

KADAKIA & MODI HOUSING

5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad - 500 003.
Phone : +91-40-66335551, Fax :

To,
The Additional. Commissioner,
Anti Aviation, Service Tax
Central Excise, Customs & Service Tax
Commissionerate II
Hyderabad.

Date: 13.09.2010

Respected Sir

Sub: Gentle follow up on our earlier letter – Reg
Ref: Our letter dated 16.08.2010.

The above referred letter was filed in your office and was duly acknowledge on 16.08.10. In that letter, we had communicated our understanding with respect to the liability of service tax under the category "Construction of Complex Service".

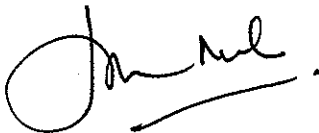
We request you to kindly confirm if our understanding therein is correct or otherwise so that appropriate decision can be taken at our end as to whether service tax has to be collected and paid.

Requesting to revert on this at the earliest as per convenience on this issue.

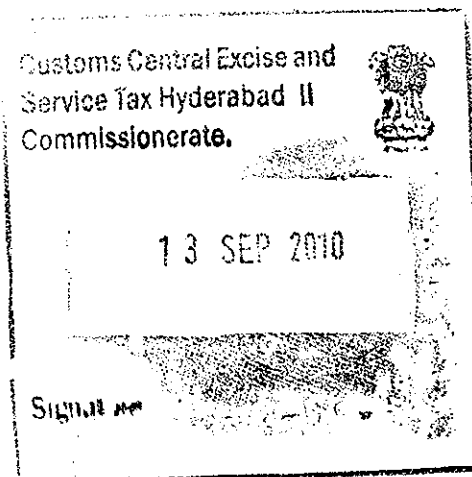
Thanking You.

Yours Truly

For KADAKIA & MODI HOUSING,



Authorised Signatory.



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To,
The Additional Commissioner,
Group III, Hyderabad – II Commissionerate,
L.B. Stadium Road,
Basheerbagh,
Hyderabad – 500004.

Date: 16.08.2010.

Dear Sir,

Sub.: Intimation regarding payment of service tax from 01.07.2010.
Ref.: STC No. AAHFK8714SD001.

1. With reference to above, we would like to inform that we are Builders/Developers of Residential Villas (independent houses in a gated community). We wish to recall our letter no. Nil dated 12.03.009 wherein, we had informed that we would not be liable for service tax and accordingly we had stopped remitting the payment of service tax also.
2. The reason for termination of payment of service was as under
 - a. Single Agreement: since the transaction involved is sale of immovable property (stamp duty has been suffered) service tax would not be payable in view of the Gauhati High Court in case of Magus Construction (P) Ltd., (2008 (11) S.T.R. 225 (Ga.)) and circular no. 108/02/2009-ST dated 29.0.2009.
 - b. Sale deed & construction agreement: For the consideration relating to Sale Deed (transfer of vacant land), the stand same as mentioned for single agreement would be applied. In case of construction, since the construction is for the customer for his personal use, the same has been excluded in the definition of the Residential Complex, which was also clarified vide Circular no. 108/02/2009-ST dated 29.01.2009.
 - c. Chennai Tribunal in case of Macro Marvel has held that independent houses in a gated community would not be liable for service tax.
 - d. Customer was not reimbursing the service tax, since the same was not liable based on the above view.
3. Now we understand that, recently there are amendments vide the Finance Act, 2010 r/w recent circulars and notifications issued in this regard. The essence of the amendment is that if we receive any amount/advance prior to taking completion certificate, then we would be liable for service tax under "Construction of Residential Complex Service", whereas if the entire consideration is received post obtaining completion certificate, then the same would be totally excluded from the service tax.

