Hiregange & Associates
Chartered Accountants

--.2.2012

Ramesh
9652256644

To
The Commissioner of Customs,
Central Excise and Service tax,
Hyderabad –II Commissionerate,
L.B..Stadium Road, Bhasheerbagh,
Hyderabad-500004

Dear Sir,

Sub: Submission of Show Cause Notice (SCN) issued to M/s. Mehta & Modi Homes Hyderabad
Ref: O.R.No.128/2011(C.NO.IV/16/179/2011)-Adjn (ST) (Commr) dated 24.10.2011

With the above reference, we have been authorized to replay and represent M/s. Mehta & Modi Homes, Hyderabad, we herewith submit the Reply to the subject SCN, Authorization letter and subject SCN.

Kindly acknowledge the receipt of the above.

Thanking you,

Yours truly,

For Hiregange & Associates
Chartered Accountants

Chartered Accountants

Partner
Sudhir V.S

22 FEB 2012
I/c No.

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BEFORE THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD-II COMMISSIONERATE, L.B., STADIUM ROAD, BHASHEERBAGH, HYDERABAD-500 004.

Sub: Proceeding under SCN No.128/2011(C.No.IV/16/179/2011)-Adjn (ST) (Commr.) dated 24.10.2011 issued to M/s Mehta & Modi Homes., Hyderabad.

We are authorized to represent M/s Mehta & Modi Homes, 5-4-187/3 & 4 IInd Floor, MG Road, Secunderabad – 500 003. (Hereinafter referred to as 'Noticee') vide their authorization letter enclosed along with this reply.

FACTS OF THE CASE:

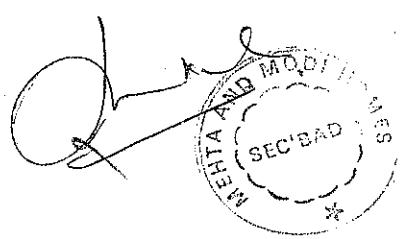
A. M/s Mehta & Modi Homes (hereinafter referred as the Noticee) is a Partnership firm registered under Partnership Act, 1932 mainly engaged in construction of residential units. They have presently performing the projects "Silver Oak Bungalow – Phase I", "Silver Oak Bungalow – Phase II" & "Silver Oak Bungalow – Phase III"

B. Noticees registered under Service Tax department vide service tax registration no. AAJFM0647CST001 for providing construction of complex service and works contract Service.

C. The activity involved in the service provided by the Noticee is as under:

   i. Noticee purchases the undeveloped land, develops it into a layout with infrastructure etc.

   ii. Noticee enters into an agreement with various customers by entering into a document tilted "Agreement of Sale" (AOS) for an agreed consideration.



iii. Then the ownership of the plot is transferred to the customer by executing a "Sale Deed", which is for the part of above agreed consideration (AOS)

iv. The Plan Sanction/permission of construction has been applied and obtained from GHMC/HUDA in three phases. In Phase I and II the permission for construction has been obtained for each independent villa in the name of the builder. In Phase-III sanction has been obtained for all the units as a group housing scheme.

v. Then an "Agreement for Development for common amenities" and "Agreement for construction of a bungalow/independent villa" on the land conveyed by executing the above mentioned sale deed.

vi. They collect the amounts against booking form/agreement of sale and during the course of construction as per the mutually agreed payment schedule.

vii. The amount received initially will be apportioned towards sale deed and then for agreement for the development and thereafter for the agreement of construction.

D. Initially, with effective from 16.06.2005, service tax was paid under the "Construction of Complex Service" after taking the abatement of 33% vide Notification 18/2005-ST dated 07.06.2005(later amended vide notification 1/2006-ST dated 01.03.2006)

E. Later there was a written instruction from the Ld. Additional Commissioner of Service Tax Hyderabad – II Commissionerate, given to

one of the Noticee's group company seeking them to change the classification to "Works Contract Service" with effective from 01.06.2007 and hence for the collections from 01.06.2007, service tax was paid at the rate of 2.06% under the composition scheme of works contract.

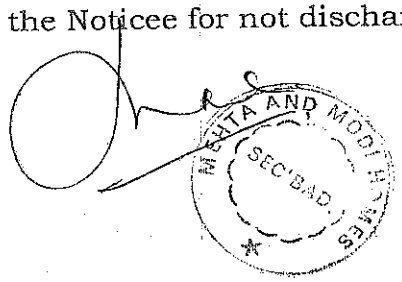
F. Later a Circular No. 180/2/2009-ST dated 29.01.2009 was issued by TRU, CBEC clarifying that in case the construction is done for the personal use of the customer then no service tax is payable.

G. In view of above, a letter dated 12-03-09 was written to the Jurisdictional Assistant Commissioner of Service Tax, stating that they understood that service tax is not applicable for their transaction and sough the comment of the Department on the same.

H. A correspondence No. CON-166 dated 08-07-09 was received by the Ld. Assistant Commissioner of Service Tax, Hyderabad – II Commissionerate stating that the circular applies only in case the entire complex is put to use by a single person.

I. In response to above letter again Noticee clarified vide their letter dated 13.07.09 their stand that the circular did not intend the same in any of the part and sought clarification, the copy of this correspondence was also sent to The Commissioner of Service Tax, Hyderabad II Commissionerate & The Member, Central Board of Excise and Customs, New Delhi and sought clarification, however no clarification has been issues till date.

J. However Later investigation has been taken up by the department on the activity of the Noticee for not discharging the Service tax properly.



K. Subsequently, summons has been issued to Noticee vide letter dated 13.01.2010 for submission of relevant records and information.

L. On verification of books of accounts submitted by Noticee, the department contended the following:

i. Noticee undertaken three projects in the year 2004 namely Silver oak bungalows (Phase-I) and Silver oak bungalows (Phase-II) and Silver oak bungalows (Phase-III) at cherlapally village, Ghatkesar mandal, Ranga Reddy Dist.

ii. Noticee received the amounts from customers from April 2006 to December 2010 towards sale of land and agreement for construction.

iii. In the said projects Noticee has entered into sale deed and agreement for construction with their customers in respect of 290 flats and paid Service tax on the same.

iv. Noticee stopped payment of Service Tax on receipts from 01.01.2009 by misinterpreting the clarification of the Board vide circular no. 108/02/2009-ST dated 29.01.2009.

