S.C. Reply (2)

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BEFORE THE ADIDITIONAL COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, HYDERABAD-II COMMISSIONERATE, 7th FLOOR, ROOM NO. 806, KENDRIYA SHULK BHAVAN, LB STADIUM ROAD, BASHEERBAGH, HYDERABAD-500 004

Sub: Proceedings under SCN O. R. No. 61/2011 Adjn. (ST) (GR-X) dated 23.4.2011 issued to M/s Greenwood Estates, Secunderabad

We are authorised to represent M/s Greenwood Estates, Secunderabad (hereinafter referred to as Noticee).

ADDITIONAL SUBMISSIONS:

1. In reply to the above propositions, Noticee makes the additional submissions on the following main heads:

   A. Service Tax liability, if any from 1.7.2010 only

   B. Works Contract Service

   C. Rule 2A of Service Tax (Determination of Value) Rules, 2006

   D. Works Contract Composition Scheme

   E. Penalty under Section 76 and Section 77

   F. Benefit under Section 80

In re: Service Tax liability, if any from 1.7.2010 only

2. Noticee submits that the Finance Act, 1994 was amended by the Finance Act, 2010 to introduce an explanation to Section 65(105)(zzq) and Section 65(105)(zzzh). Clause (zzq) relates to a service provided or to be provided to

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any person by any other person in relation to commercial or industria construction and clause (zzzh), a service in relation to the construction of a complex. Both bear the following explanation:

Explanation — For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.

3. Noticee further submits that reliance is place on Mohtisham Complex (P) Ltd. v. CCE 2011 (021) S.T.R.551 (Tri-Bang) wherein it was held as under-

"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***

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industrial/commercial or residential complex to the ultimate buyers of the property."

4. Noticee further submits that Circular 1/2011- S.T. 15.2.2011 issued by Pune Commissionerate it has been clarified as under:

"Representations have been received from trade requesting clarification particularly for advance payments for services of Construction of Residential Complex rendered after 1-7-2010 and also for service tax collected by builders even where no liability exists. It is hereby clarified that -

(a) ***Where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of Para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009. The Service of Construction of Residential Complex would attract service tax from 1-7-2010.*** Despite no service tax liability, if any amount has been collected by the builder as "Service Tax" for Services rendered prior to 1-7-2010, the same is required to be deposited by the builder to the Service tax department. Builder cannot retain the amount collected as Service Tax.

In re: Rule 2A of Service Tax (Determination of Value) Rules, 2006

5. Without prejudice to the foregoing, Noticee submits that taxable value under the work contract service is that part of value of the works contract which is relatable to services provided in the execution of a works contract. For this

purpose, valuation mechanism has been provided under Rule 2A of the valuation rules. However, an option is given to assessee to opt for a composition scheme.

6. Noticee submits that therefore it follows that composition scheme is not mandatory and if he chooses not to opt for the said scheme, service tax can be paid under Rule 2A, ibid. Therefore, the said notice is invalid in as much as it imposes the composition scheme on the assessee.

7. Noticee submits assuming but not admitting Service Tax, if any is payable under the head Works Contract, the value of works contract must be determined as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. Noticee submits that the impugned SCN has been passed with revenue bias without appreciating the statutory provision, intention of the same and also the objective of the transaction/activity/agreement. It is unreasonable to hold that material value is nil in any construction activity merely on the ground that material value has not been furnished by noticee in his correspondence dated 22.04.2011, the same was not furnished as it was not asked for by the department, therefore it does not lead to a conclusion that the same is nil without being given an opportunity of being heard. Noticee shall submit the material Consumption for the period January 2010 to December 2010.

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8. Noticee further submits that where the Value of Work Contract Service shal is determined as per as per Rule 2A of Service Tax (Determination of Value) Rules, 2006, he shall also be entitled to utilize Cenvat Credit on Input services and Capital goods.

In re: Cenvat Credit under Work Contract Composition Scheme

9. Noticee submits that assuming but not admitting service tax if any is payable and the benefit of Rule 2A, ibid is not available for any reason, service tax payable under composition scheme at 4.12% can be paid by utilizing the Cenvat Credit in respect of Input services and Capital goods. However, impugned notice has not considered the same before arriving at the tax liability and such notices issued mechanically with revenue bias should be set-aside.

