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OFFICE OF THE COMMISSIONER OF CUSTOMS, CENTRAL EXCISE & SERVICE TAX, HYDERABAD -II COMMISSIONERATE, L.B. STADIUM ROAD, BASHEERBAGH, HYDERABAD - 500 004

O.R.No. 59/2011 -Adjn (S.T.) Gr.X

Dated: 23.4.2011

SHOW CAUSE NOTICE

Subject: Service Tax - Offence - Case against M/s.Modi & Modi Constructions - Non-payment of Service Tax on taxable services rendered - Show Cause Notice - Regarding.

M/s. Modi & Modi Constructions, 5-4-187/3 & 4, IInd Floor, MG Road, Secunderabad - 500 003 (hereinafter referred as Paramount / assessee, in short) are engaged in providing works contract service. M/s Paramount Builders is a registered partnership firm and got themselves registered with the department for payment of service tax with STC No. AAKFM7214NST001.

2. A Show Cause Notice vide HQPOR No. 34/2010-Adjn(ST) dt. 12.4.2010 was issued for the period from January 2009 to December 2009 involving an amount of Rs. 604187/- including cess and the same has been adjudicated and confirmed vide Order-In-Original No: 45/2010-ST dt. 29.10.2010. Further, the assessee has gone an appeal and the same has been dismissed vide OIA No.10/2011(H-II) dt. 31.1.2011 by the Commissioner (Appeal), Hyderabad. The present notice is issued in sequel to the same for the period from January 2010 to December 2010.

3. As per Section 65 (105), (zzzza) of the Finance Act, 1994 defines that 'taxable service means any service provided or to be provided - to any person, by any other person, in relation to the execution of a Works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams'.

Explanation: For the purposes of this sub-clause, "works contract" means a contract wherein, -

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out, -
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects."

3. As per Section 65(91a) of the Finance Act, 1994, "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 the 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.

4. M/s Modi & Modi Constructions, Hyderabad registered with the service tax department and not discharging the service tax liability properly and also not filing the ST-3 returns, which are mandatory as per Service Tax Rules made there under. On verification of the records, it is found that M/s Modi & Modi Constructions, Hyderabad have undertaken a single venture by name M/s NILGIRI HOMES located at Rampally Village, Keesara Mandal, RR District and received amount from customers towards sale of land and agreement of construction of 18 houses for the said period. Further, it is found that they have not filed ST-3 returns for the said period.

5. Further it is made clear on 01.02.2010 by Sri A. Shanker Reddy, Deputy General Manager(Admn) authorized representative of the assessee, that the activities undertaken by the company are providing services of construction of residential complexes and also stated that, initially, they collected the amounts against booking form/agreement of sale. At the time of registration of the property, the amounts received till then will be allocated towards Sale Deed and Agreement of Construction. Therefore, service tax on amount received against Agreement of Construction portion of the amounts towards agreement of construction is aid on receipt basis. The Agreement of Sale constitutes the total amount of the land/semi finished flat with undivided share of land and value of construction. The sale deed constitutes a condition to go for construction with the builder. Accordingly, the construction agreement will also be entered immediately on the same date of sale deed. All the process is in the way of sale of constructed unit as per the agreement of sale but possession was given in two phases one is land/semi finished flat with undivided share of land and other one is completed unit. This is commonly adopted procedure as required for getting loads from the banks".

6. As per the exclusion provided in Section 65(91a) of the Service Tax Act, the residential complex 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. Here "personal use" includes permitting the complex for use as residence by another person on rent or without consideration. It is further clarified in para 3 of the Circular No.108/02/2009-ST dt. 29.01.2009 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, then such activity is not liable to service tax. Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer construction entire complex for one person for personal use as residence by such person would not be subjected to service tax. Further, the builder/promoter/developer normally enters into construction/completion agreement after execution of sale deed, till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services.

Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore, there is no levy of service tax on the services rendered till sale deed. i.e. on the value consideration shown in the sale deed. But, no stamp duty will be paid on the agreements/contract against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services against agreements of construction are invariably attracts service tax under Section 65(105(zzzza)) of the Finance Act 1994.