M. Subsequently, on the basis of information submitted by the Noticee under summons and investigation of books of accounts of Noticee a Show Cause Noticee was issued by the Commissioner of Customs, Central Excise and Service Tax asking to show cause why

i. An amount of Rs.22,72,979/- should not be demanded towards service tax (including cesses) short paid on the Construction of Complex Services provided by Noticee during the period 01.04.2006 to 31.05.2007 under Section 73(1) of the Finance Act, 1994 read with proviso thereto;

ii. An amount of Rs. 5,55,04,153/- towards service tax(including Cesses) short paid/not paid on the Works Contract Services provided by them during the period 01.06.2007 to 31.12.2010 should not be demanded under Section 73(1) of the Finance Act, 1994 read with proviso thereto;

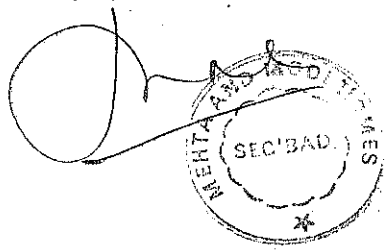
iii. Interest is not payable by the Noticee on the amounts demanded at (i) and (ii) above under Section 75 of the Finance Act, 1994.

iv. Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.

v. Penalty should not be imposed on them under Section 78 of the Finance Act, 1994 for suppression of value of Service tax and contravention of provisions of the Finance Act or the rules made there under, with intent to evade payment of service tax.

In as much as:

a. Noticee not discharging Service tax on amounts received by misrepresenting the clarification issued by Board Circular No. 108/2/2009.



b. Clarification which is mentioned in the Circular is not applicable to the Noticee

c. Payment under composition scheme is not applicable to three projects namely silver oak bungalows' (Phase-I), phase-II and Phase-III are ongoing contracts as clarified vide Board Circular dated 24-08-2010.

d. SCN alleged that the Noticee have contravened the following provisions of Finance Act,1994.

   i. Section 68 of the above Act read with Rule 6 of the Service Tax Rules, 1994.

   ii. Section 70 of the above Act read with Rule 7 of the Service Tax Rules, 1994.

e. SCN alleged that the Noticee is liable for the penalties under the following provisions under Finance Act,1994

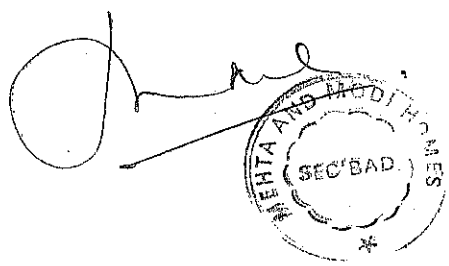
   i. The amount collected by the Noticee is liable for recovery under proviso to the Section 73(1) of the above said Act

   ii. Interest under Section 75 of above said Act

   iii. Penalty Under Section 77 and 78 of above said Act

Submissions:

For easy comprehension, the subsequent submissions in this reply are made under different heading covering different aspects involved in the subject SCN.



A. Violation of Principle of Natural Justice

B. Validity of Show Cause Notice

C. Construction of Complex Service and Circular No.108/02/2009

D. Works Contract Service and Benefit of Composition Scheme

E. Interest

F. Extended period of Limitation

G. Penalty

A. Violation of Principle of Natural Justice:

1. Noticee submits that the Show Cause Notice has placed the reliance of the *interalia* following documents which was not submitted by the them

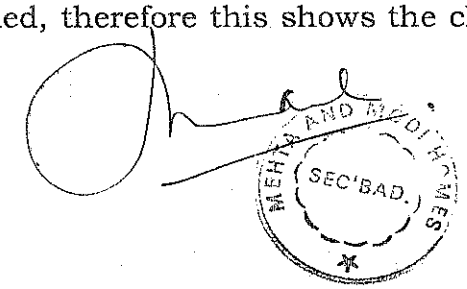
   i. Soft copy of the bank statements, books of accounts, customer documents 2008-09 and 2010-11(upto Dec 2010)

   ii. The statement dated 01.02.2010 of Sri. A Shankar Reddy, authorized person of Noticee.

   iii. Balance sheet of M/s. Mehta & Modi Homes for the years 2006-07 to 2010-11.

   None of the above documents was furnished along with the Notice.

2. Noticee submits that the SCN on the one hand places reliance on the document, alleges contravention of the provision of service tax and requires to show cause by on the other had not furnishing the documents so relied, therefore this shows the clear mind of the department of giving



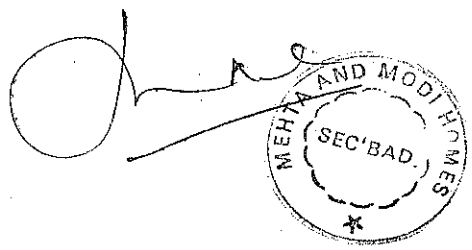
an opportunity is merely an eye wash and not the actually an opportunity extended, hence there is clear violation of principle of Natural Justice and therefore Notice issued violating the Principle of Natural Justice is Void ab initio.

3. Notice submits that the Circular 224/37/2005-Cx. Dated 24.12.2008 clearly states *"All relied upon documents should be referred to in the SCN while preparing the draft SCN. Copies of all relied upon documents should accompany the draft SCN"*

4. Noticee submits that Supreme Court has held in case of Commissioner of Customs, Calcutta vs Indian Oil Corporation Ltd. 2004 (165) ELT 0257 S.C. – (Maintained in 2005 (186) ELT A119 (S.C.)) that circulars are binding on the department. Therefore the said circular is binding on the department and Notice issued violating such binding circular is not valid notice at all and requires to be set aside.

5. Noticee wishes to place the reliance the following judicial pronouncement as support to their claim of violation of principle of natural justice

   a. Kothari Filaments vs Commissioner of Cus. (Port), Kolkata 2009 (233) ELT 0289 S.C - Effective reply could be furnished only on knowing contents of documents - Principles of natural justice violated



b. Rajam Industries (P) Ltd. vs Addl. D.G, D.C.E.I., Chennai 2010 (255) ELT 0161 Mad - Concept of natural justice relating to show cause notice includes providing documents relied on in SCN - Party cannot be expected to give effective reply unless copies of relied upon documents furnished.

c. Robust Protection Forces vs Commr. of Cus., C. Ex. & S.T., Hyderabad 2010 (019) STR 0117 Tri.-Bang - Principles of natural justice violated by not providing copies of relied upon documents along with show cause notice.

B. Validity of Show Cause Notice:

6. Noticee submits that the subject SCN is issued without understanding the nature of activity being undertaken, without examining the agreements/documents in its context, bringing out its own theory though the same is not set out in the statutory provisions, without considering the clarifications issued by the Board, without considering the intention of the legislature but confusing with the provisions of Service Tax, Incorrect basis of computation and many other factors discussed in the course of this reply but based on mere assumption, unwarranted inferences and presumptions. Supreme Court in case *Oudh Sugar Mills Limited v. UOI,* 1978 (2) ELT 172 (SC) has held that such show cause notices are not sustainable under the law. On this count alone the entire proceedings under SCN requires to be dropped.

7. Without prejudice to the foregoing, Noticee submits entire SCN seems to have been issued with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. Therefore the allegation made in the subject SCN and the entire demand made there under is not sustainable.