In re: Quantification of Demand

10. Without prejudice to the foregoing, assuming but not admitting Noticee submits for the period January 2010 to December 2010, the SCN has claimed that amount of Rs.1165.14 Lakhs are taxable. However, noticee fails to understand how the said amount has been arrived at. Out of the total receipts of Rs. 1069.12 Lakhs during the period January 2010 to December 2010, Rs.366.12 Lakhs is received towards value of sale deed and

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value of land and Rs.129.93 Lakhs taxes and other charges which shall not be leviable to service tax. An amount of Rs.573.06 Lakhs has only been received towards Construction agreement. Therefore, assuming but not admitting, service tax if any is payable should be levied only on amount of Rs.573.06 Lakhs and not on the entire amount as envisaged in the notice.

In re: Penalty under Section 76 and Section 77

11. Noticee submits that penalty under Section 77 for failure to submit the returns is not right in law as they have filed their half-yearly returns in form ST-3 for the said period. (Copy of the ST-3 returns enclosed). Hence, penalty on this count should be set-aside.

12. Without prejudice to the foregoing, assuming but not admitting the levy of service tax the Noticee submits that the penalty is not imposable on them and their case is a fit case for waiver of penalty on the following grounds.

a. Reasonable Cause

b. Bona fide Belief

c. Confusion, Interpretation issues involved

13. Noticee further submits that *mens rea* is an essential ingredient to attract penalty. The Supreme Court in the case of *Hindustan Steel v. State of Orissa [1978 (2) E.L.T. J159 (S.C.)* held that an order imposing penalty for

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failure to carry out the statutory obligation is the result of quasi - criminal proceedings and ***penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contentious or dishonest or acted in conscious disregard of its obligation.*** Penalty will not also be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose penalty will be justified in refusing to impose penalty, when there is a technical or judicial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

14. Noticee further no evidence has been brought on record by the lower authority to prove contravention of various provisions of Finance Act, 1994 by the noticee only with intent to evade the payment of service tax. In this scenario, imposition of penalties upon them is not justified. In this regard Appellant places reliance on the following decisions;

a. In *Eta Engineering Ltd.* v. *Commissioner of Central Excise, Chennai* - 2006 (3) S.T.R. 429 (Tri.-LB) = 2004 (174) E.L.T. 19 (Tri.-LB). CESTAT, Northern Bench, New Delhi [Larger Bench] held - Appellants ***being under bona fide doubt regarding their activity whether covered by Service tax or not, there exists***

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reasonable cause on their part in not depositing Service tax in time - penalty not imposable in terms of Section 80 of Finance Act, 1994.

b. In the case of *Ramakrishna Travels Pvt Ltd- 2007(6) STR 37(Tri-Mum)* wherein it was held that in the absence of any records as to suppression of facts, then bona fide belief is a reasonable cause under section 80 of the Finance Act, 1994.

15. Noticee further submits that where the interpretation of law is required, penal provisions cannot be invoked. Also in the case of *CCE vs. Ess Kay Engineering Co. Ltd. [2008] 14 STT 417 (New Delhi – CESTAT)* it was held that: *"It is settled position that when there is a dispute of interpretation of provision of law, the penal provisions cannot be invoked. Therefore, the Commissioner (Appeals) rightly set aside the penalty."* Hence penalty is not applicable in the instant case where there have been confusions as to applicability of service tax, classification of service etc. and law has very much been unsettled.

In re: Benefit under Section 80

16. Without prejudice to the foregoing, assuming but not admitting that service tax on said service is payable, Noticee further submits that Penalty under Section 77 and Section 76 of the Finance Act, 1994 should not be imposed

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as there was a reasonable cause for the said failure. Noticee further submits that Section 80 reads as follows:

"Notwithstanding anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of] section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure."

Thus, noticee submits that there is a fit case for waiver of penalty under Section 80.

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

18. The Noticee wish to be personally heard before any decision is taken in this matter.

For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner