Floor 4
80 Feet Road, 6th Block, Koramangala
Bengaluru 560095, INDIA

Chandigarh

Plot no. 55, Floor 5,
Industrial & Business Park,
Phase 1, Chandigarh 160002, INDIA

Chennai

No. 443 & 445, Floor 5, Main Building
Guna Complex, Mount Road, Teynampet
Chennai 600018, INDIA

Delhi NCR - Office 1

The Palm Springs Plaza
Office No. 1501-10, Sector-54,
Golf Course Road, Gurugram 122001, INDIA

Delhi NCR - Office 2

Windsor IT Park, Plot No: A-1
Floor 2, Tower-B, Sector-125
Noida 201301, INDIA

Goa

701, Kamat Towers
9, EDC Complex, Patto Plaza
Panaji, Goa 403001, INDIA

Hyderabad

1101/B, Manjeera Trinity Corporate
JNTU-Hitech City Road, Kukatpally
Hyderabad 500072, INDIA

Kochi

XL/215 A, Krishna Kripa
Layam Road, Ernakulam
Kochi 682011, INDIA

Kolkata

Floor 4, Duckback House
41, Shakespeare Sarani
Kolkata 700017, INDIA

Mumbai - Office 1

The Ruby, Level 9, North West Wing
Senapati Bapat Marg, Dadar (W)
Mumbai 400028, INDIA

Mumbai - Office 2

601, Floor 6, Raheja Titanium, Western
Express Highway, Geetanjali, Railway
Colony, Ram Nagar, Goregaon (E),
Mumbai 400063, INDIA

Mumbai - Office 3

Floor 20, 2001 & 2002 - A Wing, 2001 F
Wing, Lotus Corporate Park, Western
Express Highway, Ram Mandir Fatak Road,
Goregaon (E) Mumbai 400 063, INDIA

Pune - Office 1

Floor 6, Building No. 1
Cerebrum IT Park, Kalyani Nagar
Pune 411014, INDIA

Pune - Office 2

Floor 2 & 4, Mantri Sterling, Deep
Bungalow, Chowk, Model Colony, Shivaji
Nagar
Pune 411016, INDIA

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