C. Construction of Complex Service and Circular 108/02/2009

Sale of land

8. Noticee submits that, an identified plot is being sold by execution of a "sale Deed" and such sale of immovable property is a subject matter of stamp duty and accordingly service tax is not applicable on such transaction.

9. Without prejudice to the foregoing, notices further submits that this has been accepted by SCN as well and not service tax is sought to be demanded and hence the no further submission in made in this regard.

Development Agreement & Construction agreement

10. Without prejudice to the foregoing, Noticee submits that the development and construction of a bungalow/Villa is done for the owner of the plot, who in turn used such bungalow/Villa for his personal use. Further it is very important that for each such land/plot owner an agreement has

been executed independently and also permission for construction of bungalow/Villa is been independently applied by the owner of the land/plot and hence the same makes is independent by itself.

11. Without prejudice to the foregoing, Noticee submits that the independent house will not come under the ambit of the definition of residential complex. The definition of the residential complex as defined under section 65(91a) of the Finance Act is extracted as under

"residential complex" means any complex comprising of —

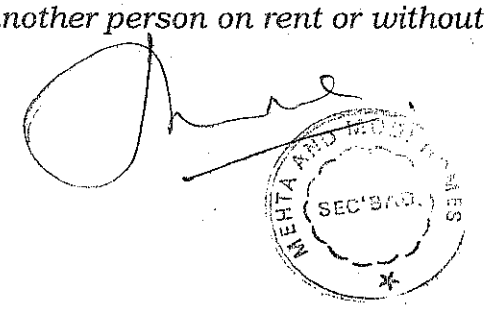
(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;



(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;

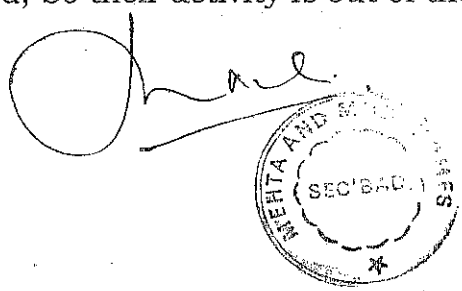
12. Noticee submits that from the above, definition it is clear that all the conditions has to be satisfied cumulatively that is the complex would be having 12 residential units, there should be a common area to be shared and common facilities.

13. Without prejudice to the foregoing, Noticee further submits that the common facilities like club house, etc are shared by the residents, however without ownership rights. The analysis of definition is given below.

    a. First there shoud be building having more than 12 residential units with common area and facilities.

    b. To Tax the construction activity all the conditions are to be cumulatively satisfied. If the activity fails to satisfy even one of the condition mentioned above, then the same is not covered under service tax net.

14. Without prejudice to foregoing, Noticee submits that in their case except common facilities other conditions mentioned in the definition are not satisfied, So their activity is out of the tax net.



15. Without prejudice to the foregoing, Noticee submits that Board had specifically clarified that independent bungalow or houses would not attract service tax vide Circular F. No. 332/35/2006-TRU, dated 1-8-2006 extracted in the foregoing paragraph

16. Without prejudice to the foregoing, Noticee submits the decision of Chennai tribunal in case of Macro Marvel Projects Ltd. vs Commr. of Service Tax, Chennai 2008 (012) STR 0603 Tri.-Mad which specifically held that individual houses are not taxable.

17. In the case of Vinod Kumar Goyal Vs Comissioner of C.EX., Jaipur-I (which is reported in the year 2011) Tribunal decided the in favor of the assessee stating that the individual houses are not taxable.

18. Noticee emphasis that the agreements/contract entered with the various customer is for construction of an independent bungalow/villa and there is no contract/agreement for construction of a complex or part thereof with anybody and hence the same not liable under service tax.

19. Noticee submits that it has been specifically clarified vide board Circular No. 108/2/2009-S.T., dated 29-1-2009 that the construction for personal use of the customer falls within the ambit of exclusion portion of the definition of the "residential complex" as defined u/s 65(91a) of the

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Finance Ac, 1994 and accordingly no service tax is payable on such transaction.

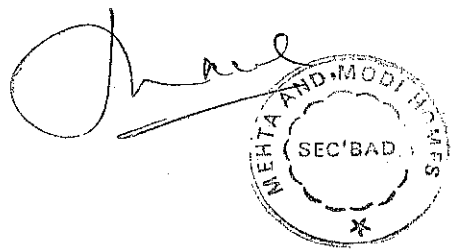
Relevant extract

"...Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'..."

20. Noticee submits that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

21. Without prejudice to the foregoing, Noticee further submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinito.

Relevant Extract



"13.4 However, residential complex having only 12 or less residential units would not be taxable. ***Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable"***

22. Noticee submits that the SCN has bought a new theory that the exemption for personal use as stated in the definition would be available only if the entire complex is for personal use of ONE person. The Noticee wishes to state that while interpreting the law no words should be added or deleted. The law should be read as it is in its entirety. The relevant part of the circular is as under

"...Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'..."

23. The Noticee wishes to highlight that neither in the definition nor in the clarification, there is any mention that the entire complex should be used by **one** person for his or her residence to be eligible for the exemption.

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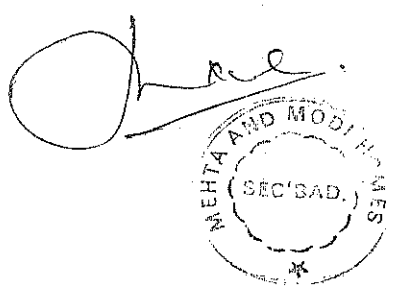
The exemption would be available if the sole condition is satisfied i.e. personal use.

24. The Noticee submits the preamble of the referred circular for understanding what issue exactly the board wanted to clarify. The relevant part of the said circular (para 1) is extracted hereunder for ready reference.

"....Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for ***selling a dwelling unit in a residential complex*** *at any stage of construction (or even prior to that) and who makes construction linked payment..." (Para 1)*

25. The Noticee submits that from the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the notice.

26. The Noticee submits that it is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted as under for ready reference.

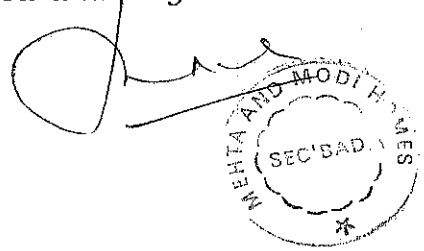


"...It has also been argued that even if it is taken that service is provided to the customer, ***a single residential unit bought by the individual customer*** *would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax..." (Para 2)*

27. The Noticee submits that the argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others.

28. The Noticee submits the final clarification was provided by the board based on the preamble and the arguments. The relevant portion of the circular is provided here under for the ready reference.