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4. We understand that such explanation inserted is not constitutionally valid for the reason that this intends to tax transfer of immovable property by apply the Doctrine of Pith and substance. Transfer of immovable property has been governed by List II of the seventy Schedule to Indian Constitution, which is exclusively state subject and union cannot levy tax on the same. Interim stay by the Bombay High Court has also been granted in this regard,
5. Further we understand, since the taxable object in the instant case is "Residential Complex", which excludes personal use of the customer. Therefore insertion of this explanation in the taxable service definition does not dilute our view taken in our earlier letter. Further to illustrate this with an example in construction of a single independent house and advance is take prior to completion certificate would not be liable for service tax even w.e.f. 01.07.2010. similarly the personal use complex would also be not liable for service tax.
6. However if we intend not litigating on the above ground, we understand that such amendment is prospective and applicable only from 01.07.2010 for the reasons mentioned below.
 - a. Since there is no specific retrospective provision in Finance Act 2010 as provided for the explanation inserted for "Commercial Coaching & training Center Service".
 - b. The explanation was inserted to enhance the scope of the existing service and hence the same can be only prospectively and ~~not~~^{not} retrospectively. This view is also supported by a recent decision of Supreme Court in case of union of India v. Martin Lottery Agencies Ltd. (2009) 20 STT 203(SC).
 - c. Circular F.No.334/03/2010-TRU dated 01.07.2010 clarifies that this service came into effect only after 01.07.2010 and further the receipts received prior to such date was not liable for service tax as the same was specifically exempted.
7. Hence the transactions and receipts prior to 01.07.2010 are not liable to service tax at all. In the instant case the taxable event is "Construction of Complex" and for such construction of complete if the consideration has been received in advance/installments before the completion certificate then the same us deemed to be taxable service. Therefore the construction (taxable event) performed prior to 01.07.2010 would not be taxable.
8. Based on the above explanation, we have approached our customer, whether they are willing to reimburse service tax. Most f the customers expressed their willingness to pay service tax if at all they are liable from 01.07.2010at 2.575% for the amounts payable by them after this date.

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9. Hence we would be paying only in respect of amounts received after 01.07.2010. we would be paying service tax at the rate of 2.575% (i.e., on 25% of value @ 10.3%). We understand this exemption would not be eligible subject to following condition
- Not availing the CENVAT credit
 - Not availing exemption under notification 12/2003-ST as amended.
 - Not only completion and finishing services in relation to residential complex.
 - Value of goods and materials supplied or provided or used for providing the taxable service by the service provider should be included in the value.
 - Cost of land has not been separately recovered from the buyer by the builder or his representative.
10. In our case we have satisfied all the condition above and hence we would be paying service on the amount received after 01.07.2010.
11. We had earlier classified ourself under works contract service as per the advice of the Additional Commissioner under works contract service upto Dec 2008 later the payment was stopped in view f exclusion for personal use. Now our customer are willing to pay service tax at 2.575% levied under 'Residential Complex Service' hence we intend to pay the same accordingly as long as the same is reimbursed by the customer.
12. We hope all our understanding is corrected and we would be glad to provide you with any further information that may be required in this regard. We request you to kindly confirm the same so that we can start collecting and making the payment of service tax.

Kindly acknowledge the receipt of the same.

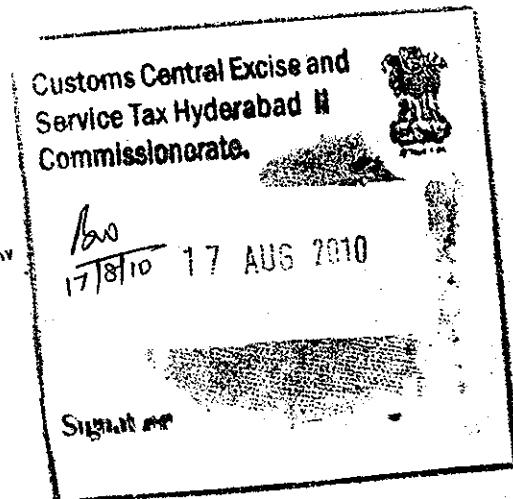
Thank You,
Yours Faithfully,
For Kadakia & Modi Housing,


Soham Modi
Managing Partner

CC to AC/DC, Asst. Commissioner (A.E)

Received
2 Copies
A.C. & Addl. Commr

- 3 -



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5-4-187/3 & 4. II Floor, Soham Mansion, M.G. Road, Secunderabad - 500 003.
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Date: 02.07.2009.

To,
The Superintendent of Service Tax
Hyderabad -II Commissionerate
L. B. Stadium Road, Basheerbagh
Hyderabad - 500 004

Dear Sir,

Sub: Non-filing of ST-3 returns for the half year ended 31.03.3009

Ref: Our STC No. AAHFK8714AST001.

1. We acknowledge the receipt of the above referred letter on 06.06.2009. We had earlier corresponded with Asst Com of Service Tax (AE) as to non-applicability of service tax liability for our operation.
2. With this regard, we again wish to clarify the above with the brief background of our company for your better appreciation. We are engaged in development of residential projects. The present project is with respect to development and selling of the residential flats. The transaction with the customer shall be as under
 - a. The customer interested in buying the property approaches us.
 - b. We sell the undivided portion of land along with the semi-constructed flat on which applicable stamp duty shall be paid by the purchaser.
 - c. We also enter into the construction/completion agreement with each of such customer for the construction/finishing of the flat.
 - d. The total consideration shall be received in installments, which is generally spread across the period i.e. right from the customer approach and completion of construction.
3. We have paid service tax on the said projects under "construction of complex service"/ "Works Contract Service" upto December 2008. However we have not made any remittance of tax for the month of January 2009 onwards in view of view the circular 108/2/2009-ST dated 29.01.2009 and the decided case given in the subsequent points.

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4. The consideration received for the first part of the transaction is not taxable for the reason
 - a. The transaction is in the nature of sale of immovable property therefore the same is not liable for service tax.
 - b. The construction undertaken is for oneself and there is no distinct service receiver and provider.
5. The above view is as per the Gauhati High Court in case of Magus Construction (P) Ltd., [2008 (11) S.T.R. 225 (Gau.)] and circular no. 108/02/2009-ST dated 29.01.2009.
6. The second part of the consideration is not taxable in view of the recent clarification given vide **circular no.108/02/2009-ST** dated 29.01.2009 clarifies that 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.
7. Instantly in our case, we execute construction for the owner of the semi-constructed flat, where the construction, service of designing and planning is done by our self. On completion of the said construction such owner receives for his/her personal use. Therefore the said circular exactly applies in our case and therefore we are not liable for payment of service tax.
8. Since the personal use exclusion is given in the definition on residential complex definition, there shall be no levy either under Construction of Complex service or under works contract service.
9. Therefore the service provided by us is not covered in the definition of the residential complex given under section 65(91a) of the Finance Act and accordingly no service tax is payable either under construction of complex service or under works contract service. Therefore the entire amount remitted by us has to consider as a deposit and not tax and accordingly we are eligible for refund of the same.

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10. Further we also wish to clarify that this circular does not states that exclusion is only when the entire complex is being put to use by a single person. Any such notion may not be in line with clarification provided in the circular. This clarification is provided with an intention of construction of residential units only, therefore the same is applicable although the same is put to use by multiple service receiver.
11. In view of the above we have stopped paying service tax with effect from January 2009. Since the service provided by us in not liable for service tax no returns is required to be filed as clarified in the Board Circular no. 97/08/2007 dated 23.08.2007 in Para 6.1.
12. However since some amount has been paid in this regard till December 2008, we are submitting the returns herewith duly filled along with the late filing fee of Rs. 2000/- as prescribed.

We hope our understanding is clear and correct. We would like to request your good self to drop initiating any further proceedings in this regard.

We shall be glad to provide any further information or explanation in this regard. Kindly acknowledge the receipt of the following

Thanking You
Yours truly,

For Kadakia & Modi Housing,



Managing Partner

Encl

1. Copy of Circular No.108/02/2009-ST dated 29.01.2009
2. ST- 3 returns
3. Copy of counterfoil of the payment challan.