7. As per the definition of "Residential Complex" provided under Section 65(91a) of the Finance Act 1994, it constitutes any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system. The subject venture of M/s Modi & Modi Constructions qualifies to be a residential complex as it contains more than 12 residential units with common area and common facilities like park, common water supply etc., and the layout was approved by HUDA vide permit No. 6092/MP2/plg/HUDA/2007 dated 16.11.2007. As seen from the records, the assessee entered into 1) a sale deed for sale of undivided portion of land together with semi finished portion of the flat and 2) an agreement for construction, with their customers. On execution of the sale deed the right in a property got transferred to the customer, hence the construction service rendered by the assesses thereafter to their customers under agreement of construction are taxable under Service tax as there exists service provider and receiver relationship between them. As there involved the transfer of property in goods in execution of the said construction agreements, it appears that the services rendered by them after execution of sale deed against agreements of construction to each of their customers to whom the land was already sold vide sale deed are taxable services under works contract service.

8. In spite of several reminders from group and anti-evasion and summons dt. 18.4.2011 M/s Modi & Modi Constructions, Hyderabad vide their statement received in this office on 22.4.2011 has submitted the Flat-wise amounts received for the period from January 2010 to December 2010. The total amount received is Rs. 29282693 /- against agreements of construction during the period and are liable to pay service tax including cess works out to Rs. 1206447/- and the interest at appropriate rates under Works Contract Service respectively.

9. M/s Modi & Modi Constructions, Hyderabad are well aware of the provisions and of liability of service tax on receipts as result of these agreements for construction and have not assessed and paid service tax properly with an intention to evade payment of Service Tax. They have intentionally not filed the ST-3 returns for the said period. Hence, the service tax payable by M/s Modi & Modi Constructions, appears to be recovered under Sub-Section (1) of Section 73 of the Finance Act 1994.

10. From the foregoing, it appears that M/s Modi & Modi Constructions, 5-4-187/3 & 4, II Floor, MG Road, Secunderabad-3 have contravened the provisions of Section 68 of the Finance Act 1994 read with Rule 6 of the Service Tax Rules, 1994 in as much as they have not paid the appropriate amount of service tax on the value of the taxable services and Section 70 of the Finance Act 1994 read with Rule 7 of the Service Tax Rules 1994 in as much as they have not filed statutory returns for the taxable services rendered and also did not truly and correctly assess the tax due on the services provided by them and also did not disclose the relevant details/information, with an intent to evade payment of service tax and are liable for recovery under provisions to the Section 73(1) of the Finance Act

1994 and thereby they have rendered themselves liable for penal action under Section 77 & 76 of the Finance Act 1994.

11. Therefore, M/s Modi & Modi Constructions, Hyderabad, are hereby required to show cause to the Additional Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II Commissionerate, Hyderabad, within 30 days of receipt of this Notice as to why:-

- (i) an amount of Rs. 1206447/- including cess should not be demanded on the works contract service under the Sub-Section (1) of Section 73 of the Finance Act 1994 for the period from January 2010 to June 2010; and
- (ii) Interest is not payable by them on the amount demanded at (i) above under Section 75 of the Finance Act 1994; and
- (iii) Penalty should not be imposed on them under Section 77 of the Finance Act 1994 for the contravention of Rules and provisions of the Finance Act 1994; and
- (iv) Penalty should not be imposed on them under Section 76 of the Finance Act 1994.

12. M/s Modi & Modi Constructions, Hyderabad at the time of showing cause, as above, are required to produce all the evidence upon which they intend to rely in their defence. They are also required to indicate in their written reply whether they wish to be heard in person before the case is adjudicated. If no cause is shown against the action proposed to be taken within the stipulated time or having desired a hearing if they do not appear for the personal hearing on the appointed day & time, the case will be decided on merits, basing on the material/evidence available on record.

13. This notice is issued without prejudice to any other action that may be taken against the noticees / others under the Finance Act, 1994 or under any other law for the time being in force in India.

14. Reliance for issue of this notice is placed on the following:

- (i) Statement submitted by M/s Paramount Builders and received on 22.4.2011.


 (G.SREEHARSHA)
 Additional COMMISSIONER

Place: Hyderabad
Date: 23.04.2011

To: M/s Modi & Modi Constructions,
5-4-187/3 & 4, IInd Floor, MG Road, Secunderabad - 500 003

Copy to the Superintendent, Group - X, Hyd-II Commr'ate, Hyd.
Spare copy.