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to



the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract ***for construction of a residential complex*** *with a promoter/builder/developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)*

29. The Noticee submits that the clarification provided above is that in the under mentioned two scenario service tax is not payable.

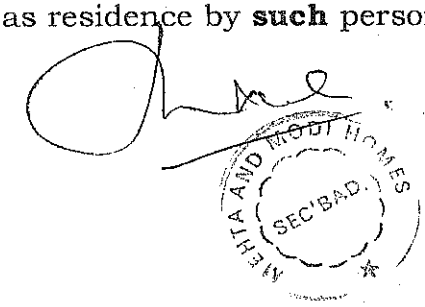
    a. For service provided until the sale deed has been executed to the ultimate owner.

    b. For service provided by entering into construction agreement with such ultimate owner, who receives the constructed flat for his personal use.

30. The Noticee submits that it is exactly the facts in their case. The first clarification pertains to consideration received for construction in the sale deed portion. The second clarification pertains to construction in the construction agreement portion. Therefore this clarification is applicable to them ibid.

31. The Noticee has very narrowly interpreted by the department without much application of mind and has concluded that if the entire complex is put to personal use by a single person, then it is excluded. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.

32. Where an exemption is granted through Circular No. 108/2/2009-S.T., dated 29-1-2009, the same cannot be denied on unreasonable grounds and illogical interpretation as above. In the definition "*complex which is constructed by **a person** directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for **personal use** as residence by **such person**.*" Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as



"personal use by **ONE persons**" Such interpretation would be totally against the principles of interpretation of law and also highly illogical.

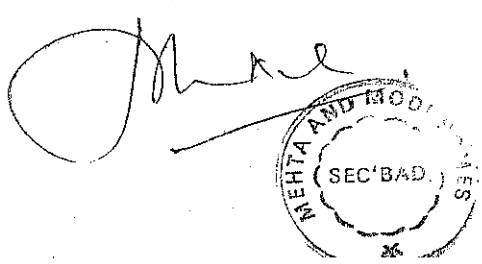
33. Noticee submits that with the above exclusion, no service tax is payable at all for the consideration pertaining to construction service provided for its customer and accordingly the SCN is void abinitio.

34. Without prejudice to the foregoing, Noticee further submits that non-taxability of the construction provided for an individual customer intended for his personal was also clarified by TRU vide its letter dated F. No. B1/6/2005-TRU, dated 27-7-2005 during the introduction of the levy, therefore the service tax is not payable on such consideration from abinitio.

Relevant Extract

"13.4 However, residential complex having only 12 or less residential units would not be taxable. ***Similarly, residential complex constructed by an individual, which is intended for personal use as residence and is constructed by directly availing services of a construction service provider, is also not covered under the scope of the service tax and not taxable"***

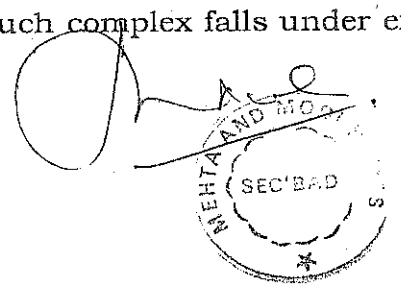
35. Without prejudice to the foregoing, Noticee further submits that the board in between had clarified in an indicative manner that the personal



use of a residential complex is not liable for service tax in the Circular F. No. 332/35/2006-TRU, dated 1-8-2006.

1. 2.	2. *Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?*	3. *Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.*
	5. *Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?*	6. *Clarified vide F. No. B1/6/ 2005-TRU, dated 27-7-2005, that residential complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.*

36. Without prejudice to the foregoing, assuming but not admitting that when the entire residential complex is meant for a person for his personal use, then such complex falls under excluded category is to be considered



as interpreted by the SCN, then the entire section 65(91a) gets defeated as in case complex belonging to single person there would be nothing called as a common area, common water supply etc, the word "common" would be used only in case on multiple owner and not in case of single owner, therefore the interpretation of the department is meaningless.

37. Without prejudice to the foregoing, noticee further submits the various decision that has been rendered relying on the Circular 108 are as under

a. M/s Classic Promoters and Developers, M/s Classic Properties v/s CCE Mangalore 2009-TIOL–1106-CESTAT–Bang,

b. M/s Virgo Properties Pvt Limited Vs CST, Chennai (Dated: May 3 2010) 2010-TIOL-1142-CESTAT-MAD,

c. Ardra Associates Vs. CCE, Calicut - [2009] 22 STT 450 (BANG. - CESTAT)

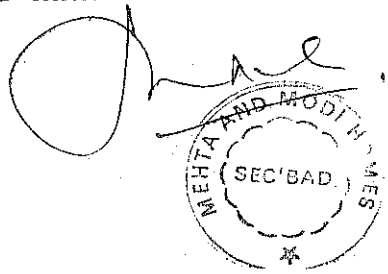
d. Ocean Builders vs Commissioner of C. Ex., Mangalore 2010 (019) STR 0546 Tri.-Bang

e. Mohtisham Complexes Pvt. Ltd. vs Commr. of C. Ex., Mangalore 2009 (016) STR 0448 Tri.-Bang

f. Shri Sai Constructions vs Commissioner of Service Tax, Bangalore 2009 (016) STR 0445 Tri.-Bang

Prior to 01.07.2011

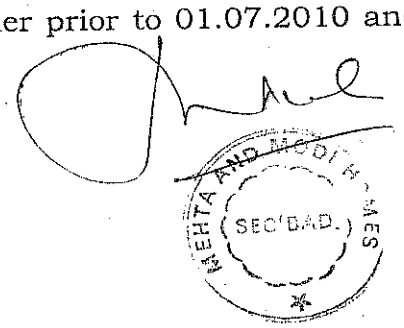
38. Further the noticee submits that in the Finance Bill, 2010 there was an explanation added to the Section 65(105)(zzzh) of the Act where the



taxable service construction of residential complex is defined. This was the first time the deeming fiction of the service provided by the Builder was bought into service tax net (prior to this only the contractors were taxable). In this respect, in the clarification issued by the TRU vide D.O.F No. 334/1/2010-TRU dated 26.02.2010 it was stated that in order to bring parity in the tax treatment among different practices, the said explanation of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is not taxable until the assent was given to the bill. Hence this shows that the transaction in question is not liable to service tax for the period of SCN.

39. Further Notification No. 36/2010-ST dated 28.06.2010 and Circular No. D.O.F. 334/03/2010-TRU dated 01.07.2010 exempts the advances received prior to 01.07.2010, this itself indicates that the liability of service tax has been triggered for the construction service provided after 01.07.2010 and not prior to that, hence there is no liability of service tax during the period of the subject notice.

40. Without prejudice to the foregoing, Noticee submits that Trade notice F.No VGN(30)80/Trade Notice/10/Pune dated 15.02.2011 issued by Pune Commissionerate, has specifically clarified that no service tax is payable by the builder prior to 01.07.2010 and amounts received prior to that is

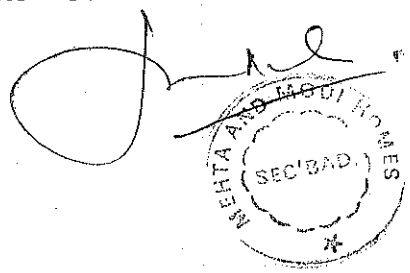


also exempted. Since the issue is prior to such date the same has to be set aside.

41. Further the clarification has been issued by the board CIRCULAR NO. 151/2/2012-ST, DATED 10-2-2012, wherein it has clearly clarified that there is no service tax liability prior to 01.07.2010.

42. Appellant further submits that the Honorable Tribunal of Bangalore in the case of Mohtisham Complexes (P) Ltd. vs Commissioner of C. Ex., Mangalore 2011 (021) STR 0551 Tri.-Bang stating that the explanation inserted to Section 65(105)(zzzh) from 01.07.2010 is prospective in nature and not retrospective. The relevant extract of the subject case is reproduced here under:

> ***"In other words, the present case is covered by the situation envisaged in the main part of the Explanation, thereby meaning that the appellant as a builder cannot be deemed to be service provider vis-a-vis prospective buyers of the buildings. The deeming provision would be applicable only from 1-7-2010.*** *Our attention, has also been taken to the texts of certain other Explanations figuring under Section 65(105). In some of these Explanations, there is an express mention of retrospective effect.* ***Therefore, there appears to be substance in the learned counsel's argument that the deeming provision contained in the explanation added to Section***



65(105)(zzq) and (zzzh) of the Finance Act, 1994 will have only prospective effect from 1-7-2010. Apparently, prior to this date, a builder cannot be deemed to be service provider providing any service in relation to industrial/commercial or residential complex to the ultimate buyers of the property. ***Admittedly, the entire dispute in the present case lies prior to 1-7-2010. The appellant has made out prima facie case against the impugned demand of service tax and the connected penalty.***

Appellant submits from the above, it is evident that there shall be no liability for the receipts received for the period prior to 01.07.10 and since the subject period involved is prior to 01.07.10, the entire demand shall be liable to be quashed.

D. Works Contract Service and benefit of composition scheme

43. Noticee submits that the definition of works contract service also uses the phrase "Residential Complex" therefore on the same ground of personal use as mentioned supra would mutandi mutasis apply to works contract service as well.

44. Noticee Summits that on introduction of works contract service the charging section 66 of the Finance Act,1994 was amended to include clause (zzzza) to be taxed at the rate of 12%. In addition to this there is an option of payment of service tax under composition scheme was given

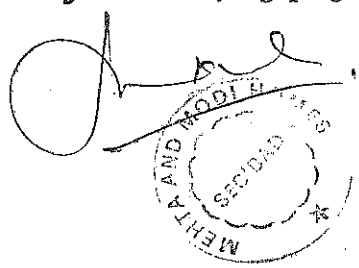
under the Works Contract (Composition Scheme of Payment of Service Tax) Rules, 2007.

45. Noticee Further states that department contended the benefit of Composition scheme by misinterpreting the clarification issued by CBEC vide Circular No. 128/10/2010-ST dated 24.10.2010 in respect of long term contracts entered prior to 1-6-2007.

46. Without prejudice to the foregoing Noticee states that when service tax was not applicable prior to 01.06.2007 then amount erroneously paid cannot be considered as Service Tax at all, therefore that implies that no service tax has been paid on such contract and can opt making payment of service tax under the composition scheme.

47. Without prejudice to the foregoing, assuming but not admitting that amount erroneously paid if considered service tax, Noticee wishes to draw attention to the Rule 3 (1) of the said rules extracted as under

"Notwithstanding anything contained in section 67 of the Act and rule 2A of (1) the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, ***instead of paying service tax at the rate specified in section 66 of the Act,*** *by paying an amount equivalent to two percent**



of the gross amount charged for the works contract

** [presently four per cent.]*

48. Noticee also wishes to draw attention to Rule 3 (3) of the said rules extracted as under

"The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to ***payment of service tax in respect of the said works contract*** *and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract"*

49. Without prejudice to the foregoing, Noticee submits that on close reading of Rule 3 (1) and Rule 3(3) it clearly specified that instead of paying service tax at the rate specified under section 66 composition rate may be opted and such option can be opted before paying service tax in respect of the said works contract, therefore the service tax so referred in Rule 3(3) is only the service tax paid at normal rates under works contract service only and not under any other service.

50. Without prejudice to the foregoing, Noticee submits when a new levy has been introduced and service tax is applicable only after such date, then the question of assuming that the reference of service tax paid made in

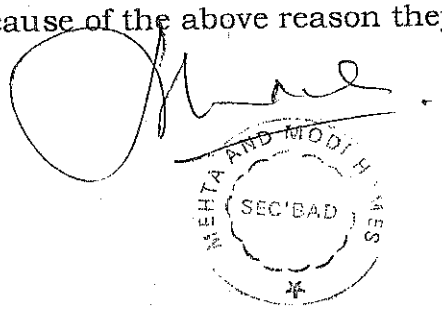
rule 3(3) can in no point of imagination can be considered that the reference is with respect to payment under any other service.

51. Without prejudice to the foregoing, assuming but not admitting that there being a service tax liability on such transaction, the liability has been rightly discharged and amount paid prior to 01.06.2007 is erroneous. Therefore the SCN has to set aside.

52. Without prejudice to foregoing, Noticee states Rule 3(1) of Works Contract (Composition scheme for payment of Service Tax) Rules, 2007 overrides the Section 67 of Finance Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006.

53. Noticee further states that when they are opting for composition scheme the valuation has to be done as per Works contract (Composition scheme for payment for payment of Service Tax) Rules, 2007 and not under Rule 2A of Service Tax (Determination of Value) Rules, 2006 for (exclusion of value of materials)

54. Noticee further states that it is difficult for them to assess the value of transfer of property in goods in the execution of the said works contract. So, because of the above reason they opted for composition scheme.



In Re: Proposal of taxing the same activity under two services

55. Noticee submits that the impunged SCN has alleged that the amount received from 01.04.2006 to 31.05.2007 is classifiable under "Construction of Complex Service" and from the amount received from 01.06.2007 to 31.12.2010 is classifiable under "works contract service". In this regard, it is submitted that when there is no change of the activity in the Noticee for the same transaction and for the same agreement/contract, however only based on the period how the same can be classified under two different category of service is not been bought bu the SCN and also the legal basis for classification is also not provided. Further such classification is against the principles of classification as if the transaction is covered under one category, the need of new service introduction was not warranted.

56. Noticee submits that the above interpretation would have been possible in case if on introduction of the "works contract service" the "construction of complex service" was deleted. However in the absence of such deletion till date, it is clear that what is covered under "residential complex service" is not covered under "works contract service" and therefore classification of the same contract under tow different service is not improper.

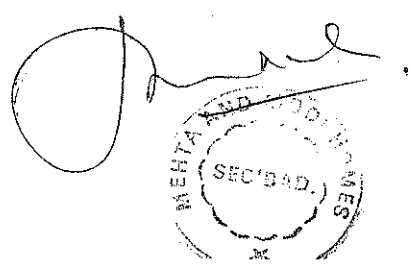
57. Noticee further submits that such act is against the circular No. 98/1/2008-S.T., dated 4-1-2008, where it is clearly clarified that *"vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of the consideration is not legally sustainable."*

In Re: Computation of tax

58. Without prejudice to the foregoing, Appellant submits that the receipts upto 31.05.2007 is not liable for service tax, since the same is covered under the "works contract service" which is applicable to tax only with effect from 01.06.2007 and hence the liability on all the receipts after 01.06.2007 under composition scheme (2.06% & 4.12% as applicable for the relevant period) the liability of service tax word be Rs. 1,02,76,647/-

59. Without prejudice to the foregoing, even assuming service tax has to be paid, there has been an error in computation of service tax by the SCN the actual amount payable would be Rs. 2,73,14,803/- and not as envisaged by the SCN.

60. Further the Noticee submits that the change of clarification any payment under composition scheme if at all is not permitted, that restriction is only for the "ongoing contract" and not the "ongoing project". Each project would be covered by a multiple contract/agreements with the various



customer and the restriction if at all can be made on such contract/agreements which has been entered prior to 01.06.2007 and service tax was paid on the same under "construction of complex service" only, which for continuing the payment under the "construction of complex" under the abatement scheme, there is no restrictions since the entry "construction of complex" is still in existence has not been deleted. Further the contract entered after 01.06.2007, that no service tax paid at all on such contract earlier would also qualify for the abatement scheme at the applicable rates and hence such benefit has to be extended and accordingly service tax payable on the same would amount to Rs.1,83,17,151/-(computation enclosed)

61. Without prejudice to the foregoing, Noticee submits that assuming that the change of classification any payment under composition is not permitted for the entire project then the service tax can be paid under the "construction of complex service" under the abatement scheme, throughout the period and hence in such case liability would arise to Rs. 1,81,55,494/-

E. Interest:

62. Without prejudice to the foregoing Noticee submits that when service tax itself is not payable, the question of interest and penalty does not arise. Noticee submits that it is a natural corollary that when the principal is

not payable there can be no question of paying any interest as held by the Supreme Court in Prathiba Processors Vs. UOI, 1996 (88) ELT 12 (SC).

F. Extended Period of Limitation:

63. Without prejudice to the foregoing, Noticee submits that the demands are barred by limitation inasmuch as it has invoked the extended period of limitation under proviso to Section 73(1) of the Finance Act, 1994 mechanically without any justification.

64. Noticee submits that there was a complete disclosure to the department as to their understanding to the department by way of the repeated correspondence and also they had sought clarification from the Board, which is still awaited, in such scenario invoking extended period of limitation based on this ground.

65. Noticee submits that extended period has been invoked for the reason that Noticee was full aware of the provision of service tax and has not decaled the turnover in the ST-3. In this regard, it is submitted that when the Noticee has volunteered and has intimate to the department as to non-payment of service tax and the same was not reacted by the Department at that juncture and invoking extended period of limitation on a later date does not arise.

66. Noticee further submits that the other ground for invoking extended period of limitation is that Noticee has misinterpreted the definition of the

works contract service with and intent to evade the payment of service tax. In this regard the following are submitted

a. SCN has not clear bought out that what misinterpretation or what incorrect conclusion was made by the Noticee in the entire notice, but is only a mere allegation without any substance

b. SCN has not bought out any documentary evidence to prove that the misinterpretation of definition of works contract has resulted in evasion of service tax.

c. The interpretation of the definition of works contract as made by the Noticee and by the department vide para 7 is one and the same, that is the amount received post 01.06.2007 is leviable to service tax under "works contract service"

d. Further the advice for change of classification from "construction of complex service" to "works contract service" was recommended by the Ld. Additional Commissioner of Service Tax, Hyderabad – II Commissionerate vide letter no HGSTNo.8 dated 21.2.08 and hence the same is not a brain child of the Noticee, but the same was that of the Department.

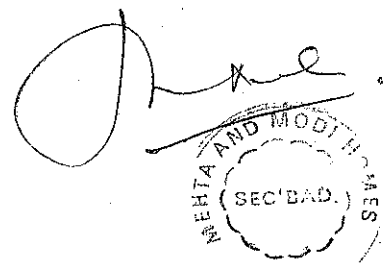
e. Noticee submits that non-payment of service tax due to interpretation of statutory provisions cannot be a ground for invoking extended period of limitation. In this regard, the following cases have been submitted

i. Sujana Metal Products Ltd. vs Commissioner of C. Ex., Hyderabad 2011 (273) ELT 0112 Tri.-Bang, wherein it was held *"As the issues involved relate to interpretations of SEZ provisions under the Customs Act, SEZ Act and provisions of the Central Excise Rules and the Cenvat Credit Rules, no charge of suppression by the assessees can be sustained and, therefore, the question of invoking the extended period of limitation and also imposing penalties does not arise".*

ii. Marsha Pharma Pvt. Ltd. vs Commissioner of C. Ex., Vadodara 2009 (248) ELT 0687 Tri.-Ahmd, wherein it was held "*when different interpretations were possible, extended period cannot be invoked and penalty cannot be levied."*

iii. Jagriti Industries vs Collector of Central Excise, Aurangabad 2001 (127) ELT 0841 Tri.-Del, wherein it was held *No suppression or mis-statement but only a case of different views on interpretation - Extended period not invokable - Demand set aside - Appeal allowed*

67. Noticee submits that the fact of receipt of the amounts towards construction has come into light only after the department has taken investigation. In this regard, when the Noticee itself in its letter

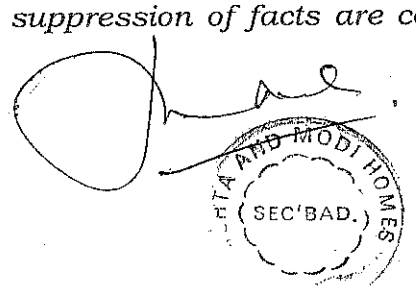


dated_____ had disclosed that it was in receipt of the consideration for the consideration, however based on the circular service tax was not paid and hence such allegation that fact reveled only after investigation is not factual and hence on such ground extended period should not be invoked.

68. Noticee places reliance on the following judicial decisions to support their contention, that under the above circumstances there cannot be any allegation or finding of suppression:

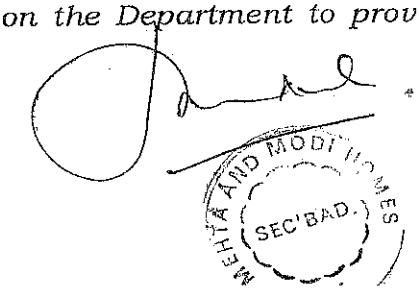
- Mercantile & Indus. Development Co.Ltd. Vs C.C.E. Mumbai-II it was held that- " *Stay/Dispensation of pre-deposit - Demand - Limitation - Show cause notice invoking extended period alleging suppression of fact of availment of Cenvat credit on maintenance and repair services - Counsel for appellant conceding that credit availment on said service not specifically mentioned in returns - Prima facie demand not time-barred - Pre-deposit of part amount directed - Section 35F of Central Excise Act, 1944 as applicable to Service tax vide Section 83 of Finance Act, 1994. [paras 6, 7]*"

- Cosmic Dye Chemical v. CCE, 1995 (75) ELT 721 (SC) *wherein at para-6 of the decision it was held that – "Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as mis-statement or suppression of facts are concerned, they are clearly*



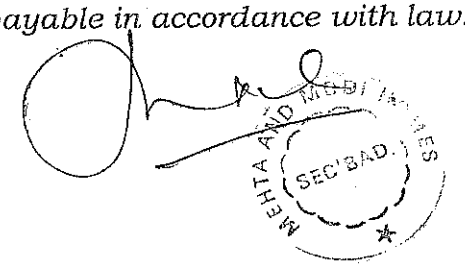
qualified by the word "wilful" preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words "contravention of any of the provisions of this Act or Rules" are again qualified by the immediately following words "with intent to evade payment of duty". It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A. Mis-statement or suppression of fact must be wilful"

- T.N. Dadha Pharmaceuticals v. CCE, 2003 (152) ELT 251 (SC) *wherein it was held that - To invoke the proviso three requirements have to be satisfied, namely, (1) that any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded; (2) that such a short-levy or short-payment or erroneous refund is by reason of fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Central Excise Act or the rules made thereunder; and (3) that the same has been done with intent to evade payment of duty by such person or agent. These requirements are cumulative and not alternative. To make out a case under the proviso, all the three essentials must exist. Further it was held that burden is on the Department to prove presence of all three*



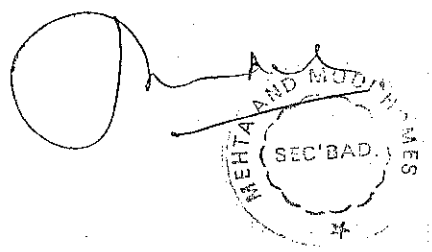
cumulative criterions and the Revenue must have perused the matter diligently. It is submitted none of the ingredients enumerated in proviso to section 11A(1) of the Act is established to present in our client's case.

- Tamil Nadu Housing Board v. CCE, 1994 (74) ELT 9 (SC) *wherein it was held that proviso to section 11A(1) is in the nature of an exception to the principal clause. Therefore, its exercise is hedged on one hand with existence of such situations as have been visualized by the proviso by using such strong expression as fraud, collusion etc. and on the other hand it should have been with intention to evade payment of duty. Both must concur to enable the Excise Officer to proceed under this proviso and invoke the exceptional power. Since the proviso extends the period of limitation from six months to five years it has to be construed strictly. Further, when the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.*



- Padmini Products v. CCE, 1989 (43) ELT 195 (SC) *wherein it was held that mere failure or negligence on the part of the manufacturer either not to take out a licence or not to pay duty in case where there was scope for doubt, does not attract the extended limitation. Unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a licence. For invoking extended period of five years limitation duty should not had been paid, short-levied or short paid or erroneously refunded because of either any fraud, collusion or wilful mis-statement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a* ***positive act****, therefore, failure to pay duty or take out a licence is not necessary due to fraud or collusion or wilful mis-statement or suppression of facts or contravention of any provisions of the Act. Likewise suppression of facts is not failure to disclose the legal consequences of a certain provision.*

- Pahwa Chemicals Pvt. Ltd. v. CCE, 2005 (189) ELT 257 (SC) *wherein it was held that mere failure to declare does not amount to mis-declaration or wilful suppression. There must be some* ***positive act*** *on the part of party to establish that either wilful mis-declaration or wilful suppression and it is a must. When the party*

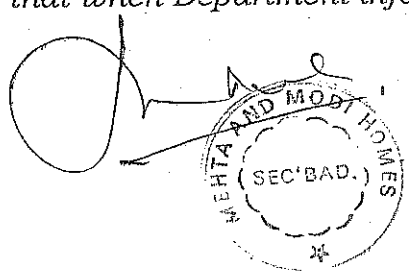


had acted in bonafide and there was no positive act, invocation of extended period is not justified.

- Gopal Zarda Udyog v. CCE, 2005 (188) ELT 251 (SC) *where there is a scope for believing that the goods were not excisable and consequently no license was required to be taken, then the extended period is not applicable. Further, mere failure or negligence on the part of the manufacturer either not to take out the licence or not to pay duty in cases where there is a scope for doubt, does not attract the extended period of limitation. Unless there is evidence that the manufacturer knew that the goods were liable to duty or he was required to take out a licence, there is no scope to invoke the proviso to Section 11A(1).*

- Kolety Gum Industries v. CCE, 2005 (183) ELT 440 (T) *wherein it was held that when the assessee was under bonafide belief that the goods in question was not dutiable, there was no suppression of fact and extended period is not invocable.*

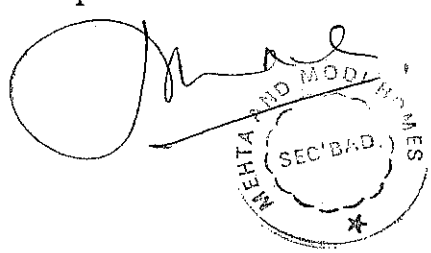
- GTN Enterprises Ltd., Vs. CCE, 2006(200) E.L.T. 76(Tri. Bang) *wherein it was held that when Department informed of activities of*



appellant by of way of filing declaration/returns, suppression of facts not proved, hence extended period of limitation not invokable.

69. Noticee submits that the above mention Supreme Court judgments have been relied by various Tribunals for Service Tax also, therefore irrespective of the difference in language of section 11A of the Central Excise Act and Section 73 of the Finance Act, all such citations are applicable to service tax also. Therefore extended period of limitation is not invokable.

70. The Noticee submits that in case of Martin & Harris Laboratories Ltd. v. CCE 2005 (185) E.L.T. 421 (Tri.), and in case of Hindalco Indus. Ltd., v. CCE, Allahabad, 2003 (161) E.L.T. 346 (T), it is held that Balance sheet of companies being a publicly available document, allegation of suppression of such information, not sustainable and Extended period is not invokable. Further if at all part of the activity was to be suppressed then why not suppress the other activities also is a point requiring ponder. If they had not filed their return then the question of mala fides could be fastened on my clients. As the only basis for invoking the extended period of limitation is this demand under proviso to Section 73(1) is not sustainable and the same requires to be set aside.

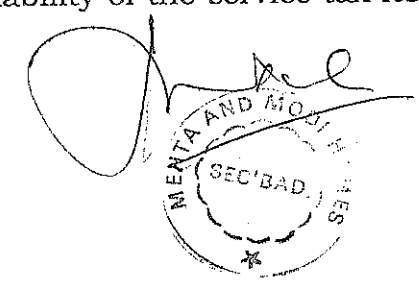


71. The Noticee further submits that in the case Rama Paper Mills vs Commissioner of C. Ex., Meerut 2011 (022) STR 0019 Tri.-Del Demand based on figures in appellant's ledger and balance sheet - Reflection of income and activity in ledger account and balance sheet points to absence of willful suppression - Extended period not invocable. In the instant case also since entire demand is based on the ledgers and Balance Sheet of the company there is no suppression and hence extended period cannot be invokable.

72. Noticee submits that Supreme Court in case of CCE Vs. Alcobex Metals 2003 (153) ELT 241 (SC) has held that once the notice is issued under the proviso for larger period, it cannot be treated as notice under main Section 11A ibid for shorter period of six months. On this ground, since the notice is issued under proviso to section 73(1), it cannot be converted into regular period and demand the service tax under Section 73(1).

G. Penalty

73. Without prejudice to the foregoing, Noticee submits that when the tax itself is not payable, the question of penalty under section 78 does not arise. Further assuming but not admitting, that there was a tax liability as envisaged in SCN as explained in the previous paragraphs, when Noticees were not at all liable for service tax and further also there was a basic doubt about the liability of the service tax itself, Noticee is acting in

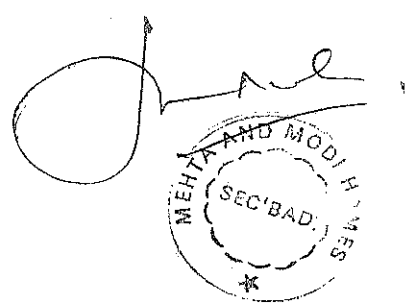


a bona fide belief, that he is not liable to collect and pay service tax, there is no question of penalty under section 78 resorting to the provisions of Section 80 considering it to be a reasonable cause for not collecting and paying service tax.

74. Without prejudice to foregoing, Noticee, further submits that they have written letters dated 25.1.10, 18-11-09, 16-8-10 for clarificartion of the regarding application of the Service Tax. But Department no given any reply regarding this.(letters are enclosed for the reference)

75. Without prejudice to the foregoing, Noticee submits that all the grounds taken for **"Extended period of limitation"** above is equally applicable for penalty as well.

76. Without prejudice to the foregoing, Noticee submits that suppression or concealing of information with intent to evade the payment of tax is a requirement for imposing penalty. It is a settled proposition of law that when the assessee acts with a bonafied belief especially when there is doubt as to statute also the law being new and not yet understood by the common public, there cannot be intention of evasion and penalty cannot be levied. In this regard we wish to rely upon the following decisions of Supreme Court.



(i) Hindustan Steel Ltd. V. State of Orissa – 1978 (2) ELT (J159) (SC)

(ii) Akbar Badruddin Jaiwani V. Collector – 1990 (47) ELT 161(SC)

(iii) Tamil Nadu Housing Board V Collector – 1990 (74) ELT 9 (SC)

Therefore on this ground it is requested to drop the penalty proceedings under the provisions of Section 78.

77. Noticee craves leave to alter, add to and/or amend the aforesaid grounds.

78. Noticee submits that wish to be heard in personal before passing any order in this regard.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner

For M/s. Mehta & Modi Homes,

Partner

BEFORE THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE, HYDERABAD II COMMISSIONERATE, L.B.STADIUM ROAD, BHASHEERBAGH, HYDERABAD-500 004.

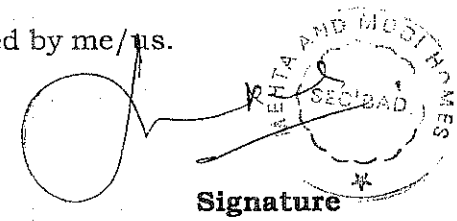
Sub: Proceeding under SCN No.128/2011(C.NO.IV/16/179/2011-Adjn (ST) (Commr). dated: 24.10.2011 issued to M/s Mehta & Modi Homes., Secunderabad.

I, Soham Modi, Managing Partner of M/s Mehta & Modi Homes., Hyderabad hereby authorise and appoint Hiregange & Associates, Chartered Accountants, Bangalore or their partners and qualified staff who are authorised to act as authorised representative under the relevant provisions of the law, to do all or any of the following acts: -

a. To act, appear and plead in the above noted proceedings before the above authorities or any other authorities before whom the same may be posted or heard and to file and take back documents.
b. To sign, file verify and present pleadings, applications, appeals, cross-objections, revision, restoration, withdrawal and compromise applications, replies, objections and affidavits etc., as may be deemed necessary or proper in the above proceedings from time to time.
c. To Sub-delegate all or any of the aforesaid powers to any other representative and I/We do hereby agree to ratify and confirm acts done by our above authorised representative or his substitute in the matter as my/our own acts, as if done by me/us for all intents and purposes.

This authorization will remain in force till it is duly revoked by me/us.

Executed this 21.. day of Feb 2012 at Hyderabad.



Signature

I the undersigned partner of M/s Hiregange & Associates, Chartered Accountants, do hereby declare that the said M/s Hiregange & Associates is a registered firm of Chartered Accountants and all its partners are Chartered Accountants holding certificate of practice and duly qualified to represent in above proceedings under Section 35Q of the Central Excises Act, 1944. I accept the above said appointment on behalf of M/s Hiregange & Associates. The firm will represent through any one or more of its partners or Staff members who are qualified to represent before the above authorities.

Dated 21.02.2012

Address for service :
Hiregange & Associates,
Chartered Accountants,
"Basheer Villa" H.No.8-2-268/1/16/B,
2nd Floor, Sriniketan Colony,
Road No.3, Banjara Hills,
Hyderabad-5000034

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner. (M. No. 219109)